

COMMENTARIES
ON
THE MODERN LAW
OF
MUNICIPAL CORPORATIONS

INCLUDING
PUBLIC CORPORATIONS AND POLITICAL AND
GOVERNMENTAL CORPORATIONS
OF EVERY CLASS

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SECTION	SECTION
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(a) POWER TO INCUR INDEBTEDNESS.

§ 825. **Manner of contracting.**—Unless prohibited by positive law a municipal corporation may do all things fairly within the scope of the powers conferred to accomplish the purposes for which it was created. Only general powers can be conferred upon such corporations, and from that source must be inferred all necessary power to render practicable that which is conferred by the general terms employed. Power to provide for the expense attendant upon the maintenance of municipal government is necessary to preserve its existence.¹ A county can be bound on a contract made by its board of supervisors only when they were acting in conformity with the law in respect to its execution.² Contracts for repairs of county bridges, when such repairs do not amount to a substantial reconstruction of the bridge, may be let by the county court privately; and modifications in the plans of a bridge in the course of construction involving labor and material in excess of that provided for in the original contract may be let in like manner so long as the same is done in good faith, and not with the intention to supersede the original contract to construct the bridge with another one not publicly let or one that shall have that effect.³ County commissioners contracted in writing to pay plaintiff the actual cost of constructing a bridge upon a highway in the county. A majority of the justices of the county, not then in session, executed a writing ratifying the contract, and afterwards, at a regular joint meeting of the commissioners and justices, a quorum of the latter voted in ratification of the contract. It was held

¹ *Law v. People*, 87 Ill. 385, holding that a municipal corporation has no authority to levy a tax to provide a fund with which to entertain official visitors to the municipality, as such a tax would not

be for any necessary or corporate purpose.

² *Wheeler v. Wayne Co.*, 31 Ill. App. 299; s. c. affirmed in 132 Ill. 599; 24 N. E. 625.

³ *Pacific Bridge Co. v. Clackamas Co.*, 45 Fed. 217.

that as the statute relating to bridges provided that where the cost of a bridge exceeded \$500 the commissioners could order its construction only with the concurrence of a majority of the justices of the peace, the approval of the contract by a majority of the justices sitting as an organized body was sufficient.⁴ As the Louisiana statute provides that the money must be accessible in the treasury before any warrant can issue against it, the police jury of a parish in that state can not, in the absence of express legislative authority, enter into a contract for the construction of bridges to be paid for in promissory notes of the parish, payable in each year for a stated number of years out of a fund created by an appropriation of a part of the annual ten-mill tax of the parish.⁵ A county has been held liable for money borrowed by its board of supervisors to replace a highway bridge over a stream which had been washed away by a flood.⁶

§ 826. Construction of statutory provisions.—The provision in the constitution of Kentucky that no act of the legislature authorizing the creation of any debt on behalf of the commonwealth shall become effective until it has been submitted to the people at a *general* election does not include debts created by a county or other municipal division of the state.⁷ The statutes of Illinois which authorize each county “to make all contracts and do all other acts necessary to the exercise of its corporate powers,” and “to manage the county funds and county business, except as otherwise specifically provided,” do not authorize counties to issue bonds without a vote of the people.⁸ The provision of a city charter that the trustees shall not incur any debt or borrow money for the use of the city, without having the concurrence of five-eighths of the taxable property owners, to be ascertained by a petition for that purpose, does not prohibit the incurring of debt for ordinary expenditures, but does forbid the incurring of a permanent debt, or an extraordinary expenditure of public money.⁹ A provision in its charter that a city shall not borrow more than \$50,000 for general

⁴ *Cleveland Cotton Mills v. Commissioners &c.*, 108 N. C. 678; s. c. 13 S. E. 271 (two judges dissenting).

⁵ *Snelling v. Joffrion*, 42 La. An. 886; s. c. 8 So. 609.

⁶ *Maneval v. Jackson Tp.*, 9 Pa. Co. Ct. 28, the court holding that the right to borrow money for that purpose resulted to the board from the duty imposed on them to repair highways and build bridges when

necessary, under penalty of fine and imprisonment for failure to discharge such duty.

⁷ *Walton v. Riley*, 85 Ky. 413; s. c. 3 S. W. 605.

⁸ *Locke v. Davison*, 111 Ill. 19. See also, *Hardin Co. v. McFarlan*, 82 Ill. 138; *Cook Co. v. McCrea*, 93 Ill. 236.

⁹ *Ivinson v. Hance*, 1 Wyom. Ter. 270.

purposes does not limit its power to go into debt for a greater sum for special improvements.¹⁰ When a county in Nebraska desires to build a court-house, if it has not on hand a sufficient fund which can be applied in payment for such a purpose without doing violence to principle, the proposition must be submitted to the qualified voters of the county to get permission to incur such extraordinary indebtedness and for authority to resort to the extraordinary remedy provided by statute for raising the necessary and appropriate funds. Without such authority the commissioners can not lawfully contract for the erection of such a building, and without such action on the part of the electors of the county the commissioners are powerless to proceed, however much the building may be needed.¹¹ Where the commissioners of a county, specially authorized by legislative enactment to erect a court-house by contract or otherwise, make a binding and valid contract for that purpose, such a contract can not be annulled by a vote of the people of the county.¹² Where the county court of a county is invested with jurisdiction and power to order the erection and repair of bridges, and is charged with the duty of taking care of and maintaining the poor, a limitation in the general revenue laws as to the rate or amount of taxes which may be annually levied for bridges and paupers does not measure the legal power of the county court to bind the county by contracts otherwise binding for those purposes.¹³ An Iowa statute provided that it should be competent for any city authorized by the statute to levy a tax to pay for the paving of street and alley intersections, "to anticipate the collection thereof by borrowing money, and pledging such tax, whether levied or not, for the payment of the money so borrowed." Under this statute there is no limitation upon the city as to the amount of work of the kind mentioned therein which it may have done in a single year, except the limitation of the constitution as to the indebtedness it may contract; nor does it limit the city in making the loan provided for to the amount of tax which would accrue under a levy for a single year. But the city is empowered to pledge the tax to any extent necessary to enable it to meet such indebtedness as it may lawfully incur in a single year and to levy a tax for successive years for that

¹⁰ *Hitchcock v. Galveston*, 96 U. S. 341.

¹¹ *Brown v. County Com'rs*, 2 McCrary 469, holding that in the absence of authority to make such an appropriation there was no rightful authority for issuing county war-

rants; consequently they were void and no recovery could be had on them.

¹² *Cook v. Commissioners &c.*, 6 McLean 612.

¹³ *Kinsey v. Pulaski Co.*, 2 Dill. 253.

purpose.¹⁴ The Ohio statute which provides that a city shall not make a contract involving the expenditure of money unless the money is certified to be in the treasury, unappropriated, though general in its terms, has been construed to prohibit cities and towns from incurring debts to subserve their ordinary purposes, and not to apply to a contract made by a city for the lighting of the streets by an electric lighting company.¹⁵ By statute in Illinois cities under special charters have power to levy an additional tax for the distinct objects named; and the "sewerage fund tax," and the "water fund tax," provided for by that statute, are in addition to the rate of taxation theretofore authorized by law.¹⁶ It has been held that under the Wisconsin statute of 1885, providing for county aid to towns in building bridges, the cost of which exceeds one-fourth of one per cent. of all the taxable property of the town "according to the last equalized valuation," the valuation of 1885 controlled as to bridges authorized at the annual town meeting of 1886, although the county was not called on for aid until after the valuation of the latter year.¹⁷ As it is the duty of the county court in Missouri to make an appropriation to pay for work done on a bridge when it orders the commissioner to enter into the contract, it will be presumed that the court performs its duty until the contrary is proved.¹⁸

§ 827. **Borrowing money.**—A power to borrow money does not belong to a municipal corporation as an incident of its creation.¹⁹ Judge Dillon declares a strong inclination, "where the legislative will is wholly silent, * * * to deny the existence of a general implied or *incidental* power to borrow money." But he admits that down to the time of giving that conclusion a majority of the express adjudications on the subject favor the contrary opinion.²⁰ The majority of

¹⁴ *Coggeshall v. City of Des Moines*, 78 Iowa 235; s. c. 41 N. W. 617; 42 N. W. 650.

¹⁵ *Clark v. City of Columbus (Ohio)*, 23 Wkly. L. Bul. 289.

¹⁶ *Thatcher v. Chicago & C. R. Co.*, 120 Ill. 560; s. c. 11 N. E. 853.

¹⁷ *State v. Board &c.*, 71 Wis. 321; 37 N. W. 231.

¹⁸ *Bryson v. Johnson Co.*, 100 Mo. 76; s. c. 13 S. W. 239.

¹⁹ *Mayor &c. v. Ray*, 19 Wall. 468.

²⁰ 1 *Dillon Munic. Corp.*, § 117. See also, *Robertson v. Breedlove*, 61 Tex. 316; *City of Richmond v. McGirr*, 78 Ind. 192. In *President &c.*

Mayor &c., 7 Ohio (pt. 2) 31, the Ohio supreme court held that in carrying out the express powers or in effecting any legitimate municipal object, the corporation possessed the incidental or implied right to borrow money. In *Mills v. Gleason*, 11 Wis. 493; s. c. 8 Am. L. Reg. 693; *State v. Common Council &c.*, 7 Wis. 688; *Clark v. City of Janesville*, 10 Wis. 136, the Wisconsin supreme court affirmed the implied authority of such corporations as incidental to the execution of the general powers granted by charter, and, in the absence of a special

the supreme court of the United States have spoken to this effect:—"To be possessed, it [the power to borrow money] must be conferred by legislation, either express or implied. It does not belong as a mere matter of course to local governments to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidence of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation."²¹ A legislature may confer upon a city power to borrow money for any public purpose whenever it may be deemed expedient so to do.²² A municipal corporation being but a subordinate branch of the government, it represents the state sovereignty in a limited district and for specified purposes,—local government and police,—and the power of taxation is granted for carrying out these purposes.²³ A clause in a city charter providing that it "may do all other acts as natural persons" must be restrained to such other acts as are authorized by its charter or the statutes of the state applicable to the city, if any, and can not be construed to remove all the limitations inseparable from corporate existence, and to confer upon the city authority to engage in business of a private nature or to make its powers commensurate with those of natural persons. It can not, therefore, be construed to confer an express power to borrow money or issue commercial paper.²⁴ The powers to borrow money, incur indebtedness, etc., are essentially legislative powers, to be exercised by the legislature, or to be delegated to municipal or quasi-municipal corporations, to be exercised free from every restriction not expressly imposed by the constitution or the inalienable rights of man.²⁵

§ 828. The same subject continued.—The statutes of New York do not empower a municipal corporation, either expressly or by implica-

restriction, to borrow money and issue bonds therefor, where it appeared that the proceeds thereof went into the treasury of the corporation and were spent by it.

²¹ *Mayor &c. v. Ray*, 19 Wall. 468, 475.

²² *Mitchell v. Burlington*, 4 Wall. 271; *Larned v. Burlington*, 4 Wall. 275, which held the building of a

plank road to be such a public purpose.

²³ *Chisholm v. City of Montgomery*, 2 Woods 584; *United States v. New Orleans*, 98 U. S. 381.

²⁴ *Gause v. City of Clarksville*, 5 Dill. 165, 170; approved in *Merrill v. Monticello*, 138 U. S. 673; s. c. 11 S. Ct. 441.

²⁵ *Board &c. v. Ætna Life Ins. Co.*, 90 Fed. 222; s. c. 32 C. C. A. 585.

tion, to borrow money to defray the expenses of a suit instituted in its behalf.²⁶ A section of the charter of a city in Kentucky authorized the city to borrow money and to give or loan its credit in aid of any person or corporation, "for appropriate municipal objects." Another section provided the condition upon which the city council might contract debts and liabilities in behalf of the city beyond the amount of revenue of the current fiscal year, and payable within or beyond such year, and required the ordinance authorizing the creation of such liability to be approved by popular vote, and to provide for levying and collecting the annual tax to pay principal and interest. By an act of the legislature certain persons were designated to prepare new assessment and revenue laws for the city, "regulating in all respects the assessment of property and choses in action, the duties of all assessing and collecting officers, the time, term and manner of the payment of taxes," etc. Their labors resulted in an act which was a revision of the mode of collecting and imposing taxes to meet the ordinary annual expenditures of the city government, but which made no allusion to the right of the city council to make extraordinary appropriations other than for revenue proper, when sanctioned by a vote of the people. It was held that the power conferred by the above quoted provisions of the charter still existed, and might be exercised for proper municipal purposes.²⁷ The issue of any change bills or promises in the similitude of currency is prohibited to persons or corporations by a Georgia statute, and no recovery can be had on such change bills issued by a city.²⁸ In the absence of an express legislative authority a municipal corporation has no power to utter unconditional obligations to pay money which will have the attributes of negotiable instruments in the hands of a bona fide purchaser before maturity.²⁹ In Texas the counties, in the absence of legislative authority, have no power to issue negotiable securities.³⁰ In the absence of any special statutory authority a city has no right to issue certificates of

²⁶ *Wells v. Town of Salina*, 119 N. Y. 280; s. c. 23 N. E. 870, the court of appeals holding the statutes authorizing municipal corporations to "raise" money for prosecuting and defending such suits as they may deem necessary, and for other municipal purposes, to mean that money is to be raised by taxation, and not by borrowing.

²⁷ *Frantz v. Jacob*, 88 Ky. 525; s. c. 11 S. W. 654.

²⁸ *Cothran v. City of Rome*, 77 Ga. 582.

²⁹ *Brenham v. German-American Bank*, 144 U. S. 173; s. c. 12 S. Ct. 559; *Newgass v. City of New Orleans*, 42 La. An. 163; s. c. 7 So. 565.

³⁰ *Francis v. Howard Co.*, 50 Fed. 44; following *Nolan Co. v. State*, 83 Tex. 182; 17 S. W. 823; and *Robertson v. Breedlove*, 61 Tex. 316.

indebtedness in negotiable form, even in payment for property which it has authority to buy.³¹

§ 829. Employment of attorneys.—In California a board of county commissioners has authority to employ counsel other than the district attorney to collect the money due to the county from the state for the support of indigent persons, and the choice of such counsel is a matter within their discretion and can not be reviewed.³² The county board is not deprived of power to authorize any competent attorney to begin and carry on suits to recover delinquent taxes by the Illinois statute which provides that the state's attorney shall prosecute all actions for debts and revenues due the state or county, and that if he is incapacitated the court in which the suit is pending may appoint some competent attorney to take his place.³³ A county board of supervisors, under the Illinois statute giving them power to "do all other acts in relation to the concerns of the county," has power to employ an attorney to defeat collection of a tax to pay interest on railroad bonds claimed to be illegal and to procure a final adjudication as to the validity of such bonds.³⁴ A county board has the right, by virtue of its general powers, to manage the affairs of the county, to employ counsel and to cause proceedings to be instituted in the name of the county without the consent of the county attorney and regardless of his willingness or ability to appear for the county.³⁵ But a board of county commissioners has not the power to bind its successors by employing attorneys to act for a period beyond the time when the board will by operation of law have to be reorganized.³⁶

§ 830. Contracts for construction of county buildings.—Though county commissioners may have exceeded their authority in awarding a contract for the building of a court-house, taxpayers of the county have no such special interest distinct from that of the public as will entitle them to maintain an action to restrain the issuance of warrants in payment for work done in building the court-house.³⁷ It has been

³¹ *Bangor Savings Bank v. City of Stillwater*, 46 Fed. 899.

³² *Lassen Co. v. Shinn*, 88 Cal. 510; s. c. 26 Pac. 365.

³³ *Ottawa Gas Light & Co. v. People*, 138 Ill. 336; s. c. 27 N. E. 924; following *Sterling Gas Co. v. Higby*, 134 Ill. 557; s. c. 25 N. E. 660.

³⁴ *Franklin Co. v. Layman*, 34 Ill. App. 606.

³⁵ *Taylor Co. v. Standley*, 79 Iowa 666; s. c. 44 N. W. 911. See also,

Tatlock v. Louisa Co., 46 Iowa 138; *Jordan v. Osceola Co.*, 59 Iowa 388; s. c. 13 N. W. 344.

³⁶ *Board & Co. v. Taylor*, 123 Ind. 148; s. c. 23 N. E. 752.

³⁷ *Wood v. Bangs*, 1 Dak. 179; s. c. 46 N. W. 586. Nor have they such common interest that they may join in the action. The supreme court held that the relief should also be denied because the plaintiff had a complete remedy at law under the

held that an objection to changes in the specifications for heating a court-house, in an action for the cost thereof, under the provisions of the Indiana statute which requires plans and specifications for the construction of public buildings to be prepared and filed, was not well taken in the absence of proof that the changes respecting the steam-heating apparatus were other than of such minor importance, as were necessary and apparent in the progress of the work.³⁸ County officers who are authorized by law to contract for the building of a court-house can not delegate such authority to a private individual.³⁹

§ 831. Support of the poor.—The statute of Indiana makes it the duty of the county commissioners to employ physicians for the poor, but authorizes the overseers of the poor in townships not otherwise provided for to employ such medical or surgical services as paupers within their jurisdiction may require. Under that statute the overseer of the poor may, at the county's expense, employ a physician to treat a pauper in urgent need of medical aid where the regular county physician refuses to take the case.⁴⁰ But he has no right to employ a physician where the county physician is willing to take the case, but is not requested to do so because in the judgment of the overseer

Dakota statute which authorizes the commissioners to erect court-houses, but allows an appeal to the district court from their decision on any matter properly before them.

³⁸ *Board &c. v. Cincinnati Steam-Heating Co.*, 128 Ind. 240; s. c. 27 N. E. 612. See also, *Board &c. v. Motherwell Iron &c. Co.*, 123 Ind. 364; s. c. 24 N. E. 115, holding that where the board of commissioners of a county, engaged in building a court-house, appointed an architect and intrusted to him the full supervision of its construction, and such architect ordered a change in the iron work to be made by a subcontractor, which caused an increase in the expense, and after the work was completed the commissioners accepted the building, the county was liable for such extra work, although there was no agreement as to the price of the same, and the contract was not in writing and attached to the original contract with the contractor as provided for in the

original contract. It has also been held in Indiana that where a board of county commissioners let a contract for the construction of a county building, and the contractor abandoned the contract, the county commissioners had power to take charge of the work and complete the building without adopting new plans and specifications, or letting a new contract: *Board &c. v. Byrne*, 67 Ind. 21; *Bass Foundry &c. v. Board &c.*, 115 Ind. 234; s. c. 17 N. E. 503; *Board &c. v. Hill*, 122 Ind. 215; s. c. 23 N. E. 779.

³⁹ *Russell v. Cage*, 66 Tex. 428; s. c. 1 S. W. 270.

⁴⁰ *Board &c. v. Lomax*, 5 Ind. App. 567; s. c. 31 N. E. 584; 32 N. E. 800; *Board &c. v. Jennings*, 104 Ind. 108; s. c. 3 N. E. 619; *Board &c. v. Boynton*, 30 Ind. 359; *Board &c. v. Hon*, 87 Ind. 356; *Board &c. v. Seaton*, 90 Ind. 158; *Board &c. v. Holman*, 34 Ind. 256; *Conner v. Board &c.*, 57 Ind. 15; *Board &c. v. Ritter*, 90 Ind. 362.

he is incompetent.⁴¹ Those who accept employment from an overseer of the poor must, however, at their own risk inquire into his power to bind the county.⁴² Where provision for a physician is not made, the trustees of the township (who act as overseers of the poor) have, in Indiana, statutory authority to employ "such medical services as paupers within their jurisdiction may require." It has been held that in an action against a county on account of such employment by a trustee, the burden was on plaintiff to show a necessity for employing a physician other than the one provided by the county.⁴³ The county judge and justices are the sole judges of the need of a poor-house, and can purchase land therefor and make the necessary improvements under the Kentucky statute.⁴⁴ A statute of New York provides that "the powers and duties heretofore conferred upon the supervisors of the respective towns of [one of the counties], so far as relates to the adjudications in relation to and the relief and support of the poor, are hereby conferred on the overseers of the poor of the respective towns of said county." The overseer of the poor gave orders in payment of certain services to a pauper, which the owner presented to the board of town auditors, who disallowed them as not being valid claims against the town. It was held that, as the statutes vest in the overseer the exclusive power to make such contracts for services, the determination of the board did not bind the owner.⁴⁵ By the failure of a town in Massachusetts to choose directors of the alms-house, their duties were imposed on the overseers of the poor. The board of overseers consisted of three members, elected for three years, one member being elected at the town meeting in March of each year. In February, 1888, the member next to retire having resigned, leaving a vacancy to be filled in the following March, the two remaining members contracted in writing for services of a superintendent and matron of the alms-house for one year from the 1st of April then next. It was held that they could not bind the town by such contract not to be entered upon until after the election by which

⁴¹ Board &c. v. Lomax, 5 Ind. App. 567; s. c. 31 N. E. 584; 32 N. E. 800.

⁴² Board &c. v. Lomax, 5 Ind. App. 567; s. c. 31 N. E. 584; 32 N. E. 800; Robbins v. Board &c., 91 Ind. 537; Washburn v. Board &c., 104 Ind. 321; s. c. 3 N. E. 757; Morgan Co. v. Seaton, 122 Ind. 521; s. c. 24 N. E. 213.

⁴³ Board &c. v. Osburn, 4 Ind. App. 590; s. c. 31 N. E. 541. The court said:—"The function of administering public charities is governmental,

and township trustees are agents of the county for that purpose. This agency is created and defined by law, and consequently is of such a character that all are bound to take notice of its scope and limitations."

⁴⁴ Jones v. Pendleton Co. Court (Ky.), 19 S. W. 740; s. c. sub nom. Lee v. Pendleton Co. Court, 14 Ky. L. 159.

⁴⁵ Christman v. Phillips, 58 Hun (N. Y.) 282; s. c. 12 N. Y. S. 338.

another member would be added to the board and at which directors might be chosen.⁴⁶

§ 832. **Taxation for school purposes.**—Boards of supervisors may levy a tax to pay teachers' warrants of a previous year, these constituting indebtedness of the county, if in so doing the limits of taxation for all purposes provided by law for counties having outstanding indebtedness is not exceeded.⁴⁷ Under the Mississippi statute which makes it the duty of the board of supervisors of each county to "levy upon the taxable property of such county a tax of three mills or more" for school purposes, the levy does not include property in a town in the county which is a separate school district. As to such separate district the levy is to be made by the town authorities.⁴⁸ Where a levy of a tax for school purposes is properly made and within the statutory limit, it is no ground for enjoining its collection that the levy was unnecessarily large, or that the directors proposed to divert part of the money raised to another purpose.⁴⁹ It has been held that allegations in a bill to enjoin the collection of a school tax that the determination to levy was not made by the school directors at a regular or special meeting, nor in their corporate capacity, but as individ-

⁴⁶ *Reed v. Inhabitants &c.*, 152 Mass. 500; s. c. 25 N. E. 974, further holding that there could be no ratification of the contract by the overseers after such election, acting not as a board but as individuals, especially as no knowledge of the matter by the incoming member was shown except by his testimony that he knew there was "some sort of a contract" and knew "something of its terms." See as to their being required to act together, *Mayor &c. v. Railroad Com'rs*, 113 Mass. 161; *Shea v. Inhabitants &c.*, 145 Mass. 525; s. c. 14 N. E. 769; § 275, ante. A constitutional restriction against appropriations for charitable, industrial, etc., purposes, not under the absolute control of the state, relates to the disbursement of state funds only and has no relation to counties: *In re House*, 23 Colo. 87; s. c. 46 Pac. 117; *Williamson v. Board &c.*, 23 Colo. 87; s. c. 46 Pac. 117.

⁴⁷ *Cowart v. Foxworth*, 67 Miss. 322; s. c. 7 So. 350; distinguishing

Foote v. Brown, 60 Miss. 155, in which it was held that a tax collector could not be compelled to receive in payment of the tax for school purposes in the year 1882 a teacher's warrant issued in a previous year, and that a county treasurer could not be required to pay such a warrant out of money collected for the year 1882, unless there was in his hands a surplus of such fund beyond what was required for schools for that year. The court pointed out that it was not suggested or decided therein that the supervisors could not levy a tax to pay such a deficit for a previous year.

⁴⁸ *Bordeaux v. Meridian Land &c. Co.*, 67 Miss. 304; s. c. 7 So. 286. In the matter of taxation the word "county" is to be restricted to property outside of the town in order to effectuate the purpose of the legislation and to carry out the scheme of separate school districts.

⁴⁹ *Lawrence v. Traner*, 136 Ill. 474; s. c. 27 N. E. 197.

uals, did not charge that the directors acted in the matter without meeting together.⁵⁰ The supreme court of Georgia held that a majority of the complainants in an action for injunction having voted in favor of the approval of a local school law, and all of them having acquiesced in the result of the election until after a school was established and put into operation, an interlocutory injunction restraining the collection of a tax authorized by the local law and levied for supporting the public school system provided for by the local law was properly denied.⁵¹ Under the school law of Kentucky the trustees of a common school district may order the collection of a tax to build or repair a schoolhouse without submitting the question to the voters of the district; but it is a condition precedent to the right to order the tax that it is necessary to build a schoolhouse, or that the county superintendent has condemned the schoolhouse and that it needs repairing.⁵² A demurrer to a complaint which prayed simply for a money judgment against a newly-created town for the amount of taxes for the support of the high school alleged to be due and unpaid as its proportionate share was held by the supreme court of Wisconsin to have been properly sustained; also that it was not a case calling for present damages, but rather further enforcement of an official duty, which could only be compelled by a mandamus to the officers of the town ordering a levy and collection of its share of the taxes.⁵³

§ 833. The same subject continued.—The officers of a city may be invested by the legislature with power to levy and collect taxes for the support of common schools.⁵⁴ And the adoption of the general incorporation law by a city, and the passage of a general school law, do

⁵⁰ *Lawrence v. Traner*, 136 Ill. 474; s. c. 27 N. E. 197.

⁵¹ *Irvin v. Gregory*, 86 Ga. 605; s. c. 13 S. E. 120.

⁵² *Macklin v. Trustees &c.*, 88 Ky. 592; s. c. 11 S. W. 657. It was further held that the legislature has the constitutional power to authorize the trustees of a school district to order the collection of a tax, not to exceed a certain sum, without submitting the question to a popular vote; and while the legislature must always prescribe the rules under which the taxation is imposed and can not refer the power to another body, yet having prescribed the rule

it need not fix the exact sum to be raised or the particulars of the expenditure. See also, *Talbot v. Dent*, 9 B. Mon. (Ky.) 526.

⁵³ *Joint Free High-School Dist. v. Town of Green Grove*, 77 Wis. 532; s. c. 46 N. W. 895.

⁵⁴ *Fuller v. Heath*, 89 Ill. 296. Such laws, wherever found, are a part of the school laws of the state and not strictly a part of the charter or law of the city. In such case the city officers are mere agencies of the public to carry into effect the objects and purposes of the general school system.

not modify or impair any former special laws authorizing such city as a public agency to levy and collect taxes for school purposes.⁵⁵

§ 834. **The same subject continued—Validity of resolutions.**—The general school law of Maryland provides that when the state school fund is insufficient in any county the county commissioners shall, on the demand of the school board, levy not exceeding ten cents on the one hundred dollars for school purposes; and a special local statute provides that in Anne Arundel county there may be an additional levy not exceeding twenty cents on the one hundred dollars for school purposes, which shall constitute a separate fund, not to be used for other purposes, both to be paid by the treasurer to the school commissioners; and that the treasurer's commissions shall be separately levied. County commissioners can not deduct under these statutes from the school levy, unconditionally made, either the amount of the treasurer's commissions or discounts for prompt payment of taxes, but must pay over the gross levy to the school commissioners.⁵⁶ Under the statute of Illinois which requires the official acts of each school board to be recorded by its clerk, a tax levy which has been duly signed by the directors and filed with the township treasurer has been held not to be invalidated by the failure to record the action of the directors in making the levy.⁵⁷ A special meeting of a school district can vote to raise money to build a schoolhouse, although a similar proposition had been rejected at a previous special

⁵⁵ *Fuller v. Heath*, 89 Ill. 296; *Speight v. People*, 87 Ill. 600, in which case it was held that there was no limitation in the constitution of Illinois as to the agencies the state shall adopt in providing this system of free schools, and that the general assembly had full power to select or prescribe the agencies by which school taxes shall be levied, collected, held and disbursed for school purposes, and that all laws, whether in city charters or elsewhere, designed to affect free schools, may be regarded as school laws—as part of the law intended to provide a system of free schools; and that the provision as to the power of passing special laws related merely to the management of common schools, that is, to the con-

duct of common schools in imparting instruction, and did not relate to the matter of providing the necessary funds for their support. See also, *Covington v. East St. Louis*, 78 Ill. 548; *Sheridan v. Colvin*, 78 Ill. 243. As to public education being a corporate purpose, see *Vanover v. Justices*, 27 Ga. 354; *Common Schools v. Commissioners &c.*, 20 Md. 449; *Burr v. City of Carbondale*, 76 Ill. 455; *Taylor v. Thompson*, 42 Ill. 9.

⁵⁶ *Board &c. v. Gantt*, 73 Md. 521; s. c. 21 Atl. 548.

⁵⁷ *Lawrence v. Traner*, 136 Ill. 474; s. c. 27 N. E. 197. The reason for the rule was that the officers charged with carrying the levy forward act upon the certificate of levy and not upon the record of the board.

meeting held in the same year.⁵⁸ A resolution to raise a single sum for building and furnishing a schoolhouse is not bad for uncertainty because the amount to be used for building and the amount for furnishing are not separately stated.⁵⁹ A resolution to raise a sum of money to build a schoolhouse was followed by a resolution that several bonds payable in successive years should be issued. In such a case it was held erroneous to issue a certificate to levy the whole amount in one year.⁶⁰ And a resolution to sell an old schoolhouse, passed at the same meeting at which it was resolved to raise money to build a new house, was held to be illegal.⁶¹

§ 835. **Levy of taxes.**—A mandamus will not lie to compel the levy of an unauthorized tax.⁶² But where a statute provides that the board of supervisors “may, if deemed advisable,” levy a special tax

⁵⁸ *State v. Clark*, 52 N. J. L. 291; s. c. 19 Atl. 462. The act of 1888 (Pamphl. L. N. J. 93, § 1), amending the act of 1880 (Pamphl. L. 225, § 1), leaves in force that portion of general school act (Rev. 1085), § 86, requiring a vote of a majority of the legal voters present upon any proposition to raise money for building a schoolhouse. The act of 1885 requires the presence of a majority of the taxable voters of the district only when any proposition for the condemnation of land is presented. See also, *State v. Lewis*, 35 N. J. L. 377; *Point Pleasant Land Co. v. Trustees*, 47 N. J. L. 235.

⁵⁹ *State v. Clark*, 52 N. J. L. 291; s. c. 19 Atl. 462. The court distinguished *State v. Sullivan*, 36 N. J. L. 89.

⁶⁰ *State v. Clark*, 52 N. J. L. 291; s. c. 19 Atl. 462; the reason being that the bonds were to be paid as they successively matured by warrants issued in accordance with the general school act, § 89 (Rev. N. J. 1086).

⁶¹ *State v. Clark*, 52 N. J. L. 291; s. c. 19 Atl. 462, for the reason that no notice was given that the sale of the old schoolhouse would be a subject for consideration at the meeting.

⁶² *Supervisors v. United States*, 18 Wall. 71, 84, in which mandamus was prayed for to compel the supervisors of an Iowa county to levy a tax exceeding four mills on the dollar to which they were limited by the law for ordinary expenses of the county, to pay a judgment on county warrants. The court said:—“None of them were issued in pursuance of a popular vote or for any extraordinary expenditure. They were such instruments as the legislature contemplated might be employed in conducting the current and usual business of the county. The act which empowers the county board to levy a tax for ordinary county revenue speaks of them and evidently intends that they shall be satisfied either from the proceeds of that tax or by their being received in payment thereof. They are simply a means of anticipating ordinary revenue.” Following *Clark v. City of Davenport*, 14 Iowa 494, holding that the code of Iowa conferred no independent power to levy a specific tax in order to pay a judgment recovered against a municipal corporation, and that when the power was not otherwise given it was not given by the code.

to pay a judgment rendered against the county, these words have been construed as peremptory instead of permissive merely and to require the levy of a tax to pay such judgment.⁶³ Where a county has no power to levy a special tax to pay its warrants, and under its general power of taxation can only levy a tax of five mills on the dollar, payable in cash or county warrants, which tax is entirely used in paying its ordinary current yearly expenses, a mandamus will not lie to compel the county to levy this five mills general tax, to compel its collection in cash, and its application fully or in part to the payment of county warrants instead of to ordinary expenses.⁶⁴ And a power in the charter of a municipal corporation to levy a limited general tax for ordinary purposes does not abrogate its power and duty to levy special taxes in proper cases for special purposes.⁶⁵ Where a city has power to levy a tax of one per cent. on all property within its limits, and besides, with the consent of its legal voters expressed at any general or special election, an unlimited power of taxation, a mandamus will lie to compel the municipal officers to call an election and require the voters to vote the tax necessary to pay a judgment against it.⁶⁶ Where there is no legislative limit upon the amount of money that may be raised by taxation in a city, and ample power is given to levy and collect all that may be necessary to discharge the corporate obligations, the power to contract a debt by issuing municipal stock carries with it, by necessary implication, the power to provide for the payment thereof by the levy and collection of a tax.⁶⁷

§ 836. Contracts for water supply and lighting.—If a charter provides that the common council of a city shall have no power “to contract debts, incur liabilities, or make expenditures in any one year which should exceed the revenue for the same year, unless authorized so to do by a majority vote of the taxpayers,” a contract entered into without submission to the taxpayers for a supply of water for a term of years, at a cost per year which would not exceed the authorized levy of past years, but the aggregate of which would exceed any such percentage as could be collected in any one year, is void.⁶⁸ A provi-

⁶³ *Supervisors v. United States*, 4 Wall. 435.

⁶⁴ *United States v. Miller Co.*, 4 Dill. 233.

⁶⁵ *Britton v. Platte City*, 2 Dill. 1.

⁶⁶ *United States v. City of Sterling*, 2 Biss. 408, 410. The reason given for this rule was that if a tax of one per cent. was not sufficient to raise the amount necessary to pay the

judgment, it was the duty of the city authorities to call an election for that purpose. The fact that the tax of one per cent. was exhausted in paying its current expenses was no excuse for the failure to take a vote.

⁶⁷ *Ex parte Parsons*, 1 Hughes 282.

⁶⁸ *Niles Water-Works v. Mayor &c.*, 59 Mich. 311; s. c. 26 N. W. 525; 11

sion in a city charter limiting the borrowing of money is rendered nugatory by a general act empowering all cities to construct water-works without limit as to cost, and to borrow money for the purpose on their bonds.⁶⁹ A statute providing that a city may contract with a company for supplying it and its inhabitants with water, and for the time and mode of payment, and may grant the use of its streets, and prescribe reasonable terms for tolls, is not repealed by a subsequently enacted city charter limiting the amount the city may raise by general tax and defraying general expenses, to a specified per cent., in any years unless the city avails itself of the provisions of the water-works act.⁷⁰

§ 837. School boards and directors.—In Missouri a board of public school directors has no power to rent buildings or rooms separate from the district schoolhouse, and to employ teachers for a supplemental school therein, without authority from the voters of the district.⁷¹ Under the statutes of Illinois, one of which provides that if judgment shall be obtained against school directors it shall be competent for the

Am. & Eng. Corp. Cas. 299. As to the lack of power to enter into a contract for a supply of water for a fixed annual sum where no steps are taken to raise by taxation the necessary moneys to meet the liability as it accrues where the indebtedness of a city has reached the prescribed limit, see *State v. Atlantic City*, 49 N. J. L. 558; s. c. 9 Atl. 759; 17 Am. & Eng. Corp. Cas. 592; *Prince v. City of Quincy*, 105 Ill. 138; s. c. 2 Am. & Eng. Corp. Cas. 66; *Davenport v. Kleinschmidt*, 6 Mont. 502; s. c. 13 Pac. 249; 16 Am. & Eng. Corp. Cas. 301; *City of East St. Louis v. Flannigan*, 26 Ill. App. 449; *Salem Water Co. v. City of Salem*, 5 Or. 29. In *Smith v. Inhabitants &c.*, 144 Mass. 177; s. c. 10 N. E. 782, it was held under a Massachusetts statute which enacts that towns shall not incur debt except in the manner prescribed by the act that a town was not restricted in its power to contract for a supply of water, the consideration therefor to be paid monthly. The court said it was in effect a cash transaction where the pay-

ments were made *pari passu* with the incurring of liability. See also, *City of Valparaiso v. Gardner*, 97 Ind. 1; s. c. 49 Am. R. 416. In *City of East St. Louis v. East St. Louis Gaslight Co.*, 98 Ill. 415, it was held that where a contract for lighting the streets of a city for a term of thirty years has been made and the agreed price therefor to be paid monthly, which sum for any one year was not in excess of the constitutional limit of indebtedness, but taken for the whole term was in excess of the debt the city was authorized to incur, the contract was not within the inhibition, but was legal and binding, there being created no present indebtedness for the whole sum, but only as the gas should be supplied from month to month.

⁶⁹ *Dutton v. City of Aurora*, 114 Ill. 138; s. c. 28 N. E. 461.

⁷⁰ *Menominee Water Co. v. City of Menominee*, 124 Mich. 386; s. c. 83 N. W. 127.

⁷¹ *Black v. Cornell*, 30 Mo. App. 641.

court in which it was rendered or some other court to issue a writ commanding its payment and to enforce obedience to the writ by mandamus, and another that funds in the hands of the treasurer of a district shall be paid out on the order of the directors of the district, mandamus will not lie to compel a treasurer to pay a judgment against the district from funds collected under a special levy for that purpose, in the absence of an order by the school directors or a court of competent jurisdiction for the payment of such funds.⁷² Where a school district at its annual meeting votes a certain sum to a moderator for money expended by him in behalf of the district, and an order is accordingly drawn by the director and countersigned by the moderator, the district should not be put to the costs of a suit on the order by reason of the refusal of the assessor to pay it, as mandamus will lie against him for the performance of his duty.⁷³ Where a school board has examined and approved the accounts and vouchers of its treasurer and granted a discharge, the discharge is conclusive unless procured by fraud; and in an action by the successor of such board to rescind the settlement and discharge, the burden is on the plaintiff to show fraud.⁷⁴ Under the Kansas statutes which provide that the director of each school district shall sign all orders drawn by the clerk upon the treasurer of the district for moneys collected or received by him, and that the treasurer of each district shall pay out on the order of the clerk signed by the director all public moneys, etc., it is the imperative duty of the director to sign orders drawn by the clerk upon the treasurer when presented to him for signature.⁷⁵

§ 838. **Erection of schoolhouses.**—The electors of a district township in voting a tax for the purchase of a site and the construction of a schoolhouse are not required by the code of Iowa, which authorizes them "to vote a tax," to vote by ballot, but they may express their views upon pending questions in any recognized manner in the absence of specific requirements.⁷⁶ Under the Kentucky statutes providing that it shall be the duty of the county superintendent to condemn dilapidated school buildings, and of the trustees, when notified by the superintendent of the condemnation, to repair the old building

⁷² *Watts v. McLean*, 28 Ill. App. 537.

⁷³ *Phillips v. School Dist.*, 79 Mich. 170; s. c. 44 N. W. 429.

⁷⁴ *Parish School Board v. Packwood*, 42 La. An. 468; s. c. 7 So. 537.

⁷⁵ *Faulk v. McCartney*, 42 Kan. 695; s. c. 22 Pac. 712.

⁷⁶ *Seaman v. Baughman*, 82 Iowa 216; s. c. 47 N. W. 1091. It was also held not to be necessary first to procure a site before voting a tax for the construction of a new schoolhouse.

or erect a new one, the superintendent and the trustees are the judges of the necessity of a new building and their action can not be questioned by the taxpayers of the district.⁷⁷ In a case where a school board was authorized by a vote of the district to approve plans for and contract for the construction of a schoolhouse, the cost of which was not to exceed five thousand dollars, and it let such contract for four thousand four hundred and twenty-five dollars, it was held that the board had the power thereafter, without further grant of authority, to make necessary changes in the plans of the building, provided the additional cost thereby incurred did not increase the whole cost beyond the amount limited by the vote.⁷⁸ Where, after this contract for erection of a schoolhouse was made by the board, the school district issued its order for five thousand dollars and converted it into cash, as a fund out of which to pay the expense of erecting the building, but only four thousand and seventy-five dollars was realized therefrom, it was held that the board had power to issue further orders to pay the amount due under the contract and for changes in the plans, provided the whole expenditure did not exceed five thousand dollars.⁷⁹ The electors of a school district may at a regular meeting, in case of default of an assessor, authorize a settlement of the matter by providing that the assessor may pay a part in cash and the balance may be paid in township orders, guaranteed by a responsible party.⁸⁰ School certificates of indebtedness, issued by the board of directors of the public schools of New Orleans for the years of 1874, 1875 and 1876, were held not to be debts of the city, and actions for the purpose of having them recognized as valid claims could be maintained only against the school board, which is authorized to pass upon the validity of the evidence of indebtedness of every one who alleges that he is a creditor.⁸¹ In an action upon a school order given for supplies furnished to a school district, the district may show the value of the supplies received and have the recovery limited thereto.⁸² In an action upon such an order by an assignee of the same, an averment in the answer that a conspiracy had been entered into between plaintiff's

⁷⁷ Trustees &c. v. Jameson, 12 Ky. L. 719; s. c. 15 S. W. 1, 779. It was further held that where the trustees are notified by the superintendent that a better house is required, and that the old one has been condemned, it is not necessary that they see the order of condemnation before taking action.

⁷⁸ Edinburg-American Land &c. Co.

v. City of Mitchell, 1 S. D. 593; s. c. 48 N. W. 131.

⁷⁹ Edinburg-American Land &c. Co. v. City of Mitchell, 1 S. D. 593; s. c. 48 N. W. 131.

⁸⁰ School Dist. v. Clark, 90 Mich. 435; s. c. 51 N. W. 529.

⁸¹ Fisher v. Board &c., 44 La. An. 184; s. c. 10 So. 494.

⁸² Kittenger v. Monroe School Tp., 3 Ind. App. 411; s. c. 29 N. E. 931.

assignor and a trustee of the school district to have the order in question made out for about two hundred dollars more than the actual consideration received by the district, for their own personal gain, was held to sufficiently show fraud.⁸³

§ 839. School district boards—Contracts for building.—The statutes of Dakota give the school district meeting power “to vote a tax annually, not exceeding one per cent. of the taxable property, * * * to purchase or lease a site, and to build, hire or purchase a schoolhouse,” and provide that the school board shall build, purchase or lease a schoolhouse “out of the funds provided for that purpose.” It has been held that the school meeting could not authorize a contract for a schoolhouse for an amount exceeding the funds on hand, and the annual tax of one per cent. actually levied, and the use of the house by the district created no liability either under the contract or for the value received.⁸⁴ The minutes of a district school meeting disclosed that a motion was carried to build a schoolhouse, a tax levied for that purpose, and the school board appointed as a building committee, but it did not appear that the meeting selected a site or directed the erection of any building. The statute as to building and leasing schoolhouses provided for the purchase or lease of such site as shall have been designated by the school meeting, and building such schoolhouse as the voters in the district meeting shall have agreed upon. The proceedings at the school meeting as disclosed by the minutes were held not to authorize the board to build a schoolhouse.⁸⁵

⁸³ *Kittenger v. Monroe School Tp.*, 3 Ind. App. 411; s. c. 29 N. E. 931.

⁸⁴ *Capital Bank v. School Dist.*, 1 N. D. 479; s. c. 48 N. W. 363.

⁸⁵ *Capital Bank v. School Dist.*, 1 N. D. 479; s. c. 48 N. W. 363. See also, *Weitz v. Independent Dist.*, 79 Iowa 423, 426; s. c. 44 N. W. 696 (where the Iowa supreme court said:—“The power of the directors is limited and circumscribed by the statute. They can enter into no contract unless authorized to do so, when the terms of the contract, and the manner of binding the district, and the things to be done in order to bind it, as prescribed by the statute must be pursued. . . . The statute confers upon the school directors the power to contract for the building of a schoolhouse with one

who is the ‘lowest responsible bidder,’ and who shall furnish ‘bonds with sufficient sureties for the faithful performance of the contract.’ If plaintiff was not the lowest bidder and did not furnish the bonds required, the statute conferred no power upon the directors of the defendant to contract with the plaintiff”); *Parr v. President &c.*, 72 N. Y. 463; *Dickinson v. City of Poughkeepsie*, 75 N. Y. 65; *Dillon Munic. Corp.* (3d ed.), §§ 466, 468. In *Farmers’ &c. Bank v. School Dist.*, 6 Dak. 255; s. c. 42 N. W. 767, it was held that school districts, being special statutory creations, have only such implied powers as are necessary to accomplish the purposes of their existence; also, that the warrants issued by a school district

§ 839a. **Contracts with teachers.**—One of the trustees of a graded school district acting as director can not employ a superintendent of schools, under the Michigan statute which authorizes the *board* of trustees to employ such officers and servants as may be necessary for the management of the schools and the school property.⁸⁶ A contract signed by a teacher and one of the trustees when the board was not in session and afterwards approved at a special session of the board and there signed by another trustee is binding on the corporation.⁸⁷ Where the president of a board of school directors is authorized to employ teachers with the consent of the board, and one whom he employs as a teacher, by written contract, begins teaching under it, with the knowledge of each member of the board, who knows that the board has taken no action on the contract, the consent of the members will be presumed, and the contract held valid.⁸⁸ The board of education of the city and county of San Francisco under the authority given it by statute to employ teachers, and fix, allow and order paid their salaries, can not appoint and employ “inspecting teachers” to perform duties imposed by the act on the board itself and on the superintendent, such as visiting the schools, ascertaining their condition by oral examinations, observing the methods of the teachers and giving them advice and instructions in the methods of teaching.⁸⁹ Where the prudential committee of a school district employed one to teach a term of school, no vote of the district having been taken authorizing

board for building a schoolhouse were void because they built the house without the authority or ratification of the voters of the district, the latter never having thereby designated, as the statute required, a site upon which it was to be built; also, that the warrants were void, having been issued as payable immediately and in excess of the restriction on the amount of revenues a school district might raise in one year; and that the district could defend on the ground that the warrants were issued in excess of its powers; and that the purchasers of such warrants must see that the powers of the corporation have not been exceeded.

⁸⁶ *Davis v. School Dist.*, 81 Mich. 214; s. c. 45 N. W. 989. It was held, however, that in such a case, if the services contracted for were actually

accepted by the board of trustees with full knowledge of all the facts, the same rule should govern as to the liability of the corporation as is applied where money or other property is received under such circumstances; that the law raises an implied promise on the part of the corporation to pay for the same. See also, *Crane v. School Dist.*, 61 Mich. 299; s. c. 28 N. W. 105; *Smith v. School Dist.*, 69 Mich. 589; s. c. 37 N. W. 567; *Devoe v. School Dist.*, 77 Mich. 610; s. c. 43 N. W. 1062.

⁸⁷ *School Town of Milford v. Powner*, 126 Ind. 528; s. c. 26 N. E. 484.

⁸⁸ *Hull v. Independent School Dist.*, 82 Iowa 686; s. c. 46 N. W. 1053; 48 N. W. 82.

⁸⁹ *Barry v. Goad*, 89 Cal. 215; s. c. 26 Pac. 785; reversing s. c. 24 Pac. 1023.

such action by the committee for that year, and the teacher performed her contract, the district was held liable therefor under the Vermont statute which provides that the prudential committee of a school district shall "appoint and agree with a teacher to instruct the school. * * *"⁹⁰ Where school trustees, with the acquiescence of the school town, continue to act as such after the expiration of their term, and before their successors are appointed, they are officers de facto, and a contract with a teacher entered into by them has been held to be binding on the town.⁹¹ And a contract thus made, though it is not to be performed before the election of the new board, will bind the town.⁹² Where an order employing a teacher is passed at a session of the board of school trustees, it is immaterial that the trustees signed the contract at different times.⁹³ Nor can a contract with a teacher be annulled by the subsequent action of a school town in abolishing the department in which she was engaged to teach.⁹⁴

§ 840. Authority of county treasurer, etc.—A county being largely indebted on account of county and town bounties to volunteers, represented by short loans for which annual taxes were levied, the treasurer was authorized to obtain extensions as the towns might desire, by resolutions of the board each year till 1875. The treasurer assumed the authority of borrowing money on notes of the county signed by himself officially, and giving new notes for old notes and bonds. The board being empowered under a statute to borrow money and renew its obligations for bounties, which statute also ratified subsisting obligations of that nature, it was held that the treasurer's acts were binding on the county.⁹⁵ A vote of a town ratifying

⁹⁰ *Cobb v. School Dist.*, 63 Vt. 647; s. c. 21 Atl. 957.

⁹¹ *School Town of Milford v. Zeigler*, 1 Ind. App. 138; s. c. 27 N. E. 303.

⁹² *School Town of Milford v. Zeigler*, 1 Ind. App. 138; s. c. 27 N. E. 303. It was further held that a contract with a teacher by school trustees after the expiration of their term, and before their successors qualified, could not be assailed by subsequently elected trustees on the ground that it was fraudulently made by the former board in order to forestall them when it was not alleged that the teacher was a party to the fraud. See also, *Gates v. School Dist.*, 53 Ark. 468; s. c. 14

S. W. 656, in which it was held that a board of school directors empowered by statute without any limitation to employ a superintendent of schools might make a contract for a superintendent for a term beginning after some members of the board go out of office.

⁹³ *School Town of Milford v. Zeigler*, 1 Ind. App. 138; s. c. 27 N. E. 303.

⁹⁴ *School Town of Milford v. Zeigler*, 1 Ind. App. 138; s. c. 27 N. E. 303.

⁹⁵ *Clark v. Board &c.*, 107 N. Y. 553; s. c. 14 N. E. 428; following *Parker v. Board &c.*, 106 N. Y. 392; s. c. 13 N. E. 308. It was further held that the acts of a county treas-

the action of the selectmen in borrowing money, which is applied to taking up outstanding debts of the town, can not be rescinded at a subsequent meeting.⁹⁶ The fact that a county had collected and placed in the hands of its treasurer a sum sufficient to pay claims upon which it is sued does not operate as a payment of them, or relieve the county from the obligation to raise money to pay them, if that placed with the treasurer for that purpose is by him appropriated to some other purpose.⁹⁷ It was held that the city of New Orleans was not liable for taxes collected for the metropolitan police by defaulting sheriffs simply because it allowed them privileges for accelerating the payment of such taxes and her own taxes from delinquents.⁹⁸

§ 841. **Authority of officers in particular instances.**—A municipal corporation authorized by its charter to tax "all" the real and personal property therein has no power to exempt any of such property from taxation.⁹⁹ A city can not levy a special tax to pay for an improvement which has been made, without any ordinance authorizing it, before the proceedings to levy the special tax were begun.¹⁰⁰ An act which places in the power of a board of commissioners of a county the approval of official bonds of certain officers does not confer upon it the power to release securities on those bonds on presentation of a new bond.¹⁰¹ A town can not lawfully divide money received from an estate among its inhabitants, but unless there is clear proof of such an intention on the part of the town or of some of its officers or agents, an injunction to restrain such action will not be granted.¹⁰² Under the statute of Indiana providing for the county prison, where a steam-heating apparatus is placed in a jail, which for its operation requires a skilled engineer, such engineer, though employed by the sheriff, should be paid by the county outside of the sheriff's compensation.¹⁰³ A county court in Missouri has no authority either to em-

urer in procuring extensions of and renewing certain indebtedness, in pursuance of resolutions of the board, were binding on the county, there being no mistake as to the debt intended, although the resolutions gave it the name of a debt which did not exist; and that it was no defense to an action on such new obligations to show that the treasurer had fraudulently given notes largely in excess of the amount requested, without proof that the notes in suit represented a part of such excess.

⁹⁶ *Brown v. Inhabitants &c.*, 79 Maine 305; s. c. 9 Atl. 844.

⁹⁷ *Caldwell Co. v. Harbert*, 68 Tex. 321; s. c. 4 S. W. 607.

⁹⁸ *Harrison v. City of New Orleans*, 40 La. An. 509; s. c. 4 So. 133.

⁹⁹ *Whiting v. Town of West Point*, 88 Va. 905; s. c. 14 S. E. 698.

¹⁰⁰ *City of Carlyle v. Clinton Co.*, 140 Ill. 512; s. c. 30 N. E. 782.

¹⁰¹ *Sullivan v. State*, 121 Ind. 342; s. c. 23 N. E. 150.

¹⁰² *McFadden v. Town of Dresden*, 80 Maine 134; s. c. 13 Atl. 275.

¹⁰³ *Board &c. v. Weeks*, 130 Ind.

ploy an attorney to assist in the prosecution of a suit for taxes or to charge the county with liability for his compensation.¹⁰⁴ It has been held that a resolution of a board of freeholders to purchase lands at a price which was shown to be an excessive valuation by the evidence of experts in such matters should be set aside.¹⁰⁵ A contract entered into by two members of the board of county commissioners, outside of their county, and without any previous authority from the board, has been held void in the absence of any subsequent ratification of the contract by the board.¹⁰⁶

§ 842. **The same subject continued.**—Under the constitution of North Carolina, which prohibits a municipal corporation from contracting any debt unless authorized by a majority of its qualified voters, in the absence of such authority a township is not bound by the appointment of its agents by the county commissioners and township justices to subscribe for railroad stock on behalf of the township, and to represent it and vote at meetings of stockholders and by the exercise of such authority by such agents.¹⁰⁷ The power of city boards of improvement to bind their districts for the payment of interest on a debt legally contracted is implied from the powers expressly conferred on the boards by the Arkansas statutes which provide that such boards shall have control of improvements in their districts, may make all contracts in reference thereto, borrow money at interest, and pledge all uncollected assessments for the payment thereof.¹⁰⁸ Such city boards of improvement are not municipalities within the meaning of the constitution of Arkansas, declaring that no "municipality in that state shall ever loan its credit or issue any interest-bearing evidences of indebtedness."¹⁰⁹ Municipal officers authorized to purchase and hold for the benefit of the town property to a certain value, and also to maintain public schools, and to this end, as well as to defray the ordinary expenses of municipal government, to levy taxes, may buy a schoolhouse (its value, together with the property already owned, not exceeding the value of property in its power to hold) on credit and give warrants therefor.¹¹⁰ Where, however, the municipal officers have no express authority to borrow money,

162; s. c. 29 N. E. 776; Board &c. v. Reissner, 58 Ind. 260; s. c. 66 Ind. 568.

¹⁰⁴ Butler v. Sullivan Co., 108 Mo. 630; s. c. 18 S. W. 1142.

¹⁰⁵ State v. Board &c., 53 N. J. L. 531; s. c. 22 Atl. 343.

¹⁰⁶ Board &c. v. Webb, 47 Kan. 104; s. c. sub nom. Willis v. Webb, 27 Pac. 825.

¹⁰⁷ Lynchburg &c. R. Co. v. Board &c., 109 N. C. 159; s. c. 13 S. E. 783.

¹⁰⁸ Fitzgerald v. Walker, 55 Ark. 148; s. c. 17 S. W. 702.

¹⁰⁹ Fitzgerald v. Walker, 55 Ark. 148; s. c. 17 S. W. 702.

¹¹⁰ Allen v. Intendant &c., 89 Ala. 641; s. c. 8 So. 30.

and instead of the warrants being given to the vendor of the school-house they borrow money and give warrants therefor, and with the money pay the vendor, the warrants are void, but the town is liable on an implied contract to repay the money which it has received and applied to an authorized purpose.¹¹¹ A settlement by an overseer of the poor of an action brought by himself or his predecessor for penalties for the violation of the excise laws, when honestly made in furtherance of general public opinion, and upon terms fair and reasonable, is within the power of the overseer, and will not be interfered with by a court of equity.¹¹² Though there may be a law authorizing the appointment of a board of park commissioners with power to purchase, condemn, pay for and regulate the parks of a city, it being discretionary whether they be chosen, where there has not been appointed such a board the power remains in the city council to purchase or condemn and to improve and care for these public grounds.¹¹³ And the city council has the power without a vote of the electors, as the statute authorizes expenditures from the general fund for such purposes.¹¹⁴ The council of a borough organized under the New Jersey statute has no right to enter into a contract by which the public moneys are to be expended and borough bonds are to be issued to pay for grading and filling a street, unless such grading and filling have been directed to be done by an ordinance.¹¹⁵

§ 843. Powers of a trustee of a school township.—The limitation of the trustee's authority is in respect to the manner and extent of contracting debts for the township, and when the debt is lawfully contracted the trustee has the necessarily resulting power of giving the creditor a proper written acknowledgment and promise to pay.¹¹⁶ Where a trustee, acting for a school township, buys furniture which is received and used in the schools, and is of the value agreed to be paid, an acknowledgment of indebtedness issued by him on behalf of the township constitutes a valid written contract, and is not within the statute of limitations governing actions on accounts and contracts

¹¹¹ *Allen v. Intendant &c.*, 89 Ala. 641; s. c. 8 So. 30.

¹¹² *Olp v. Leddick*, 59 Hun (N. Y.) 627 (mem.); s. c. 14 N. Y. S. 41; 38 N. Y. St. 122.

¹¹³ *In re City of Cedar Rapids*, 85 Iowa 39; s. c. 51 N. W. 1142.

¹¹⁴ *In re City of Cedar Rapids*, 85 Iowa 39; s. c. 51 N. W. 1142.

¹¹⁵ *State v. Brigantine Borough*, 54

N. J. L. 476; s. c. 24 Atl. 481. The court said:—"The resolution [of the council] attempts to bind the borough and pledge its credit for the payment of money to be expended to accomplish a purpose, which purpose has no legal existence."

¹¹⁶ *Noble School Furniture Co. v. Washington School Tp.*, 4 Ind. App. 270; s. c. 29 N. E. 935.

not in writing.¹¹⁷ That the trustee of a township, without first being authorized by the court commissioners, incurred indebtedness in excess of the fund in hand to which it was chargeable, as forbidden by the statutes of Indiana, has been held a matter of defense which it was incumbent on the township to plead in an action for the indebtedness, and that it was not necessary for the plaintiff to anticipate possible objections that do not appear.¹¹⁸

§ 844. **Town selectmen, etc.**—Under the power given by Connecticut statutes to superintend the concerns of the town, the selectmen may, though the town itself has taken no action, employ counsel and spend its money in proper ways in opposing a petition asking the legislature to divide its territory and apportion its property, debts and liabilities.¹¹⁹ Under the Indiana statute which provides that the town trustees may negotiate and sell town bonds, the trustees can employ a broker to effect the sale.¹²⁰ And the contract need not be in writing.¹²¹ In a suit by a broker to recover for his services under such a contract the complaint need not show that the bonds sold by the plaintiff were legally issued.¹²² Where money has been appropriated by a county to a town, and received by an officer of the town for the town, he is bound to account for it to the town, though the county had no authority to make the appropriation, and the payment to him was without warrant of law.¹²³ And it is no defense in an action against the officer for this money that he expended it for the use of the town in repairing its highways and bridges, where he expended it without any direction from the town board as provided by the Wisconsin statutes, and without thereafter rendering an account to

¹¹⁷ *Noble School Furniture Co. v. Washington School Tp.*, 4 Ind. App. 270; s. c. 29 N. E. 935. See also,

Litten v. Wright School Tp., 127 Ind. 81; s. c. 26 N. E. 567; *Honey Creek School Tp. v. Barnes*, 119 Ind. 213; s. c. 21 N. E. 747; *Bloomington School Tp. v. National School Furnishing Co.*, 107 Ind. 43; s. c. 7 N. E. 760; *State v. Hawes*, 112 Ind. 323; s. c. 14 N. E. 87; *Boyd v. Mill Creek School Tp.*, 114 Ind. 210; s. c. 16 N. E. 511; *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; s. c. 2 N. E. 194; *Johnson School Tp. v. Citizens' Bank*, 81 Ind. 515; *Brownlee v. Board*, 81 Ind. 186; *Long v. Straus*,

107 Ind. 94; s. c. 6 N. E. 123; 7 N. E. 763.

¹¹⁸ *Noble School Furniture Co. v. Washington School Tp.*, 4 Ind. App. 270; s. c. 29 N. E. 935. See also, *Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121; *Jefferson School Tp. v. Litton*, 116 Ind. 467; s. c. 19 N. E. 323.

¹¹⁹ *Farrel v. Town of Derby*, 58 Conn. 234; s. c. 20 Atl. 460.

¹²⁰ *Reed v. Town of Orleans*, 1 Ind. App. 25; s. c. 27 N. E. 109.

¹²¹ *Reed v. Town of Orleans*, 1 Ind. App. 25; s. c. 27 N. E. 109.

¹²² *Reed v. Town of Orleans*, 1 Ind. App. 25; s. c. 27 N. E. 109.

¹²³ *Town of Remington v. Ward*, 78 Wis. 539; s. c. 47 N. W. 659.

the board to be audited and allowed as provided by other statutes.¹²⁴ A resolution of the county board authorizing a town to erect a bridge and issue its bonds in payment therefor is rendered entirely void by the failure of the board to require, as provided in New York statutes, adequate security, in addition to that given for the faithful performance of their ordinary duties, from the officers charged with the duty of issuing the bonds and disbursing the proceeds.¹²⁵ An application of the funds of a town, derived from taxation, for purposes beyond the purview of municipal grant, is a wrongful appropriation of the funds held in trust for the taxpayers and people to pay the legitimate expenses of the town, and is null and void. Resident taxpayers have the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the corporation or the illegal creation of a debt which they, in common with other property holders, may otherwise be compelled to pay.¹²⁶

§ 845. **The same subject continued.**—Neither the selectmen nor the treasurer of a town in Connecticut have general power to borrow money or to incur any debts in behalf of the town.¹²⁷ Selectmen authorized to borrow money and pay certain claims can not, under such authority, give the notes of the town to the claimants. They must pay whatever money they borrow to the town treasurer and then draw their orders on him for it.¹²⁸ Towns in Connecticut, it has been held, while having power to build town halls, have no power to build a structure containing a town hall, the greater part of which is designed to be rented to private parties for other uses.¹²⁹ In the absence of authority so conferred, a town has no power to appropriate

¹²⁴ *Town of Remington v. Ward*, 78 Wis. 539; s. c. 47 N. W. 659.

¹²⁵ *Barker v. Town of Oswegatchie*, 10 N. Y. S. 834.

¹²⁶ *Peck v. Spencer*, 26 Fla. 23; s. c. 7 So. 642, in which case the court held there was no power expressly given in its charter, or by reasonable implication, to the town council, to appropriate money in the defense of contested election cases. They said:—"These contests are personal, and the corporation can have no interest in the result, and an appropriation to pay any one of the parties the expenses he may be put to is without legal authority." See also, *Lanier v. Padgett*, 18 Fla. 842; *Cotton v. Commissioners &c.*, 6 Fla.

610; *Murphy v. City of Jacksonville*, 18 Fla. 318.

¹²⁷ *Bloomfield v. Charter Oak Bank*, 121 U. S. 121; s. c. 7 S. Ct. 865. It was also held that the reports made to an annual meeting of the town by the selectmen and treasurer as required by statute are not, unless acted on by the town, evidence to charge it with debts which those officers had no authority to contract in its behalf.

¹²⁸ *Ladd v. Town of Franklin*, 37 Conn. 53, 62, 70.

¹²⁹ *White v. Town of Stamford*, 37 Conn. 578, holding, however, that it is competent for the legislature to validate the transaction.

money for gratuities to men drafted for the military service of the United States.¹³⁰ But the action of towns in illegally appropriating money to such purposes, it has been held, might be confirmed and made binding upon such towns by a retroactive legislative act.¹³¹ Township supervisors in Pennsylvania may lawfully borrow money in good faith to repair roads and bridges injured or destroyed by a flood.¹³² The board of health of a township has power, and it is its duty during the prevalence of a contagious disease, if necessary, to employ a physician, and the township is primarily liable in the premises; and such physician is not bound to look anywhere else for payment, his contract being with the township.¹³³ A town in Connecticut having voted to build an almshouse appointed a committee to procure plans and specifications to be submitted to bidders, and directed them to give the contract to the lowest responsible bidders. The committee decided to give the contract to parties who were not the lowest responsible bidders. The supreme court held an injunction in a suit of a taxpayer in restraint of the town authorities was improperly granted, as the matter was wholly within the control of the town, which could confirm and accept the actions of its committee or deny its responsibility for their acts.¹³⁴

§ 846. **Township boards.**—A Michigan statute authorizing a township board to issue township bonds to the amount of four thousand dollars for the payment of certain outstanding orders was held not to require the payment of all such orders, whether valid or invalid, but to leave it in the power of the township board to determine their validity.¹³⁵ Under another Michigan statute prohibiting the issuance of highway or contingent orders in excess of the funds provided for those purposes, the mere fact that there were outstanding orders, to

¹³⁰ *Booth v. Town of Woodbury*, 32 Conn. 118; *Stuart v. Town of Warren*, 37 Conn. 225; *State v. Fyler*, 48 Conn. 145.

¹³¹ *Bartholomew v. Town of Harwinton*, 33 Conn. 408, 410; *Potter v. Canaan*, 37 Conn. 224.

¹³² *Maneval v. Jackson Tp.*, 141 Pa. St. 426; s. c. 21 Atl. 672; 28 W. N. C. (Pa.) 130.

¹³³ *Wilkinson v. Long Rapids Tp.*, 74 Mich. 63; s. c. 41 N. W. 861. See also, *Rae v. Mayor &c.*, 51 Mich. 526; s. c. 16 N. W. 887; *Elliott v. Supervisors*, 58 Mich. 452; s. c. 25 N. W. 461.

¹³⁴ *Dibble v. Town of New Haven*, 56 Conn. 199; s. c. 14 Atl. 210. The court said that "in making expenditures [in the discharge of a governmental duty] the will of the municipality is a law unto itself, as is that of an individual to himself, and as little subject to judicial control; and if it appoints an agent to make contracts in its name for such purposes, a court has no greater power to restrain it than it has to restrain the agent of an individual."

¹³⁵ *Boyce v. Auditor-General*, 90 Mich. 314; s. c. 51 N. W. 457.

pay which there was no money, did not show that such orders were illegal when it did not appear what moneys were raised for the year in which the orders were issued or that the moneys so raised were not applied to some other purpose.¹³⁶ Where a committee is appointed at a town meeting to procure plans and specifications for a school-house, and the treasurer of the town is authorized to borrow a sum not exceeding a certain amount for the use of the committee, the authority of the committee to incur debts on behalf of the town is limited to that amount.¹³⁷ And the fact that the town adopts the report of such a committee in relation to the erection of such a building does not ratify an expenditure in excess of such amount, where it does not appear that the report informed the town of such increased expenditures.¹³⁸

§ 847. **The same subject continued—Michigan decisions.**—In general the presentation to the board of a claim against a township confers jurisdiction to decide whether the claim is a valid township charge or not, pleadings or formal papers not being required.¹³⁹ The presence of the claimant before the board is not necessary to the allowance of his account. Nor is it necessary that the account should be sworn to (although it must be in writing) or that it be proved by evidence under oath. The board may act upon its own knowledge of the demand, and if satisfied of its correctness that is enough.¹⁴⁰ Where a township board assumes to pass upon and allow a class of claims over which the law gives it no jurisdiction, its allowance is void, and the supervisor and township clerk can not be compelled by mandamus to issue orders thereon.¹⁴¹ Under a statute of Michigan the township boards, independent of any vote of the electors, might raise money to pay claims audited and allowed against the township.¹⁴² A township is not estopped by the action of its board in settling with the treasurer from suing him for an additional amount afterwards found to be due and overlooked in the settlement.¹⁴³ A township treasurer who holds for a new school district a tax collected to pay its ascertained proportion of the value of school property in the district of which it was formerly a part can not receive school orders on the old district for such tax; he can not use the fund for any purpose except

¹³⁶ *Boyce v. Auditor-General*, 90 Mich. 314; s. c. 51 N. W. 457.

¹³⁷ *Brown v. Inhabitants &c.*, 155 Mass. 587; s. c. 30 N. E. 87. See also, *Turney v. Town of Bridgeport*, 55 Conn. 412; s. c. 12 Atl. 520.

¹³⁸ *Brown v. Inhabitants &c.*, 155 Mass. 587; s. c. 30 N. E. 87.

¹³⁹ *Wall v. Trumbull*, 16 Mich. 228.

¹⁴⁰ *Wall v. Trumbull*, 16 Mich. 228.

¹⁴¹ *People v. Supervisors &c.*, 14 Mich. 336.

¹⁴² *Wisner v. Davenport*, 5 Mich. 501.

¹⁴³ *Boardman Tp. v. Flagg*, 70 Mich. 372; s. c. 38 N. W. 284.

to pay it over to the new district, and if he does so he is liable to account for it as though never drawn out.¹⁴⁴ A warrant drawn upon the township treasurer by the director of a school district and countersigned by the moderator is not a negotiable instrument, and no action can be maintained thereon by a transferee.¹⁴⁵ The assessor of a school district is the lawful treasurer and depository of school district funds, and all moneys must pass through his hands and be paid out by him on proper orders.¹⁴⁶

§ 848. **Town trustees—Indiana decisions.**—The board of trustees of a town in Indiana have incidental power to employ counsel to defend an action for false imprisonment brought against the town marshal by one arrested by him for the violation of a town ordinance, and a claim for services rendered under such employment may be enforced against the town.¹⁴⁷ A town possesses inherent power to purchase fire-engines for the protection of the property of its citizens from fire.¹⁴⁸ A township has been held not to be liable upon a certificate issued by its trustee for school supplies contracted for by him for future delivery, which supplies, although suitable, were not needed in the township schools, and which the township refused to accept.¹⁴⁹ A township trustee has no authority to accept the note of his predecessor in payment of the sum due from him to the township, but the outgoing trustee is required to pay his obligation in money.¹⁵⁰ The sureties on the bond of a defaulting township trustee can not recover against the township, as assignees of an order of the board of county commissioners, payable out of the township funds, given to the trustee for his services and assigned for the indemnity of his sureties, so long as the township has an unpaid judgment against the township trustee

¹⁴⁴ *Midland School Districts*, 40 Mich. 551.

¹⁴⁵ *Fox v. Shipman*, 19 Mich. 218. In *Fractional School Dist. v. Mal-lary*, 23 Mich. 111, it was held that an order drawn by the director upon the township treasurer for school money should be made payable to the district assessor, and was void if drawn payable to "A. or bearer." In *Stockwell v. White Lake Tp.*, 22 Mich. 341, it was held that the duty of a moderator of a school district to countersign an order drawn by the director upon the assessor is not merely ministerial. He has a right to satisfy himself that the director

drew it for a valid claim, and in the proper performance of his duty.

¹⁴⁶ *Midland School Districts*, 40 Mich. 551. See also, *Burns v. Bender*, 36 Mich. 195. The township treasurer can pay school moneys only to the school district assessor, and then only on the warrant of the proper district officers.

¹⁴⁷ *Cullen v. Town of Carthage*, 103 Ind. 196; s. c. 2 N. E. 571.

¹⁴⁸ *Corporation of Bluffton v. Studabaker*, 106 Ind. 129; s. c. 6 N. E. 1.

¹⁴⁹ *Boyd v. Mill Creek School Tp.*, 114 Ind. 210; s. c. 16 N. E. 511.

¹⁵⁰ *Madison Tp. v. Dunkle*, 114 Ind. 262; s. c. 16 N. E. 593.

for the money lost by his default in excess of the amount of the order.¹⁵¹ An obligation for property bought for the use of a township, and received by it, may be given by the trustee.¹⁵² While a township trustee has no authority to borrow money for the use of the school corporation, yet for money borrowed and actually used for the benefit of the school township, in a legitimate way, as in payment of a corporate indebtedness, the school township may be held liable.¹⁵³

§ 849. **The same subject continued.**—The trustee of a school corporation has power to contract a debt in the name of and binding upon such corporation in the purchase of necessary furniture, apparatus and other supplies of its schools, and to execute in the name of his corporation a valid and binding certificate of indebtedness or note for the amount of such debt, and such certificate or note will constitute *prima facie* a good cause of action against the corporation.¹⁵⁴ And it had before been held that payment of such a note could not be resisted upon the grounds that the goods were not needed and that

¹⁵¹ *Heth Tp. v. Lewis*, 114 Ind. 508; s. c. 17 N. E. 113, holding that the order of allowance is not a commercial instrument and the surety's rights are no greater than the principal's.

¹⁵² *Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121. In *Wallis v. Johnson School Tp.*, 75 Ind. 368, it was held that where a promissory note signed by a township trustee appears upon its face to have been intended to impose an obligation on the township, and it appears that the consideration therefor moved to the township, the contract should be regarded as that of the corporation, and not as that of the officer whose name is signed to it.

¹⁵³ *First Nat'l Bank v. Union School Tp.*, 75 Ind. 361; *Bicknell v. Widner School Tp.*, 73 Ind. 501; *Wallis v. Johnson School Tp.*, 75 Ind. 368; *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; s. c. 2 N. E. 194, holding that where the school trustee borrows money and executes notes therefor in the name of the school corporation, the corporation will be liable if the money is actually used for the payment of legiti-

mate claims against the corporation, and the circumstances are such as make it equitable that the lender should be subrogated to the rights of the persons whose claims the borrowed money paid. But where the trustee has money in his hands derived from the school revenues or funds, such subrogation can not occur. - - - The authority of the trustee is purely statutory, and all who deal with him must, at their peril, ascertain the extent of his authority: *Bloomington School Tp. v. National School Furnishing Co.*, 107 Ind. 43; s. c. 7 N. E. 760.

¹⁵⁴ *Miller v. White River School Tp.*, 101 Ind. 503. It was further held that such a certificate was not rendered invalid by the trustee's failure to comply with the provisions of R. S. Ind. 1881, §§ 6006, 6007 (*Burns R. S. Ind. 1901, §§ 8081, 8082*), as those sections of the statute have no application to the ordinary debts of a school corporation, incurred by the trustee for the usual and necessary furniture, apparatus and other supplies of its common schools.

the price of the goods—in this case school furniture—was too high, unless fraud be shown, and not then without an offer duly made to return the goods.¹⁵⁵ This power has been still further qualified by a ruling that such a contract for school supplies could not be made by the trustee unless the supplies were suitable and reasonably necessary for the township, and had been actually delivered to and received by the township.¹⁵⁶ Under the statutes of Indiana, which provide in substance that township trustees can not contract debts on behalf of their township in excess of the fund on hand to which such debts are chargeable, and of the fund to be derived from the tax assessed against their townships for the year in which such debts are to be incurred, without first procuring an order from the board of county commissioners authorizing them to contract such debts, and that in order to procure such an order they shall file a petition setting forth the object for which the debts are to be incurred, and give twenty days' notice of the filing of such petition, the trustees of a school township, without an order from the board of county commissioners authorizing it, can not contract a debt for the building of a school-house which will make the aggregate debts chargeable to the special school fund exceed the amount of that fund on hand and to be derived from the tax assessed against the township for the year in which the debt is to be incurred.¹⁵⁷

¹⁵⁵ *Johnson School Tp. v. Citizens' Bank*, 81 Ind. 515.

¹⁵⁶ *State v. Hawes*, 112 Ind. 323; s. c. 14 N. E. 87. See also, *Reeve School Tp. v. Dodson*, 98 Ind. 497, where the complaint in such a case was held bad on demurrer for its failure to aver that the articles purchased for the benefit of the schools were suitable or necessary, or that they had been received by the township. As to the paper creating no obligation against any one, see *Axt v. Jackson School Tp.*, 90 Ind. 101. As to the rights of the assignee being no more than that of the person to whom it was issued, see *Sheffield School Tp. v. Address*, 56 Ind. 157; *McCurdy v. Bowes*, 88 Ind. 583; *Mayor &c. v. Ray*, 19 Wall. 468; *Wall v. Monroe Co.*, 103 U. S. 74; *Police Jury v. Britton*, 15 Wall. 566; *First Nat'l Bank v. Rush School Dist.*, 81½ Pa. St. 307. As to the invalidity of such a paper, see *Bissell v. Spring*

Valley Tp., 110 U. S. 162; s. c. 3 S. Ct. 555; *School Dist. v. Stone*, 106 U. S. 183; s. c. 1 S. Ct. 84; *Merrill v. Town of Monticello*, 14 Fed. 628; s. c. 16 Cent. L. J. 90.

¹⁵⁷ *Middleton v. Greeson*, 106 Ind. 18; s. c. 5 N. E. 755, holding taxpayer entitled to an injunction; also, that the statutes limited the authority of the town trustee to contract debts, whether on behalf of the civil or school district. The court said:—"The legislation of the state clearly shows that the contracting of debts by township trustees on behalf of both their school and civil townships was regarded by the legislature as a growing evil, and one that should be checked. We think, too, that the legislation and the use of the words 'township trustee' therein show that generally the legislature regarded these words as sufficiently comprehensive and specific to include the township trustee in

§ 850. **Directors of schools—Illinois decisions.**—For the purpose of building schoolhouses, purchasing school sites, or for repairing or improving the same, school directors in Illinois, by a vote of the people of their district, are authorized to borrow money and give bonds therefor executed by any two of them.¹⁵⁸ The power to borrow money carries with it at common law, independent of the statute, the power to give evidence of the loan. The power in school directors to give bonds for money borrowed given by statute is not a limitation but an enlargement of their powers. An order given by them or their treasurer, or other simple evidence of indebtedness for money borrowed for schoolhouse purposes, is valid and may be enforced against the district.¹⁵⁹ When school directors borrow money under authority of the statute, their duty is to pay it to their treasurer, who is the only proper custodian. Should they place it in the hands of any one else, it is at their own risk.¹⁶⁰ School directors have no power to make acceptances of orders or bills of exchange so as to bind the school district and create a right of action against them.¹⁶¹ A contract by school directors for the purchase on credit of school apparatus, where it did not appear that there were any surplus funds after all necessary school expenses were paid applicable to such purchase, has been held void.¹⁶² Orders drawn by school directors on the township treasurer in payment for building a schoolhouse without a vote of the people on the question will be void even in the hands of an assignee, and the successors of such directors may contest their validity.¹⁶³

his dual capacity as trustee of the civil and school townships."

¹⁵⁸ *Folsom v. School Directors*, 91 Ill. 402.

¹⁵⁹ *Folsom v. School Directors*, 91 Ill. 402. In *School Directors v. Sippy*, 54 Ill. 287, it was held that this power to borrow money upon a vote of the people could not be enlarged by construction or implication, so as to authorize them to execute promissory notes which in themselves would be binding on the district.

¹⁶⁰ *Adams v. State*, 82 Ill. 132. The reason for the rule is that their duties are derived exclusively from the statute and are specifically defined, and if they exercise powers and functions not conferred upon them, the statute makes them re-

sponsible for all losses that may ensue.

¹⁶¹ *Peers v. Board of Education*, 72 Ill. 508.

¹⁶² *Clark v. School Directors*, 78 Ill. 474, holding the authority given to school directors by statute to "appropriate to the purchase of libraries and apparatus any surplus funds after all necessary expenses are paid" to be a limitation to their power to make such purchases to the circumstances named, and to be an implied restriction of any power to purchase generally on credit.

¹⁶³ *School Directors v. Fogleman*, 76 Ill. 189, holding also that the levying of a tax to defray these expenses, and the acceptance of the building and teaching school therein, could not legalize the act or bind the taxpayers.

§ 851. **Town supervisors—Illinois and Minnesota decisions.**—It has been held in Illinois that, under existing legislation, the authority of a supervisor of a town to employ counsel to represent the town in defending a suit in the United States courts upon bonds of the town, the validity of which was disputed, might well be implied, and especially where the contract had been fully executed, the services all performed, their benefit enjoyed, and acquiescence by the town in the contract of employment during the seven years of litigation.¹⁶⁴ The statute confers upon towns, at their annual meetings, the power to provide for the institution and defense of all suits in which the towns are interested, and a town meeting may properly exercise that power by resolution directing the supervisor to procure legal services, and such a contract will be binding on the town when the amount agreed to be paid is not so great, in view of the interests involved, as to indicate bad faith.¹⁶⁵ Township treasurers, under the Illinois statute, are made insurers of the funds coming to their possession, and nothing can excuse them from their obligation safely to keep and pay over such funds but the act of God or the public enemy.¹⁶⁶ A judgment against a town, under the township system, is made a town charge, and the board of town auditors have no discretion or power to refuse to audit and certify the amount necessary to satisfy the same, and if they refuse they will be compelled to do so by mandamus.¹⁶⁷ Where a county in Minnesota had by its board of commissioners voted two hundred dollars towards building a bridge in a town, county orders to be issued thereon on the order of the chairman of the board of supervisors of the town; and the town voted seven hundred dollars for the bridges, especially that one and another; and the town authorities then made a contract for the construction of these bridges for \$900, payable in town and county orders,—it was held that this contract would be presumed to have been made with reference to these two appropriations, and was therefore not void as one incurring a town debt, or expenditure of town money, for an amount greater than was authorized by the vote of the town meeting.¹⁶⁸

¹⁶⁴ *Town of Bruce v. Dickey*, 116 Ill. 527; s. c. 6 N. E. 435.

¹⁶⁵ *Town of Mt. Vernon v. Patton*, 94 Ill. 65. In *Cooper v. Town of Delavan*, 61 Ill. 96, it had been already held that the supervisors might employ attorneys to attend to suits against the towns they represented, and the town would be liable

to the attorney to pay a reasonable compensation for services rendered.

¹⁶⁶ *Thompson v. Board of Trustees*, 30 Ill. 99. See also, *United States v. Prescott*, 3 How. 578.

¹⁶⁷ *Town of Lyons v. Cooledge*, 89 Ill. 529.

¹⁶⁸ *Evans v. Town of Stanton*, 23 Minn. 368.

§ 852. **Power of towns and town officers in Maine.**—It is competent for a town in Maine, in its corporate capacity, by a vote of the majority, to release a debt as well as to contract one.¹⁶⁹ So it, or its officers duly authorized, may settle a disputed claim and enforce a tax to raise money for its payment.¹⁷⁰ The words “and for other necessary town charges,” as used in the statutes, authorize towns to employ a reasonable number of agents or attorneys to advance or protect the rights of the town before any legally constituted tribunal. But they do not authorize a town to raise and expend money to send lobbyists to the legislature.¹⁷¹ Nor can a town incur expenses in opposing before a legislative committee a division of its territorial limits.¹⁷² Selectmen are not required or permitted to violate the law by paying over money of the town in obedience to an illegal vote of the town.¹⁷³ In drawing an order upon the treasurer in payment of a debt due from the town, selectmen have authority to make it negotiable in its form.¹⁷⁴ The signature of one selectman to a written contract can not bind the town.¹⁷⁵ Selectmen have the right to prosecute and defend pauper suits in which their towns are interested, and their written contracts to such an end will bind the towns although not authorized by any special vote.¹⁷⁶ Overseers of the poor are justified in advancing money, employing counsel and rendering assistance in the prosecution of a bastardy process where the complainant is poor and an inhabitant of the town.¹⁷⁷ A town agent and selectmen may, without a vote of the town, purchase or receive a negotiable note for the purpose of meeting an expected claim upon the town by the maker of the note.¹⁷⁸

§ 853. **Powers of towns in Massachusetts.**—It has been held in Massachusetts that towns have no authority, under the statutes, to

¹⁶⁹ *Ford v. Clough*, 8 Maine 334.

¹⁷⁰ *Vose v. Inhabitants &c.*, 64 Maine 229. And the expense of collecting and the necessary abatements are to be taken into consideration in fixing the amount to be raised.

¹⁷¹ *Inhabitants &c. v. Inhabitants &c.*, 54 Maine 250; *Inhabitants &c. v. Inhabitants &c.*, 63 Maine 231.

¹⁷² *Inhabitants &c. v. Inhabitants &c.*, 63 Maine 231.

¹⁷³ *Hooper v. Emery*, 14 Maine 375.

¹⁷⁴ *Willey v. Greenfield*, 30 Maine 452.

¹⁷⁵ *Inhabitants &c. v. Johnson*, 53

Maine 437. In *Crommett v. Pearson*, 18 Maine 344, it is held that one of the selectmen may employ the hand of another to affix his signature.

¹⁷⁶ *Inhabitants &c. v. Inhabitants &c.*, 65 Maine 167.

¹⁷⁷ *Dennett v. Nevers*, 7 Maine 399.

¹⁷⁸ *Inhabitants &c. v. Inhabitants &c.*, 16 Maine 45. See also, *Inhabitants &c. v. Inhabitants &c.*, 1 Pick. (Mass.) 123; *Davenport v. Inhabitants &c.*, 1 Fairf. (Maine) 317; *Baker v. Inhabitants &c.*, 13 Maine 74; *Willard v. Inhabitants &c.*, 12 Pick. (Mass.) 227.

vote money and cause it to be assessed upon the inhabitants, for the purpose of raising and maintaining a military force for their protection against an enemy in time of war; nor for the purpose of giving additional wages to those of the militia of the town who have enlisted or who have been drafted to serve in the army of the United States; nor for any other purpose of defense against an invading enemy.¹⁷⁹ Nor have they authority to raise money for building a theatre, or any other place of mere amusement; nor for the purpose of raising a statue or a monument, unless, in populous and wealthy towns, they should be thought suitable ornaments to buildings or squares, the erecting and maintenance of which are within the duty and care of the governor or of officers of such towns;¹⁸⁰ nor to raise money to aid in the construction of a highway which by law is to be made at the expense of the county.¹⁸¹ A town which also acts as a parish may raise money to repair a meeting-house, as a compensation for its use for municipal purposes, or to pay a sexton for ringing the bell for town meetings.¹⁸² It has authority to provide for the repair of a public clock.¹⁸³ It is also authorized to appropriate money for the repair of fire-engines used for the purpose of extinguishing fires therein, whether they belong to the town or are purchased by private subscription,¹⁸⁴ and for the construction of reservoirs for water to supply fire-engines.¹⁸⁵ Cities and towns have authority in their corporate capacity to build a market-house, to appropriate money therefor, and to assess the same upon the inhabitants.¹⁸⁶

§ 854. **Michigan decisions.**—Highway commissioners have no authority to involve a township in Michigan in debt, at their discretion, for building bridges.¹⁸⁷ Neither will a contract by such commissioners

¹⁷⁹ *Stetson v. Kempton*, 13 Mass. 272.

¹⁸⁰ *Parker, C. J., in Stetson v. Kempton*, 13 Mass. 272.

¹⁸¹ *Parsons v. Inhabitants &c.*, 11 Pick. (Mass.) 396.

¹⁸² *Woodbury v. Inhabitants &c.*, 6 Pick. (Mass.) 101.

¹⁸³ *Willard v. Inhabitants &c.*, 12 Pick. (Mass.) 227.

¹⁸⁴ *Allen v. Inhabitants &c.*, 19 Pick. (Mass.) 485.

¹⁸⁵ *Hardy v. Inhabitants &c.*, 3 Met. (Mass.) 163.

¹⁸⁶ *Spaulding v. City of Lowell*, 23 Pick. (Mass.) 71, where it was also held that the appropriation of cer-

tain parts of the market-house to other subordinate purposes was not such an excess of authority as to render the erection of the building and raising money therefor illegal.

¹⁸⁷ *Hosier v. Higgins Tp. Board*, 45 Mich. 340; s. c. 7 N. W. 897. In *Wrought Iron Bridge Co. v. Jasper Tp.*, 68 Mich. 441; s. c. 36 N. W. 213, it was held that a township was not bound by the joint action of its highway commissioners with one of another township in contracting for a bridge on that part of the highway between the two towns which had been allotted to the other town; nor did its knowledge that the work was

to pay for a sewer in an incorporated village within the limits of a township bind the township, nor would partial payment of its cost amount to a valid ratification of the contract.¹⁸⁸ A township is liable to one who has been wrongfully taxed for the amount received from him, even though it has been paid out from the township treasury on orders from the proper school and highway authorities.¹⁸⁹ Where a township treasurer defaults in paying over money due the county, the township is liable to the county, which liability must be enforced by mandamus to have the amount of taxes re-assessed against the township.¹⁹⁰

§ 855. **Selectmen in New Hampshire.**—It seems that a vote by a town to raise money to build a court-house is unauthorized by law; the town was nevertheless held liable for the services and expenses of a committee appointed by a separate vote of the same meeting to apply to the legislature for a law that one term of the court in each year be held in that town.¹⁹¹ Selectmen have not a general authority to bind a town by contract.¹⁹² They are general agents for towns in respect to pecuniary matters, and unless restrained by specific instructions are warranted in paying any existing debts of the town which, in the exercise of a sound discretion, should be paid.¹⁹³ They can not, as such, adjust controversies or suits of the corporation nor bind it to the payment of money for such an adjustment by a written contract.¹⁹⁴ Nor can they borrow money upon the credit of the town.¹⁹⁵

going on or the use by its inhabitants of the bridge validate the contract.

¹⁸⁸ *Sault Ste. Marie Highway Com'rs v. Van Dusen*, 40 Mich. 429.

¹⁸⁹ *Byles v. Golden Tp.*, 52 Mich. 612; s. c. 18 N. W. 383. For the township treasurer is an officer and agent of the township in collecting such taxes as would be retained in the township treasury after paying to the county treasurer the state and county taxes. And township orders received in the township treasury as money on collection of taxes are equivalent to money and must be accounted for in the same way.

¹⁹⁰ *Hart Tp. v. Oceana Co.*, 44 Mich. 417; s. c. 6 N. W. 863. And this remedy is not barred by an adverse judgment in a suit on the defaulting treasurer's bond. And in *Oceana Co.*

v. Hart Tp., 48 Mich. 319; s. c. 12 N. W. 190, it was held not to be a defense that the amount actually collected by the defaulter was less than the amount of local taxes which the township might have retained before making payments to the county treasurer.

¹⁹¹ *Bachelor v. Epping*, 28 N. H. 354, 359.

¹⁹² *Andover v. Grafton*, 7 N. H. 298, 300.

¹⁹³ *Sanborn v. Town of Deerfield*, 2 N. H. 251.

¹⁹⁴ *Underhill v. Gibson*, 2 N. H. 352.

¹⁹⁵ *Rich v. Errol*, 51 N. H. 350. And a bona fide indorsee of such a contract can not recover by merely proving the borrowing of money and the giving of a town note for it by the selectmen; he must show their authority, or else that the money

They have power to institute a suit in favor of the town to recover back usurious interest.¹⁹⁶ In some cases they may bind the town by a promissory note, but the burden will be upon the holder to show that in giving the note they acted within the scope of their authority.¹⁹⁷ One of the selectmen can not release an action of debt on a bond given by the collector of taxes to the selectmen as obligees for the use of the town.¹⁹⁸ One selectman can not bind the town by signing a note with his own name "for the selectmen;" nor will the note be made good by proof that another selectman authorized him to sign it.¹⁹⁹ An award by arbitrators, made on the submission of selectmen, is binding on the town when it has no other authorized agent.²⁰⁰ The liability of a town treasurer and his sureties on his official bond for a sum of money in his hands due the town is not discharged by his own note for that sum accepted by his official successor as cash in full payment and discharge of the debt and with the assent of a selectman.²⁰¹

§ 856. **Towns and town officers in New York.**—A board of town auditors in New York have not the right to audit their own accounts.²⁰² They may disregard the verification to an assessor's bill for services, ascertain the time necessarily spent by him, and reduce the bill accordingly.²⁰³ Only the final action of such a board, which consists in making and signing a certificate, terminates their right to reconsider and re-examine accounts.²⁰⁴ Where the board of town officers under a New York statute directed the supervisor of a town to raise the amount of unpaid taxes upon certificates of indebtedness, and the supervisor issued an extra certificate after he had issued others, the proceeds of which he used to pay the county treasurer the amount of the unpaid taxes, in an action by the bona fide holder of the extra

came to the use of the town. See also, *West v. Town of Errol*, 58 N. H. 233; *Eaton v. Berlin*, 49 N. H. 219, where it was held that such an indorsee could not recover upon a town order drawn by the selectmen upon the treasurer and accepted by him, where the only consideration was an enlistment of a minor in a regiment out of the state.

¹⁹⁶ *Albany v. Abbott*, 61 N. H. 157.

¹⁹⁷ *Andover v. Grafton*, 7 N. H. 298, 300.

¹⁹⁸ *Horn v. Whittier*, 6 N. H. 88.

¹⁹⁹ *Andover v. Grafton*, 7 N. H. 298.

²⁰⁰ *Fogg v. Dummer*, 58 N. H. 505.

²⁰¹ *Henniker v. Wyman*, 58 N. H. 528.

²⁰² *Att'ys-Gen'l Opinions*, 1796-1872, p. 538.

²⁰³ *People v. Whalen*, 5 Weekly Dig. (N. Y.) 410.

²⁰⁴ *People v. Board &c.*, 5 Hun (N. Y.) 647, where a claim was presented and audited by the board of town auditors, and at a subsequent meeting was reduced, and included at the reduced amount in a summary and certificate signed by the board as required by law. See *People v. Stocking*, 50 Barb. (N. Y.) 573.

certificates, the town was held to be estopped from setting up the lack of authority in its agent, the supervisor, to issue it.²⁰⁵ The proceedings at a special town meeting called to consider the propriety of instituting or defending certain suits, and to raise money therefor, have been held to be regular, and to make void a claim for his reasonable charges and expenses by one authorized thereat to bring the suits.²⁰⁶ Towns have no power to contract for construction of bridges without special authority from the legislature.²⁰⁷ Electors assembled in a town meeting have not power to vote money for a reward, and the town board has not power to audit a claim for a reward.²⁰⁸ Under an act authorizing a town to issue bonds to secure bounty money, and imposing on the supervisors the duty of levying a tax for their payment, it has been held that a bona fide holder of such bonds might maintain an action thereon against the town instead of applying for a mandamus against the supervisors to levy the tax.²⁰⁹ It seems that the mandamus would not lie, as there was a clear legal remedy.²¹⁰ There was formerly some doubt as to the rights of creditors of a town or county to maintain a common-law action for the recovery of their claims; but since the legislatures have so largely authorized the issue of negotiable securities,—such as bonds issued by towns for railroad purposes,—the right of action thereon has been admitted.²¹¹

§ 857. **Vermont decisions.**—A town, by force of the Vermont statute which provides that “towns in town meetings may vote such sums of money as they judge necesasry for * * * and for other necessary incidental town expenses,” may, under the last clause, build town-houses for the accommodation of its meetings, and for its municipal offices, and lay taxes for such purposes; may provide therefor such conveniences and improvements as prudent people customarily employ in building—as steam-heating and the introduction of water; and though it has no right as a primary purpose to erect buildings to rent,

²⁰⁵ *Gifford v. Town of White Plains*, 25 Hun (N. Y.) 606.

²⁰⁶ *People v. Board &c.*, 4 Hun (N. Y.) 94.

²⁰⁷ *Donnelly v. Town of Ossining*, 18 Hun (N. Y.) 352.

²⁰⁸ *Att'ys-Gen'l Opinions*, 1796-1872, p. 448.

²⁰⁹ *Marsh v. Town of Little Valley*, 64 N. Y. 112; affirming s. c. 1 Hun (N. Y.) 554. See also, *Brown v. Town of Canton*, 4 Lans. (N. Y.)

409; *Hathaway v. Town of Homer*, 5 Lans. (N. Y.) 267; *Northrup v. Town of Pittsfield*, 2 N. Y. Super. Ct. (T. & C.) 108.

²¹⁰ *Ex parte Lynch*, 2 Hill (N. Y.) 45; *People v. Hawkins*, 46 N. Y. 9; *Sharp v. Mayor &c.*, 40 Barb. (N. Y.) 256.

²¹¹ *Federgreen v. Town of Fallsburgh*, 25 Hun (N. Y.) 152. See also, *Thompson v. Perrine*, 103 U. S. 806.

it may fit up rooms for rent, as an expense incidental to the building of a town hall, and rent part of the building for income to lighten its burdens.²¹² Under a warning to vote upon the question of raising money for school purposes, a town meeting can not vote a tax or authorize the borrowing of money for erecting a high-school building.²¹³ It is within the scope of the implied powers of selectmen to protect the interests of their town by the employment of counsel at the charge of the town in road cases where the town agent provides no counsel and makes no objection to the employment of counsel by the selectmen.²¹⁴ A town agent to defend and prosecute suits has no authority, as such, to bind the town by a promise to pay a certain sum in settlement of a suit against the town to recover for an injury occasioned by the insufficiency of a highway.²¹⁵ The presentation of the account of a town officer to the auditors for examination and adjustment is not by the statutes made a condition precedent to his right to recover against the town for his services.²¹⁶ Selectmen have no authority to draw town orders in their own behalf in settlement of their own private claims against the town, nor are such orders made effectual by the allowance of the town auditor.²¹⁷ Town orders, if in form negotiable, pass by delivery or indorsement, and the assignee may sue thereon in his own name after demand upon the town treasurer.²¹⁸

§ 858. Debts which are valid.—Where there is no charter provision authorizing trustees to contract debts to preserve public health, but a general law makes the municipality liable for all expenses incurred by a local board of health in the suppression of disease, the general law may be regarded as part of the municipal charter and render it liable.²¹⁹ Under a charter provision it was held legal to issue bonds for a bridge though part was beyond city limits.²²⁰ It is not unconsti-

²¹² *Bates v. Bassett*, 60 Vt. 530; s. c. 15 Atl. 200. The proposed expenditure for such purpose rests in the discretion of the voters and will not be interfered with by the courts, unless it is seen that the discretion is abused by a wilful perversion of the power to illegal ends, or is an abuse of its exercise that demands restraint. It was also held that it was competent for the voters to appropriate money for the repair of an old, dilapidated hall for rental purposes.

²¹³ *Allen v. City of Burlington*, 45 Vt. 202.

²¹⁴ *Burton v. Inhabitants &c.*, 34 Vt. 345. And the assent of the town agent may be presumed where he neglects to employ counsel and no dissent is shown.

²¹⁵ *Clay v. Wright*, 44 Vt. 538.

²¹⁶ *Judevine v. Town of Hardwick*, 49 Vt. 180.

²¹⁷ *Davenport v. Town of Johnson*, 49 Vt. 403.

²¹⁸ *Davenport v. Town of Johnson*, 49 Vt. 403.

²¹⁹ *In re Taxpayers of Plattsburgh*, 157 N. Y. 78; s. c. 51 N. E. 512.

²²⁰ *City of South St. Paul v. Lamprecht Bros. Co.*, 88 Fed. 449.

tutional to devote money to the construction of a street railway, it being a highway and "for a city purpose."²²¹

§ 859. **Debts which are invalid.**—A city has no power to incur indebtedness for the purposes of securing the location of the state capital.²²² Where the constitution prohibits gifts of public money, an act of the legislature requiring municipal officers to pay an individual a sum of money for which he has no legal and enforceable claim, is void.²²³ An act authorizing cities and towns to refund money devoted to furnishing substitutes for men drafted into the military service is unconstitutional and void.²²⁴

§ 860. **Miscellaneous matters pertaining to municipal debts.**—An indebtedness created in excess of the statutory limit without the consent of the electors may be ratified by the electors.²²⁵ Where a resolution, as to the necessity of an article, and directing its purchase, is required, a subsequent ratification will render the transaction valid.²²⁶ The legislature has power to revive a debt, barred by the statute of limitations, as against a municipality.²²⁷ Where a valid contract is entered into prior to the passage of an act limiting the amount of an assessment, the city will not be permitted to repudiate the indebtedness growing out of such contract.²²⁸ A contract for street improvement is not a current expense for which the yearly revenues are applicable.²²⁹

²²¹ *Sun Printing & Co. Ass'n v. Mayor & Co.*, 152 N. Y. 257; s. c. 46 N. E. 499.

²²² *Shannon v. City of Huron*, 9 S. D. 356; s. c. 69 N. W. 598.

²²³ *Conlin v. Board & Co.*, 114 Cal. 404; s. c. 46 Pac. 279.

²²⁴ *Bush v. Board & Co.*, 42 N. Y. S. 417; s. c. 10 App. Div. (N. Y.) 542.

²²⁵ *Bell v. Borough of Waynesboro*, 195 Pa. St. 299; s. c. 45 Atl. 930.

²²⁶ *Pope Mfg. Co. v. Granger*, 21 R. I. 298; s. c. 43 Atl. 590.

²²⁷ *Sheenan v. Mayor & Co.*, 4 N. J. L. J. 92.

²²⁸ *City of Kansas City v. Wyandotte Gas Co.*, 9 Kan. App. 325; s. c. 61 Pac. 317.

²²⁹ *Berlin Iron Bridge Co. v. City of San Antonio*, 92 Tex. 388; s. c. 50 S. W. 408. The mere approval of sewer bills by the head of the sewer department can not be regarded as an expenditure under the provisions

of § 419 of the charter of Greater New York: *People v. Kane*, 161 N. Y. 380; s. c. 55 N. E. 946. Construction of Pa. act of May 23, 1889, and validity of contract thereunder: *City of Harrisburg v. Shepler*, 190 Pa. St. 374; s. c. 42 Atl. 893. As to the duty of sinking fund commissioners, see *City of Cincinnati v. Guckenberger*, 60 Ohio St. 353; s. c. 54 N. E. 376. In Kentucky provisions for refunding city indebtedness may be provided for by resolution as well as by ordinance: *Roberts & Co. v. City of Paducah*, 95 Fed. 62. Money raised by taxation and set aside to pay interest on bonds is not subject to taxation: *Van Horn v. Kittitas Co.*, 59 N. Y. S. 883; s. c. 28 Misc. (N. Y.) 333. What is not a floating debt,—see *State v. Board of Liquidation & Co.*, 51 La. An. 1142; s. c. 26 So. 55.

(b) LIMITATION OF INDEBTEDNESS.

§ 861. Limitation on power to create municipal indebtedness.—

There are limitations on the power to create municipal indebtedness growing out of the inherent limitations on the power of such corporations, and limitations placed upon such power in the constitution, or statutes made in pursuance thereof. The power to raise money by taxation is conferred for the purpose of defraying public expenditures, and is to be exercised only for the purpose of meeting such expenditures, and the limitation on this power is effected by limiting the objects for which the money may be expended. The power of taxation is one of the highest attributes of sovereignty, and, as a municipality seeking to exercise it must find express authority from the legislature, so its power to disburse the public moneys, being correlative to the power of taxation, must equally find express authority for its exercise.²³⁰ Of the wisdom of such constitutional limitations there can be no doubt, but that is a subject foreign to the purpose before us. Such limitations of course are mandatory, and the usual results follow their violation.²³¹ By the ordinary rules of construction they are not retroactive.²³² A person dealing with a corporation is chargeable with notice of the limitations upon its power as to the creation of an indebtedness,²³³ and where a city is indebted to the extent of its constitutional limit, such person is charged with notice of such fact and can not maintain an action to enforce the contract.²³⁴ Contracts creating an indebtedness in excess of the constitutional limit are

²³⁰ *Von Schmidt v. Widber*, 105 Cal. 151, 158; s. c. 38 Pac. 682. Where the constitution prohibits the incurring of any indebtedness by a municipality except for city purposes, the indebtedness must be confined strictly to such purposes: *In re Jensen*, 59 N. Y. S. 653; s. c. 28 Misc. (N. Y.) 378. Thus where the expenses incurred by an official in successfully defending against a wrongful removal from office or malfeasance in office are audited and allowed it is an appropriation of public funds for private uses: *In re Fallon*, 59 N. Y. S. 849; s. c. 28 Misc. (N. Y.) 748. This would be true independently of any constitutional provision.

²³¹ *Dunbar v. Board &c.* (Idaho), 49 Pac. 409.

²³² A constitutional amendment adopted pending the execution of a contract for a drainage system prohibiting the increase of a city's debt does not apply to a debt already incurred and put into judgment: *New Orleans v. Warner*, 175 U. S. 120; s. c. 20 S. Ct. 44. But it has been held that a constitutional limitation against indebtedness renders invalid a claim for services already rendered: *City of Helena v. Mills*, 94 Fed. 916.

²³³ *Jutte & Foley Co. v. City of Altona*, 94 Fed. 61.

²³⁴ *Gamewell Fire Alarm Tel. Co. v. City of Laporte*, 96 Fed. 664.

void,²³⁵ and can not be rendered valid by a curative act.²³⁶ But a contract is not void by reason of limitation as to the amount which provides for payment of the contract price from money in the treasury and an assessment against property benefited although it is subsequently determined that the assessments can not be enforced.²³⁷

§ 862. **Indebtedness depending on popular vote.**—The nature and scope of the constitutional limitations under consideration are various, and the terms of the limitation in constitutional provisions based upon the same general ground are often quite different, giving rise to a lack of harmony in the decisions. Where a constitution limits the indebtedness of a municipality to its income and revenue for such year, without the assent of two-thirds of its voters, a municipality has no power to become indebted in excess of its income for the year in which the indebtedness is created.²³⁸ Where an indebtedness beyond a fixed limit is made to depend upon the consent of two-thirds of the voters voting at an election held for that purpose it means two-thirds of the electors actually voting at the election and not two-thirds of those that vote on the question of indebtedness.²³⁹ A contract for water supply for twenty years without the assent of two-thirds of the legal voters, where payments are to be semi-annual, may be good as a contract from year to year so long as neither party repudiates it.²⁴⁰ Where voters have given their consent to the creation of an indebtedness an ordinance authorizing the borrowing of the money for such purpose is legal although at the time there has been no ordinance specifically providing for the expenditure.²⁴¹ An election to validate bonds relates to the time the bonds were issued.²⁴² Bonds issued by authority of a vote of the district are part of the indebtedness of the district.²⁴³

²³⁵ *City of Indianapolis v. Mann*, 144 Ind. 175; s. c. 42 N. E. 901.

²³⁶ *Mitchell Co. v. City Nat'l Bank*, 15 Tex. Civ. App. 172; s. c. 39 S. W. 628.

²³⁷ *Addyston Pipe &c. Co. v. City of Corry*, 197 Pa. St. 41; s. c. 46 Atl. 1035.

²³⁸ *Brown v. Board of Education &c.*, 22 Ky. L. 483; s. c. 57 S. W. 612.

²³⁹ *Belknap v. City of Louisville*, 99 Ky. 474; s. c. 36 S. W. 1118; 18 Ky. L. 313; 34 L. R. A. 256. To the same effect is *McGoodwin v. City of Franklin*, 18 Ky. L. 752; s. c. 38 S. W. 481.

²⁴⁰ *City Council &c. v. Dawson Waterworks Co.*, 106 Ga. 696; s. c. 32 S. E. 907.

²⁴¹ *Barr v. City of Philadelphia*, 191 Pa. St. 438; s. c. 43 Atl. 335.

²⁴² *West v. City of Chehalis*, 12 Wash. 369; s. c. 41 Pac. 171. A general system of waterworks in Michigan requires the consent of two-thirds of the electors (see laws of 1895): *Savidge v. Village of Spring Lake*, 112 Mich. 91; s. c. 70 N. W. 425.

²⁴³ *Stanley v. McGeorge*, 17 Wash. 8; s. c. 48 Pac. 736.

§ 863. **Indebtedness limited by a per cent. of valuation.**—Very frequently there is a limit placed upon the power to create an indebtedness in excess of a specified per cent. of the assessed valuation of property at the last preceding assessment. Where the constitution limits the indebtedness to five per cent. on the assessed valuation and provision is made for a sinking fund, an indebtedness in violation of these restrictions is void.²⁴⁴ And where the annual taxation is limited to a certain per cent. of the valuation, it does not prohibit the incurring of an indebtedness maturing annually though the aggregate exceeds the limit, as in such case the indebtedness of each year is measured by the assessment for the year or preceding year, as the case may be.²⁴⁵ In determining the amount on an assessment basis the assessment for state and county purposes is the basis,²⁴⁶ but it has been held that the valuation which governs is the valuation for city purposes,²⁴⁷ and when there is an assessment limitation, it means the assessment as equalized by the board of review.²⁴⁸

§ 864. **Preliminary provisions for a sinking fund.**—There are other constitutional, and sometimes charter provisions usually embraced in general statutes, which prohibit the creating of a municipal indebtedness without precedent provisions being made for a sinking fund to meet the interest, as it accrues, and the principal at its maturity. A provision for the payment for electric lights at an annual rental not exceeding the amount the city is authorized to collect and appropriate for such purpose each year, payment to be made only on the performance of the services provided for, is not in contravention of the constitutional inhibition against the creation of a debt without making provision for the collection of a sum to pay interest and provide a sinking fund for the payment of the principal.²⁴⁹

§ 865. **Aggregate indebtedness—How determined.**—The great difficulty, judging by the amount of litigation, is to determine when the aggregate municipal indebtedness is in excess of the constitutional limit. What indebtedness is to be included in ascertaining the aggregate? To classify and arrange the cases in a somewhat logical order will be the purpose of this section. (a) *Refunding and sinking fund*

²⁴⁴ John Hancock &c. Ins. Co. v. City of Huron, 100 Fed. 1001; s. c. 40 C. C. A. 683.

²⁴⁷ Dupont v. City of Pittsburg, 69 Fed. 13.

²⁴⁵ Ludington Water-Supply Co. v. City of Ludington, 119 Mich. 480; s. c. 78 N. W. 558.

²⁴⁸ State v. Common Council &c., 96 Wis. 73; s. c. 71 N. W. 86.

²⁴⁹ Dallas Electric Co. v. City of Dallas, 23 Tex. Civ. App. 323; s. c.

²⁴⁶ Todd v. City of Laurens, 48 S. C. 395; s. c. 26 S. E. 682.

58 S. W. 153.

bonds: Bonds for the purpose of refunding existing indebtedness are not to be included in the limitation.²⁵⁰ Municipal warrants issued for the ordinary, necessary and current expenses, which are within the limit of the current revenue, and such special taxes as legally and in good faith might have been intended to be levied therefor, and the issue of bonds for the funding thereof, are not within the constitutional limitations, since such bonds would not increase the indebtedness.²⁵¹ Negotiable refunding bonds, legally issued, under valid laws, in exchange for valid outstanding indebtedness, in the hands of purchasers for value, before maturing, will be presumed not to have increased the indebtedness.²⁵² (b) *Indebtedness payable in annual rentals:* Where there is a limitation in the amount of indebtedness a city is authorized to incur the weight of authority as well as reason favors the more liberal construction that a municipal corporation may contract for a supply of water or gas or like necessary for a term of years and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. The crucial test is whether there is an absolute debt created at once, as by the issue of bonds, although the debt be payable in the future by instalments. There is a distinction between a debt and a contract for a future indebtedness to be incurred provided the contracting party perform the agreement out of which the debt is to arise. And so where the annual indebtedness does not become due until the water for that year has been furnished, it will not be payable at all if the water is not furnished. The reason for this construction is in the effect that might ensue.²⁵³ If by

²⁵⁰ *National Life Ins. Co. &c. v. Mead*, 13 S. D. 37; s. c. 82 N. W. 78; *City of Poughkeepsie v. Quintard*, 136 N. Y. 275; s. c. 32 N. E. 764; *In re State Warrants*, 6 S. D. 518; s. c. 62 N. W. 101; *Western Town-Lot Co. v. Lane*, 7 S. D. 599; s. c. 65 N. W. 17; *City of Mitchell v. Smith*, 12 S. D. 241; s. c. 80 N. W. 1077; *Huron v. Bank*, 57 U. S. App. 593; s. c. 86 Fed. 272; 30 C. C. A. 38; *Powell v. City of Madison*, 107 Ind. 106; s. c. 8 N. E. 31.

²⁵¹ *City of Cedar Rapids v. Bechtel*, 110 Iowa 196; s. c. 81 N. W. 468; *Grant v. City of Davenport*, 36 Iowa 396; *French v. City of Burlington*, 42 Iowa 614; *Tuttle v. Polk*, 92

Iowa 433; s. c. 60 N. W. 733; *Creston Waterworks Co. v. City of Creston*, 101 Iowa 687; s. c. 70 N. W. 739; *City of Sioux City v. Weare*, 59 Iowa 95; s. c. 12 N. W. 786; *Edmundson v. School Dist.*, 98 Iowa 639; s. c. 67 N. W. 671; *Thompson v. Independent School Dist.*, 102 Iowa 94; s. c. 70 N. W. 1093; *Palmer v. City of Helena*, 19 Mont. 61; s. c. 47 Pac. 209; *Morris v. Taylor*, 31 Or. 62; s. c. 49 Pac. 660; *Kelly v. City of Minneapolis*, 63 Minn. 125; s. c. 65 N. W. 115.

²⁵² *Lyon Co. v. Keene &c. Bank*, 100 Fed. 337; s. c. 46 C. C. A. 391.

²⁵³ *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 20;

reason of the limitation the city is unable to erect the necessary improvements of its own, and if it is debarred from contracting with another party who stands ready to incur the large expense necessary to the erection and equipment of a plant relying upon annual payments, the maturity and payment of which are based upon services to be performed, it is readily seen that serious disaster might ensue. There would seem to be no doubt that if the city proposed to purchase outright, or establish a system of water-works of its own, the limitation would apply even where the bonds issued therefor were payable in the future.²⁵⁴ An ordinance providing for the payment of an annual rental for water hydrants does not of itself create any indebtedness. If it merely establishes a maximum rate, subject to review by the courts, it is a regulation.²⁵⁵ A contract by a city for water supply at a stipulated rental, together with such preferred expenses as are provided for by statute and which do not in the aggregate exceed the total income of the city for each year the contract is in force, is valid.²⁵⁶ A contract payable in monthly rentals, based on the number of hydrants in good condition, creates no present indebtedness.²⁵⁷ And it has been held that a contract with annual payments extending over several years is legal.²⁵⁸ But in Wisconsin it has been held that a contract to pay for water-works as rentals until paid for is void.²⁵⁹ (c) *Includes valid indebtedness only:* The indebtedness included in the limitation includes any indebtedness

s. c. 19 S. Ct. 77; *Smith v. Inhabitants &c.*, 144 Mass. 177; s. c. 10 N. E. 782; *Crowder v. Town of Sullivan*, 128 Ind. 486; s. c. 28 N. E. 94; *Saleno v. City of Neosho*, 127 Mo. 627; s. c. 30 S. W. 190; *City of Valparaiso v. Gardner*, 97 Ind. 1; *Merrill &c. Co. v. City of Merrill*, 80 Wis. 358; s. c. 49 N. W. 965; *Weston v. Syracuse*, 17 N. Y. 110; *City of East St. Louis v. East St. Louis L. Co.*, 98 Ill. 415; *Grant v. City of Davenport*, 36 Iowa 396; *Lott v. Mayor &c.*, 84 Ga. 681; 11 S. E. 558; *Burlington Water Co. v. Woodward*, 49 Iowa 58. But see contra: *Niles Water-Works v. City of Niles*, 59 Mich. 311; s. c. 26 N. W. 525; *State v. Mayor &c.*, 55 N. J. L. 241; 26 Atl. 81; *Salem Water Co. v. City of Salem*, 5 Or. 29.

²⁵⁴ *Buchanan v. Litchfield*, 102 U. S. 278; *Culbertson v. City of Fulton*, 127 Ill. 30; s. c. 18 N. E. 781; *Coul-*

son v. City of Portland, Deady 481; *State v. Atlantic City*, 49 N. J. L. 558; s. c. 9 Atl. 759; *Spilman v. City of Parkersburg*, 35 W. Va. 605; s. c. 14 S. E. 279; *Beard v. City of Hopkinsville*, 95 Ky. 239; s. c. 24 S. W. 872.

²⁵⁵ *City of Danville v. Danville Water Co.*, 180 Ill. 235; s. c. 54 N. E. 224.

²⁵⁶ *Webb City &c. Co. v. City of Carterville*, 153 Mo. 128; s. c. 54 S. W. 557; *Lamar &c. Co. v. City of Lamar*, 140 Mo. 145; s. c. 39 S. W. 768.

²⁵⁷ *Keihl v. City of South Bend*, 76 Fed. 921; s. c. 36 L. R. A. 228.

²⁵⁸ *Hay v. City of Springfield*, 64 Ill. App. 671; *Higgins v. San Diego Water Co.*, 118 Cal. 524; s. c. 45 Pac. 824; 50 Pac. 670.

²⁵⁹ *Earles v. Wells*, 94 Wis. 285; s. c. 68 N. W. 964.

created by the legislature and indebtedness created by the municipality, which is valid,²⁶⁰ but does not include warrants illegal and non-enforceable,²⁶¹ or illegal bonds.²⁶² In determining whether municipal bonds outstanding are to be included in the indebtedness of the city at the time a subsequent issue is made the test of validity is whether they are legally enforceable and not whether they were recognized as valid by the officers, or were subsequently paid without their legality being questioned.²⁶³ Warrants for current expenses after the limit has been reached, but in anticipation of a tax levied, are legal.²⁶⁴ Warrants are valid where the city has on hand or in prospect funds with which to meet them although the funds may be thereafter wrongfully applied to other purposes.²⁶⁵ The general rule is that the warrants outstanding which there is money in the treasury to meet do not constitute indebtedness within the meaning of the limitation.²⁶⁶

(d) *Includes implied as well as express liability:* Where the constitution limits the incurring of indebtedness to the income and revenue for the current year it applies to implied liability as well as express.²⁶⁷

(e) *Does not include current expense:* It would seem that in estimating the indebtedness with a view of determining the limit, the ordinary warrants for money actually in the treasury, and contracts for ordinary current expenses, within the current revenue, should be excluded.²⁶⁸ It has been held, however, that a city having an indebtedness in excess of the constitutional limit is powerless to create an indebtedness even for its ordinary and current expenses.²⁶⁹ (f) *Does not include debts payable from special fund:* Indebtedness payable out of a special fund is not to be included in estimating the amount of

²⁶⁰ *Martin v. Territory*, 5 Okl. 188; s. c. 48 Pac. 106.

²⁶¹ *Keene &c. Sav. Bank v. Lyon Co.*, 90 Fed. 523; s. c. 97 Fed. 159; 100 Fed. 337.

²⁶² *Ashuelot Nat'l Bank v. Lyon Co.*, 81 Fed. 127.

²⁶³ *German Ins. Co. &c. v. City of Manning*, 95 Fed. 597.

²⁶⁴ *Shannon v. City of Huron*, 9 S. D. 356; s. c. 69 N. W. 598.

²⁶⁵ *Phillips v. Reed*, 107 Iowa 331; s. c. 76 N. W. 850; 77 N. W. 1031.

²⁶⁶ *German Ins. Co. &c. v. City of Manning*, 95 Fed. 597.

²⁶⁷ *Buck v. City of Eureka*, 124 Cal. 61; s. c. 56 Pac. 612. Cf. *Windsor v. City of Des Moines*, 110 Iowa 175; s. c. 81 N. W. 476; *Buck v. City*

of Eureka, 124 Cal. 61; s. c. 56 Pac. 612.

²⁶⁸ *State v. Common Council &c.*, 96 Wis. 73; s. c. 71 N. W. 86.

²⁶⁹ *City of Chicago v. McDonald*, 176 Ill. 404; s. c. 52 N. E. 982. This decision is based upon the theory that the question is one of indebtedness simply and not of insolvency. - - - In determining the amount of indebtedness which the city is authorized to contract the current indebtedness maturing during the year is the proper measure and not the aggregate of annual payments accruing during the existence of the contract: *City of South Bend v. Reynolds*, 155 Ind. 70; s. c. 57 N. E. 706.

permissible indebtedness.²⁷⁰ (g) *Does not include special assessment indebtedness*: Laws providing for special assessments on abutting owners, payable in instalments and not to be deemed indebtedness of the city, are not repealed by a city charter limiting the city indebtedness.²⁷¹ Although a municipality may have a right to levy a special assessment for maintaining and operating an electric light plant it may not, therefore, anticipate its future general revenues in order to erect such plant.²⁷² (g) *Does not include a debt the payment of which is optional*: A debt which it is entirely optional with the city to pay does not come within the constitutional limitation.²⁷³ (h) *Includes debts paid with diverted money*: An indebtedness paid with money diverted from a fund raised for another purpose must be considered as still existing.²⁷⁴ Where a city diverts funds from a paving assessment and applies them in payment of other paving debts, it increases the indebtedness to that extent.²⁷⁵ (i) *Does not include license money, etc.*: License money received during the year is not to be considered in determining the question of limitation.²⁷⁶ Park certificates which do not exceed the assessments for park purposes on which the city is liable only to the extent of money collected, do not create an indebtedness within the limitation,²⁷⁷ nor does the bonded debt of school district, though co-extensive with the city,²⁷⁸ nor an assessment for damages for opening a highway payable from taxes levied for that purpose;²⁷⁹ and so when a contractor accepts bonds payable from a special fund in satisfaction for work done, it is not within the limitation.²⁸⁰ Bonds in payment of a judgment do not create a new indebtedness.²⁸¹ (j) *Includes judgment for tort, etc.*:

²⁷⁰ State v. City of Great Falls, 19 Mont. 518; s. c. 49 Pac. 15.

²⁷¹ Ladd v. Gambell, 35 Or. 393; Denny v. City of Spokane, 79 Fed. 719; Little v. Cogswell, 20 Or. 345; s. c. 25 Pac. 727; State v. Rogers, 22 Or. 348; s. c. 30 Pac. 74; Continental &c. Co. v. Riggen, 31 Or. 336; s. c. 48 Pac. 476; Strickland v. Geide, 31 Or. 373; s. c. 49 Pac. 982.

²⁷² Windsor v. City of Des Moines, 110 Iowa 175; s. c. 81 N. W. 476. Cf. Grant v. City of Davenport, 36 Iowa 396; Spilman v. City of Parkersburg, 35 W. Va. 605; s. c. 14 S. E. 279; Earles v. Wells, 94 Wis. 285; s. c. 68 N. W. 964.

²⁷³ Windsor v. City of Des Moines, 110 Iowa 175; s. c. 81 N. W. 476.

²⁷⁴ Rice v. City of Milwaukee, 100 Wis. 516; s. c. 76 N. W. 341.

²⁷⁵ Allen v. City of Davenport, 107 Iowa 90; s. c. 77 N. W. 532.

²⁷⁶ Rice v. City of Milwaukee, 100 Wis. 516; s. c. 76 N. W. 341.

²⁷⁷ Kansas City v. Ward, 134 Mo. 172; s. c. 35 S. W. 600.

²⁷⁸ Todd v. City of Laurens, 48 S. C. 395; s. c. 26 S. E. 682.

²⁷⁹ Commissioners &c. v. Jackson, 165 Ill. 17; s. c. 45 N. E. 1000.

²⁸⁰ City of Clinton v. Walliker, 98 Iowa 655; s. c. 68 N. W. 431. Cf. Thompson v. Independent School Dist. &c., 102 Iowa 94; s. c. 70 N. W. 1093.

²⁸¹ Board &c. v. Platt, 79 Fed. 567. A vote of the people for free turnpikes is not an increase of indebtedness beyond constitutional limits: Maysville &c. Co. v. Wiggins, 20 Ky. L. 724; s. c. 47 S. W. 434.

A judgment in tort is part of the municipal indebtedness.²⁸² The fact that a city had the necessary funds to pay when the indebtedness accrued does not render valid a contract which was made at a time when it was indebted exceeding its limit.²⁸³ The agreement of a water company to pay the debt of the city upon bonds does not extinguish the indebtedness as a municipal debt.²⁸⁴ Where bonds are to be delivered on the completion of a road the date for determining the indebtedness of the county is the time when the bonds are to be delivered—at the completion of the road.²⁸⁵ A judgment creditor has a right to have his judgment included in the tax roll even if it increases the levy beyond the limit allowed where the right to have the judgment placed in the roll matured before the annual budget was made up, the city being required in such case to take notice of the judgment and limit its levy accordingly.²⁸⁶ The proof in all cases of excess must be clearly shown.²⁸⁷

§ 866. **Evasion of constitutional limitations.**—There have been frequent attempts to evade the constitutional limitations imposed upon municipal indebtedness, some of which have been sustained by the courts and some have not. There is considerable conflict in the authorities as to the limitations in municipal charters prohibiting the incurring of indebtedness in excess of a specified amount and where the bonds issued therefor are payable in the future. There can be no doubt that where a city proposes to purchase outright and establish a system of water-works of its own the limitation applies, though bonds were issued therefor made payable in the future.²⁸⁸ There are also a number of respectable authorities to the effect that the limitation covers a case where the city agrees to pay a certain sum per annum if the aggregate amount payable under such agreement exceeds the amount limited by the charter.²⁸⁹ But the great weight of au-

²⁸² *City of Chicago v. McDonald*, 176 Ill. 404; s. c. 52 N. E. 982.

²⁸³ *City of Laporte v. Gamewell &c. Co.*, 146 Ind. 466; s. c. 45 N. E. 588; 35 L. R. A. 686; *City of Valparaiso v. Gardner*, 97 Ind. 1, 8.

²⁸⁴ *Gold v. City of Peoria*, 65 Ill. App. 602.

²⁸⁵ *State v. Common Council &c.*, 96 Wis. 73; s. c. 71 N. W. 86.

²⁸⁶ *State v. Wharton*, 103 Wis. 307; s. c. 79 N. W. 253.

²⁸⁷ *Roe v. Town of Philippi*, 45 W. Va. 785; s. c. 32 S. E. 224.

²⁸⁸ *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19; s. c. 19 S. Ct. 77; *Buchanan v. Litchfield*, 102 U. S. 278; *Culbertson v. City of Fulton*, 127 Ill. 30; s. c. 18 N. E. 781; *Coulson v. City of Portland*, Deady 481; *State v. Atlantic City*, 49 N. J. L. 558; s. c. 9 Atl. 759; *Spilman v. City of Parkersburg*, 35 W. Va. 605; s. c. 14 S. E. 279; *Beard v. City of Hopkinsville*, 95 Ky. 239; s. c. 24 S. W. 872.

²⁸⁹ *Niles Water-Works v. Mayor &c.*, 59 Mich. 311; s. c. 26 N. W. 525;

thority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water, or gas, or like necessary, for a term of years, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter.²⁹⁰ Where a city is limited in its indebtedness by the constitution the fact that, by entering into a contract for the construction and maintenance of an electric light plant, it did not obligate itself to pay more than it had previously paid for lighting alone, is no justification for entering into the contract.²⁹¹ A city hall to be paid for in thirty years by assessments of taxes is an indebtedness though it may have the semblance of a lease.²⁹² In some states it has been held that when a city has reached the limit of its permissible indebtedness it may anticipate the collection of its revenue by drawing warrants against the taxes levied, but not collected, which in effect is an assignment of the amount to the holder of the warrant.²⁹³ But in order to do so the tax not only

State v. Mayor &c., 55 N. J. L. 241; s. c. 26 Atl. 81; *Salem Water Co. v. City of Salem*, 5 Or. 29.

²⁹⁰ *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19; s. c. 19 S. Ct. 77.

²⁹¹ *Windsor v. City of Des Moines*, 110 Iowa 175; s. c. 81 N. W. 476. Cf. *Davis v. City of Des Moines*, 71 Iowa 500; s. c. 32 N. W. 470; *City of Clinton v. Walliker*, 98 Iowa 655; s. c. 68 N. W. 431; *Anderson v. Orient &c. Co.*, 88 Iowa 579; s. c. 55 N. W. 348; *Tuttle v. Polk*, 92 Iowa 433; s. c. 60 N. W. 733; *Allen v. City of Davenport*, 107 Iowa 90; s. c. 77 N. W. 532; *State v. Atlantic City*, 49 N. J. L. 558; s. c. 9 Atl. 759; *Beard v. City of Hopkinsville*, 95 Ky. 239; s. c. 24 S. W. 872; *Spilman v. City of Parkersburg*, 35 W. Va. 605; s. c. 14 S. E. 279; *Prince v. City of Quincy*, 128 Ill. 443; s. c. 21 N. E. 768; *State v. Commissioners &c.*, 37 Ohio St. 526; *Phillips v. Reed*, 107 Iowa 331; s. c. 76 N. W. 850; 77 N. W. 1031. The time of payment of debts for the erection of an electric light plant being extended or postponed to a

later date does not exclude such debts from the constitutional limitations: *Windsor v. City of Des Moines*, 110 Iowa 175; s. c. 81 N. W. 476. A contract by a city which had already reached its debt limit providing for the lighting and maintenance of 7,000 street lamps at a definite price per lamp per annum payable monthly creates an indebtedness in excess of the constitutional limit and the city may be enjoined from paying the money: *City of Chicago v. Galpin*, 183 Ill. 399; s. c. 55 N. E. 731. Cf. *Beard v. City of Hopkinsville*, 95 Ky. 239; s. c. 24 S. W. 872; *Lake Co. v. Rollins*, 130 U. S. 662; s. c. 9 S. Ct. 651; *Thompson-Houston Electric Co. v. City of Newton*, 42 Fed. 723; *City of Chicago v. McDonald*, 176 Ill. 404; s. c. 52 N. E. 982.

²⁹² *Reynolds v. City of Waterville*, 92 Maine 292; s. c. 42 Atl. 553.

²⁹³ *French v. City of Burlington*, 42 Iowa 614; *Law v. People*, 87 Ill. 385; *City of Springfield v. Edwards*, 84 Ill. 626; *Koppikus v. State Cap. Com'rs*, 16 Cal. 248.

must have been levied, but the warrant must be drawn payable out of the particular fund, and be such in legal effect as to discharge the municipality from all indebtedness thereon.²⁹⁴ A contract for an annual rental for a number of years is not obnoxious to a statute prohibiting the creation of a debt of a specified amount without a vote of the electors.²⁹⁵

§ 867. Indebtedness in excess of limit not a defense when.—A city can not defend against a contract creditor on the ground that it levies taxes to the full constitutional limit and has no surplus after paying government expenses to be applied on the debt under a statute which provides that a city may be compelled by mandamus to levy a tax for the payment of a judgment against it, and that the whole amount raised under it within the constitutional limit may be applied in satisfaction of such debt, except such amount as may be necessary to pay salaries allowed by law to specified officers, where it has expended money for other purposes than those enumerated.²⁹⁶ Where it appears that if a contractor had examined the city treasury he would have found no money on hand and that the condition of the city's finances was such that the obligation exceeded the limitation and he has complied with his contract and furnished an engine under the contract, the city will not be permitted to plead *ultra vires* and will be liable.²⁹⁷

§ 868. Construction of constitutional provisions.—The rule for construing the provisions of constitutions limiting indebtedness of municipal corporations has been stated as follows: If directed to the legislature, they do not operate as a repeal of the existing powers of those corporations. But if directed to the municipalities, they have, in themselves, the effect of repealing any inconsistent provisions contained in the charters.²⁹⁸ The constitutional provisions for submis-

²⁹⁴ *Fuller v. City of Chicago*, 89 Ill. 282; *People v. May*, 9 Colo. 404; s. c. 12 Pac. 838.

²⁹⁵ *Cunningham v. City of Cleveland*, 98 Fed. 657.

²⁹⁶ *Crebs v. City of Lebanon*, 98 Fed. 549.

²⁹⁷ *Arbuckle-Ryan Co. v. City of Grand Ledge*, 122 Mich. 491; s. c. 81 N. W. 358. Under Neb. Stat., ch. 14, art. 2, §§ 39-42, the payment for coal alleged to have been furnished the poor of a city can not be recovered: *City of Kearney v. Downing*, 59 Neb. 549; s. c. 81 N. W. 509. Con-

struction of Oregon laws of 1893 in regard to indebtedness of Klamath Falls: *Town of Klamath Falls v. Sachs*, 35 Or. 325; s. c. 57 Pac. 329. Construction of Pennsylvania constitution, art. 9, § 8, limiting taxation: *Houston v. City of Lancaster*, 191 Pa. St. 143; s. c. 43 Atl. 83. Construction of Pennsylvania act of June 9, 1891, concerning indebtedness of cities: *Barr v. City of Philadelphia*, 191 Pa. St. 438; s. c. 43 Atl. 335.

²⁹⁸ *List v. City of Wheeling*, 7 W. Va. 501.

sion to voters of questions as to indebtedness as well as those limiting the exercise of the taxing power of municipal corporations in North Carolina have reference only to the contracting of debts, the pledging of municipal faith, the loan of municipal credit, and the levying and collecting of taxes after they became operative, and not to antecedent obligations or the use of the means necessary to their discharge.²⁹⁹ If the municipal indebtedness has reached the constitutional limit, a city can not enter into an agreement to pay a stated sum as rent for a market-house if its annual revenues are insufficient, over and above the interest of its indebtedness and the ordinary expenses of the city, to meet the rent proposed to be paid.³⁰⁰ Under the provision in the constitution of Missouri that "no county * * * shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year," a county warrant issued in payment for books bought by a county clerk which he is required to provide by statute is void, if at the time of its issuance the revenue for that year has already been consumed.³⁰¹ In an action against a county on warrants given in satisfaction of a judgment, an answer which alleges that at the time the judgment was rendered the county debt exceeded the constitutional limit, without stating that such debt exceeded the limit at the time of making the contract on which the judgment was rendered, has been held demur-

²⁹⁹ *Street v. Board &c.*, 70 N. C. 644. See also, *Brothers v. Commissioners*, 70 N. C. 726. As to the rules for computing indebtedness, see *City of Waxahachie v. Brown*, 67 Tex. 519; s. c. 17 Am. & Eng. Corp. Cas. 348; *Durant v. Iowa Co.*, Woolw. 69; *Culbertson v. City of Fulton*, 127 Ill. 30; s. c. 18 N. E. 781; *Wilkinson v. Van Orman*, 70 Iowa 230; s. c. 30 N. W. 495; *People v. Hamill*, 134 Ill. 666; s. c. 17 N. E. 799; 29 N. E. 280; 22 Am. & Eng. Corp. Cas. 39; *Potter v. Douglas Co.*, 87 Mo. 239; s. c. 13 Am. & Eng. Corp. Cas. 656; *Grant Co. v. Lake Co.*, 17 Or. 453; s. c. 21 Pac. 447.

³⁰⁰ *Appeal of City of Erie*, 91 Pa. St. 398. Where the limit of indebtedness has been reached, contracts have been held invalid as creating unauthorized debts:—in *French v. Burlington*, 42 Iowa 614, for grading streets; in *Hebard v. Ashland Co.*,

55 Wis. 145; s. c. 12 N. W. 437, by a county for the building of a court-house; in *People v. Johnson*, 6 Cal. 499, for the construction of a wagon road; in *Book v. Earl*, 87 Mo. 246, for remodeling and building additions to a court-house. In *Mayor &c. v. Gill*, 31 Md. 375, a transaction by which the city pledged railroad stock belonging to it as security for an advance was held, notwithstanding the lender stipulated to look for its payment only to the stock pledged, and the city was not to be responsible for any deficit, to be the incurring of a debt.

³⁰¹ *Barnard v. Knox Co.*, 105 Mo. 382; s. c. 16 S. W. 917; overruling *Potter v. Douglas Co.*, 87 Mo. 239. The reason for this is that a debt of that kind is as much within the constitutional prohibition as a debt contracted for any other purpose by the county court.

table.³⁰² The constitution of Nebraska provides that county authorities shall never assess taxes, the aggregate of which shall exceed a certain limit, except for the payment of indebtedness existing at the adoption of the constitution, unless authorized by a vote, etc. It has been held that in determining whether a proposed levy of taxes will exceed the constitutional limit, taxes to provide for bonded indebtedness contracted before the adoption of the constitution for internal improvements were not to be considered.³⁰³ Refunding bonds issued by a county for the purpose of taking up a prior valid indebtedness of the county are not rendered invalid by the fact that they exceed the constitutional limitation on the indebtedness of counties and other municipalities.³⁰⁴

§ 869. Rulings of the United States supreme court.—In a case holding that the bonds issued were in excess of the amount that could be legally issued, and that the recitals in the bonds were not sufficient to estop the municipality from pleading a want of authority to issue them, the United States supreme court said: “As, therefore, neither the constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their existing indebtedness, it would seem that if the bonds in question had contained recitals which upon any fair construction amounted to a representation on the part of the constituted authorities of the city that the requirements of the constitution were met,—that is, that the city’s indebtedness increased by the amount of the bonds in question was within the constitutional limit,—then the city under the decisions of this court might have been estopped from disputing the truth of such representations as against a bona fide holder of its bonds.” And again: “Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated in any form that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of the authority therein conferred [to issue these bonds] to those municipal corporations whose indebtedness did not at the time exceed the constitutional limit, there would have been ground for holding that the city could not as against the plaintiff dispute the fair inference to be drawn from such recital or statement as to the extent of its existing indebtedness.”³⁰⁵ The prohibition in the Illinois con-

³⁰² *Wilder v. Board &c.*, 41 Fed. 512.

³⁰³ *Bonnell v. Nuckolls Co.*, 32 Neb. 189; s. c. 49 N. W. 225; affirming s. c. 28 Neb. 90; 43 N. W. 1145.

See also, *Baird v. Todd*, 27 Neb. 782; s. c. 43 N. W. 1143.

³⁰⁴ *Ætna Life Ins. Co. v. Lyon Co.*, 44 Fed. 329.

³⁰⁵ *Buchanan v. Litchfield*, 102 U.

stitution has been construed by this court, and Justice Miller said of the powers of a municipality under it: "It shall not become indebted—shall not incur any pecuniary liability. It shall not do this in any manner: neither by bonds nor notes, nor by express or implied promises. Nor shall it be done for any purpose, no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt in any manner or for any purpose whatever. If this prohibition is worth anything it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law."³⁰⁶ Of the prohibition in the Nebraska constitution Matthews, Justice, said: "We regard the entire section as a prohibition upon the municipal bodies enumerated in the manner of creating and increasing the public debts, by express and positive limitations upon the legislative power itself."³⁰⁷

§ 870. Rulings in California.—The constitution of California provides that no county shall incur any liability or indebtedness, exceeding in any year its annual income, without a two-thirds vote of the electors. The county government act provides that claims shall be paid according to priority of presentation. The petitioner had a warrant issued on a valid claim. There was money enough in the fund

S. 278, 292. As to estoppel of a county by recitals in bonds as to the constitutional limit of indebtedness not having been exceeded, see *Town of Coloma v. Eaves*, 92 U. S. 484; *Town of Venice v. Murdock*, 92 U. S. 494; *Marcy v. Township of Oswego*, 92 U. S. 637; *Wilson v. Salamanca Tp.*, 99 U. S. 499; *Northern Bank v. Porter Tp. Trustees*, 110 U. S. 608; s. c. 4 S. Ct. 254.

³⁰⁶ *Litchfield v. Ballou*, 114 U. S. 190, 192, 193; s. c. 5 S. Ct. 820.

³⁰⁷ *Dixon Co. v. Field*, 111 U. S. 83; s. c. 4 S. Ct. 315. On pages 95 and 320 the court said as to recitals in bonds:—"No recital involving the amount of the assessed valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount as fixed by reference to that record that is made by the constitution the standard for measuring the

limit of municipal power." See also, *Lake Co. v. Rollins*, 130 U. S. 662; s. c. 9 S. Ct. 651, in which the court held that the provision in the constitution of Colorado limited the power of a county to contract debts for any purpose whatever. In *Lake Co. v. Graham*, 130 U. S. 674; s. c. 9 S. Ct. 654, they held the county not estopped by certain recitals in the bonds. *Lamar, J.*, said on p. 680 and p. 685:—"In this case the constitution charges each purchaser with knowledge of the fact that as to all counties whose assessed valuation equals \$1,000,000 there is a maximum limit beyond which those counties can incur no further indebtedness under any possible conditions, provided that in calculating that limit debts contracted before the adoption of the constitution are not to be counted."

on which it was drawn to pay it and all other warrants on claims accruing during that fiscal year. The treasurer refused to pay it because there were not funds enough for it and outstanding warrants for former years previously presented. It was held that the income of each year must be used to pay the debts of that year, and that the provision in the county government act governed as to the warrants of any given year.³⁰⁸ Under the same provision of the constitution, and another section of the county government act, which provides that the board of supervisors shall not allow, nor the auditor or treasurer pay, any such indebtedness, a petition for a writ of mandate to enforce the payment of a claim for supplies furnished said county, which had been ordered paid by the board, was held to be defective where it failed to show that the debt was ordered paid out of funds for the fiscal year in which the supplies were furnished and the claim filed.³⁰⁹ A statute of California provides that no county officer shall pay in any month demands against the treasury exceeding one-twelfth of the amount allowed for the year. The board of supervisors of a county limited the expense of the county clerk's office to \$72,000 per year. The auditor refused to audit the bills of said office for a certain month because they aggregated \$8,000. These bills included salaries fixed by law. On mandamus to compel the audit, the auditor based his answer on the constitutional provision that no county shall incur any indebtedness exceeding in any one year the income and revenue provided for it for such year, without the assent of two-thirds of the electors. It was held that the amount fixed by the board was not the limit of the revenue of the county clerk's office for salaries fixed by law, they being payable out of the general fund, and, in the absence of any showing that the general fund would be exhausted thereby, payment could not be excused by the prohibition in the constitution.³¹⁰ An over-issue of bonds under a statute authorizing an issue "not to exceed in all one hundred and fifteen thousand dollars, the numbers, dates and amounts to be recorded," has been held invalid.³¹¹

§ 871. Rulings in Colorado.—The limitation of indebtedness by the constitution of Colorado that "the aggregate amount of indebtedness of any county for all purposes shall not at any time exceed twice the amount above herein limited" has been held not confined to debts by

³⁰⁸ *Shaw v. Statler*, 74 Cal. 258; s. c. 15 Pac. 833.

³⁰⁹ *Schwartz v. Wilson*, 75 Cal. 502; s. c. 17 Pac. 449.

³¹⁰ *Welch v. Strother*, 74 Cal. 413; s. c. 16 Pac. 22.

³¹¹ *Sutro v. Rhodes*, 92 Cal. 117; s. c. 28 Pac. 98; following *Sutro v. Pettit*, 74 Cal. 332; s. c. 16 Pac. 7.

loan.³¹² A county which has reached the constitutional limit of indebtedness may constitutionally make assignments of the annual revenue accruing from taxes levied, but uncollected for the current year, provided such assignments are not in excess of the amount covered by the annual levy for the year in which such assignment is made, and the warrant or instrument of assignment is expressly made payable out of the incoming revenue for the current year, and is an assignment *pro tanto*, without recourse by the county, of such fund.³¹³ The decision of the supreme court of Colorado that, when a county has reached the constitutional limit of indebtedness, a debt for the statutory fee of an officer, or a statutory liability in connection with any other municipal expense, is as much within the constitutional inhibition as any contract directly entered into by the county commissioners,³¹⁴ was overruled by the United States circuit court, which held that warrants issued in payment of compulsory obligations, namely, fees of witnesses, jurors, constables, sheriffs, and the like, are not within the provision of the constitution limiting county indebtedness.³¹⁵ But the state court adhered to its position and again held the provision in the constitution to be a limitation of indebtedness, whatever its form, including county warrants and debts contracted under the direct authority of the legislature, and to differ from the constitution of Missouri, which limits taxation as well as indebtedness.³¹⁶ Where county bonds are issued in excess of the constitutional limit of indebtedness, a recital in the bonds that they are issued by virtue of a legislative act which recites the constitutional limitation, and that all the provisions of such act have been fully complied with, does not estop the county from denying the validity of the bonds.³¹⁷

§ 872. **Rulings in Illinois.**—The constitution of Illinois forbids municipal corporations to become indebted, in any manner or for any purpose, to an amount exceeding five per centum on the value of the taxable property therein. A city indebted beyond the constitutional limit contracted for street lighting at a certain price, payable monthly in warrants on the fund appropriated for that purpose. It was held that warrants drawn on the treasury for gas furnished before the levy of the tax were illegal; but otherwise as to gas furnished after the levy, the city having a right to pay for it at the contract price.³¹⁸

³¹² *Rollins v. Lake Co.*, 34 Fed. 845; following *People v. May*, 9 Colo. 80; s. c. 10 Pac. 641.

³¹³ *People v. May*, 9 Colo. 404; s. c. 12 Pac. 838.

³¹⁴ *People v. May*, 9 Colo. 404; s. c. 12 Pac. 838.

³¹⁵ *Rollins v. Lake Co.*, 34 Fed. 845.

³¹⁶ *People v. May*, 9 Colo. 414; s. c. 15 Pac. 36.

³¹⁷ *Sutliff v. Lake Co.*, 47 Fed. 106.

³¹⁸ *City of East St. Louis v. Flannigan*, 26 Ill. App. 449.

Under the same provisions a contract by a city, whose indebtedness exceeded such limit, to pay, in monthly instalments, for water to be furnished for fire purposes, has been held to be void.³¹⁹ And where no fraud or deceit was practiced by the city to induce plaintiff to enter into the contract, a refusal by the city to pay for the water, followed by use of the water as before, does not constitute a substantive, actionable tort.³²⁰ But the constitution of Illinois, which limits the extent of municipal indebtedness, does not render invalid the annexation of one municipality to another, pursuant to the statutes of the state, though the indebtedness of one or both of them exceeds the constitutional limit.³²¹ A statute of Illinois provides that, before incurring an indebtedness, a city shall provide for the collection of a direct annual tax, sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal within twenty years. It has been held that an ordinance providing for the acquisition of land for the purpose of a cemetery, and appropriating the principal and interest of the lands issued thereunder, to be annually assessed and collected in yearly parts, and setting out the amount to be collected each year, is sufficient under the statute.³²² The salary of a health officer is an indebtedness within the meaning of the constitution of Illinois fixing the limit of indebtedness which may be incurred by a city.³²³ But where the price of fire hydrants which a city agreed to purchase from a water-works company was to be paid in annual

³¹⁹ *Prince v. City of Quincy*, 128 Ill. 443; s. c. 21 N. E. 768.

³²⁰ *Prince v. City of Quincy*, 128 Ill. 443; s. c. 21 N. E. 768.

³²¹ *True v. Davis*, 133 Ill. 522; s. c. 22 N. E. 410. The limitation in the special charter of a city in Illinois as to the extent of municipal taxation has been held to have been repealed by the "Act authorizing cities, incorporated towns and villages to construct and maintain water-works," the "Act in relation to the rate of taxation in cities, villages and incorporated towns," and the "Act in relation to the levy and collection of taxes for sewerage and water-works in cities:" *Culbertson v. City of Fulton*, 127 Ill. 30; s. c. 18 N. E. 781. In the same case it was held that under the constitutional provision forbidding cities from becoming indebted to an

amount exceeding five per cent. on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of the indebtedness, the constitutionality of a debt incurred August 15, 1887, by a city, the assessment of whose taxable property for the year 1887 was not fixed by the state board of equalization until October 1, 1887, was to be determined by reference to the assessment of 1886, and that a contract creating a debt in excess of the limit is only void as to the excess, and a tax for the payment of the same will only be enjoined to that extent.

³²² *Dehm v. City of Havana*, 28 Ill. App. 520.

³²³ *Norton v. City of East St. Louis*, 36 Ill. App. 171.

instalments during a period of twenty-one years, the fact that the entire purchase price exceeded the city's limit of indebtedness has been held not to render the contract void.³²⁴

§ 873. **Rulings in Indiana.**—A contract between a city and a private corporation, whereby the latter agrees to supply the city with light for a specified number of years at a certain price per year, does not create a debt for the sum of all the annual payments within the meaning of the statutory limitation on municipal indebtedness, since the payment for each year does not become obligatory till the services for that year have been rendered.³²⁵ Bonds or certificates for street improvements have been held valid as not creating an indebtedness within the inhibition of the constitution of Indiana limiting municipal indebtedness, on the ground that they were payable out of the special improvement fund to be accumulated from assessments made against the property benefited, and hence no indebtedness arose against the city.³²⁶ But the character of the bonds and that they are payable out of a special street improvement fund should appear upon the face of the paper, thus making it apparent to the world that they are not regarded as the obligations of the corporation.³²⁷ The constitution of Indiana limiting municipal indebtedness furnishes no defense to an action upon a contract made by a municipality to pay for services to be rendered in effecting a compromise of its debt.³²⁸

³²⁴ *Carlyle Water &c. Co. v. City of Carlyle*, 31 Ill. App. 325. The court said:—"There was no present indebtedness by the contract when it was made; and no appropriation was necessary at the time of making, or before entering into, the contract."

³²⁵ *Crowder v. Town of Sullivan*, 128 Ind. 486; s. c. 28 N. E. 94; *City of New Albany v. McCulloch*, 127 Ind. 500; s. c. 26 N. E. 1074; *City of East St. Louis v. East St. Louis &c. Co.*, 98 Ill. 415; *Appeal of City of Erie*, 91 Pa. St. 398; *Grant v. City of Davenport*, 36 Iowa 396.

³²⁶ *Quill v. City of Indianapolis*, 124 Ind. 292; s. c. 23 N. E. 788. The court held that it is essential to the idea of a debt that an obligation should have arisen out of a contract express or implied, which entitles the holder thereof unconditionally to receive from the promisor a sum

of money which the latter is under a legal or moral duty to pay without regard to any future contingency. See also, *State v. Hawes*, 112 Ind. 323; s. c. 14 N. E. 87; *The Mayor &c. v. Gill*, 31 Md. 375; *Sackett v. City of New Albany*, 88 Ind. 473, in which the court defined "indebtedness" in this connection to "mean an agreement of some kind by the city to pay money where no suitable provision has been made for the prompt discharge of the obligations imposed by the agreement." As to what do not come within the inhibition, see *Strieb v. Cox*, 111 Ind. 299; s. c. 12 N. E. 481; *Board &c. v. Hill*, 115 Ind. 316; s. c. 16 N. E. 156; *City of Valparaiso v. Gardner*, 97 Ind. 1.

³²⁷ *Quill v. City of Indianapolis*, 124 Ind. 292; s. c. 23 N. E. 788.

³²⁸ *City of Logansport v. Dykeman*, 116 Ind. 15; s. c. 17 N. E. 587.

§ 874. **Rulings under the Iowa constitution.**—The bonds issued by a school district in the case cited in the note were held not to be enforceable, as they were in violation of the constitution of Iowa so far as it limited the indebtedness of political or municipal corporations.³²⁹ The payment of instalments of interest will not have the effect of ratifying bonds issued beyond the constitutional limit.³³⁰ The supreme court of Iowa have held their constitutional restriction to include not only municipal bonds, but all forms of indebtedness, except warrants for money actually in the treasury, and perhaps contracts for ordinary expenses within the limits of current revenues.³³¹ The purchaser of bonds issued by a school district is bound to take notice of the limitation in the constitution of Iowa which restricts the indebtedness of political and municipal corporations to five per cent. of the taxable value of the property within their limits, and of the official assessment of the taxable property within the district.³³² A warrant issued by way of compromise of back taxes by the terms of which the city was to redeem property from a tax sale and the taxpayers were to pay to the city an agreed sum of money on account of

³²⁹ *Doon Tp. v. Cummins*, 142 U. S. 366; s. c. 12 S. Ct. 220. The statute under which these bonds for funding indebtedness were issued authorized the treasurer of such district "to sell the bonds . . . at not less than their par value and apply the proceeds thereof to the payment of the outstanding bonded indebtedness of the district, or he may exchange such bonds for outstanding bonds, par for par." The court said: "The second alternative . . . might be consistent with the constitution; but under the first alternative . . . it is evident that if (as in the case at bar) new bonds are issued without a cancelation or surrender of the old ones, the aggregate debt outstanding, and on which the corporation is liable to be sued, is at once and necessarily increased, and if new bonds equal in amount to the old ones are so issued at one time, is doubled, and that it will remain at the increased amount until the proceeds of the new bonds are applied to the payment of the old ones,

or until some of the obligations are otherwise discharged."

³³⁰ *Doon Tp. v. Cummins*, 142 U. S. 366; s. c. 12 S. Ct. 220. See also, *Marsh v. Fulton Co.*, 10 Wall. 676; *Loan &c. Association v. Topeka*, 20 Wall. 655; *Daviess Co. v. Dickinson*, 117 U. S. 657; s. c. 6 S. Ct. 897; *Norton v. Shelby Co.*, 118 U. S. 425, 451; s. c. 6 S. Ct. 1121.

³³¹ *Scott v. City of Davenport*, 34 Iowa 208; *McPherson v. Foster*, 43 Iowa 48; *Mosher v. Independent School Dist.*, 44 Iowa 122; *City of Council Bluffs v. Stewart*, 51 Iowa 385; s. c. 1 N. W. 628; *Kane v. Independent School Dist.*, 82 Iowa 5; s. c. 47 N. W. 1076. School districts have been held to be political or municipal corporations within the meaning of the constitution, in *Winspear v. Holman Tp.*, 37 Iowa 542; *Mosher v. Independent School Dist.*, supra, and *Kane v. Independent School Dist.*, supra.

³³² *Nesbit v. Independent District of Riverside*, 144 U. S. 610; s. c. 12 S. Ct. 746; affirming s. c. 25 Fed. 635.

back taxes has been held not to be void because when it was issued the city was indebted in excess of the constitutional limit.³³³

§ 875. **The same subject continued.**—A contract by which a contractor agrees to construct a sewer and to accept in payment certificates assessing the benefits against the property benefited does not create a debt within the constitutional inhibition, and will be sustained although a city has reached the constitutional limit of indebtedness.³³⁴ An ordinance which authorized the construction of water-works within a city and provided that the city should have the right, when its financial condition might permit, to purchase the works, has been held not an incurring of indebtedness.³³⁵ Generally only that part of the indebtedness incurred which exceeds the constitutional limit will be held to be void.³³⁶ But if the indebtedness would be invalid in case no part of it were within the limit, if part of it be within the part without is not cured of illegality.³³⁷

§ 876. **Rulings under the Oregon and Washington constitutions.**—An ordinance of a municipal corporation which provides for the payment of money by a town without providing the means wherewith to

³³³ *Hintrager v. Richter*, 85 Iowa 222; s. c. 52 N. W. 188. The court said, as the city received from the taxpayers more money than the amount for which the warrant was issued, "its indebtedness must have been reduced rather than increased."

³³⁴ *Davis v. City of Des Moines*, 71 Iowa 500; s. c. 32 N. W. 470. In *Dively v. City of Cedar Falls*, 27 Iowa 227, it was held that the obligation under a contract on the part of the city to pay for work when and as it should be performed in the future did not constitute an indebtedness within the meaning of the inhibition of the constitution until the actual performance of the work. In *Bartle v. City of Des Moines*, 38 Iowa 414, it was held that a corporation could not escape liability by pleading that its indebtedness had already reached the constitutional limit, in an action for damages on account of injury caused by negligence in the construction and maintenance of the gutters of its streets; nor, as held in *Rice v. City of Des*

Moines, 40 Iowa 638, in an action for damages caused by a defective sidewalk; nor, as held in *Thomas v. City of Burlington*, 69 Iowa 140; 28 N. W. 480, in an action to recover back an illegal tax which had been paid under protest. In *National State Bank v. Independent Dist. of Marshall*, 39 Iowa 490, an order drawn upon a treasurer of a municipality which was already indebted in excess of the constitutional limit was held to be invalid in the hands of the original payee, and a bona fide holder would take it subject to all the equities existing against the payee, as it was not a negotiable paper. Nor would the assignment of such an order entitle the assignee to recover in an action.

³³⁵ *Burlington Water Co. v. Woodward*, 49 Iowa 58.

³³⁶ *McPherson v. Foster*, 43 Iowa 48.

³³⁷ *McPherson v. Foster*, 43 Iowa 48, holding also that the express assent of all the inhabitants of a municipality will not validate bonds issued in excess of the constitutional limit.

make such payment creates an indebtedness against such corporation, within the meaning of the constitution of Oregon, which provides that the legislature in incorporating towns shall restrict their power to create debts.³³⁸ The provision of the constitution of Washington that no county shall become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county without the assent of three-fifths of the voters therein does not authorize county commissioners to incur an indebtedness up to the one and one-half per cent. in addition to any indebtedness which may have been incurred before such provision took effect.³³⁹ Nor does it authorize them to submit to the people the question of validating any purported indebtedness they had attempted to incur in excess of the limit.³⁴⁰ It has been held that where a city has done an act—as, for instance, incurring a liability in excess of the amount named as a limit of municipal indebtedness—beyond its statutory powers, but within the powers which it is competent for the legislature to confer upon it, the act may be validated by a curative act.³⁴¹

§ 877. **Rulings under Texas laws.**—The section in the laws of Texas authorizing the issue of bonds to build a court-house which declares that the county shall not issue a larger number of bonds than can be liquidated in ten years by an annual tax of one-fourth of one per cent. upon the property in the county has been held a limitation upon the section which authorizes the issue of such bonds “in such amount as may be necessary.”^{341a} And bonds issued in excess of the amount authorized by the provision as to tax are void and can not be enforced even by a bona fide purchaser.^{341b} And the purchasers of such bonds are chargeable with notice of the official assessment rolls of taxable property, which are public records, and can not claim to be innocent purchasers.^{341c} That part of the constitution of Texas which provides that no debt shall be created by a city unless at the same time provision be made for taxation for its payment applies to all cities alike, though other parts of the section are expressly limited to cities of more than ten thousand inhabitants.^{341d}

³³⁸ *Murphy v. East Portland*, 42 Fed. 308.

³³⁹ *Rehmke v. Goodwin*, 2 Wash. 676; s. c. 27 Pac. 473.

³⁴⁰ *Rehmke v. Goodwin*, 2 Wash. 676; s. c. 27 Pac. 473.

³⁴¹ *Baker v. City of Seattle*, 2 Wash. 576; s. c. 27 Pac. 462.

^{341a} *Francis v. Howard Co.*, 50 Fed. 44; following *Russell v. Cage*, 66 Tex. 428, 432; s. c. 1 S. W. 270, and

Nolan Co. v. State, 83 Tex. 182; s. c. 17 S. W. 823.

^{341b} *Francis v. Howard Co.*, 50 Fed. 44.

^{341c} *Francis v. Howard Co.*, 50 Fed. 44.

^{341d} *City of Terrell v. Dessaint*, 71 Tex. 770; s. c. 9 S. W. 593. And it was also held that a note for \$1,000, given by a city in payment for water-works material, and payable

§ 878. **Rulings in West Virginia.**—Where there is a constitutional limit of indebtedness of a city, and it is indebted up to that limit, it can not carry on its operations upon credit in any manner or for any purpose, but must pay during the current year with funds in hand or with funds already legally levied.³⁴² And any taxpayer, resident and voter of a city may sue on behalf of himself and all other taxpayers to enjoin the creation of any indebtedness by such city in excess of the constitutional limit.³⁴³

§ 879. **Special statutory provisions.**—When the charter of a municipal corporation authorizes a contract to be made by the corporate body in a certain mode its officers and agents can not bind it in any other manner.³⁴⁴ Where a statute makes no contract binding on a city unless an appropriation sufficient to pay the same be previously made by the council, it has been held that when an appropriation was made sufficient at the time to pay the contract in full, a subsequent diversion of the same to other objects by the city left it liable as though such diversion had not been made.³⁴⁵ Nor does such a provision repeal the obligation imposed upon councils to raise annually the amount required by commissioners for the erection of public buildings, and

with interest two years after date, was a debt within the meaning of the constitution, forbidding cities to contract debts without at the same time providing for taxation for their payment.

³⁴² *Spilman v. City of Parkersburg*, 35 W. Va. 605; s. c. 14 S. E. 279, holding further that a city could not increase its indebtedness beyond the constitutional limit by contracting for an electric apparatus and plant; and, such indebtedness being forbidden, the contract out of which it arose, although executory, was also forbidden. The end aimed at, being prohibited, carries with it the prohibition of the means directly and appropriately designed and adapted for its accomplishment. See also, *List v. City of Wheeling*, 7 W. Va. 501; *Brannon v. County Court*, 33 W. Va. 789; s. c. 11 S. E. 34; *County Court v. Boreman*, 34 W. Va. 362; s. c. 12 S. E. 490; *City of East St. Louis v. People*, 124 Ill. 655; s. c. 17 N. E. 447; 23 Am. & Eng. Corp.

Cas. 408; *Gould v. City of Paris*, 68 Tex. 511; s. c. 4 S. W. 650; 17 Am. & Eng. Corp. Cas. 340; *Scott v. City of Davenport*, 34 Iowa 208. The supreme court of West Virginia considered that the safe and sound construction of this constitutional inhibition which West Virginia modeled after that in the Illinois constitution of 1870 was the rule laid down in *Prince v. City of Quincy*, 128 Ill. 443; s. c. 21 N. E. 768, as follows:—"The effect of this constitutional inhibition is to require cities indebted to the limit fixed by the constitution to carry on their corporate operations while so indebted upon the cash system, and not upon credit to any extent or for any purpose."

³⁴³ *Spilman v. City of Parkersburg*, 35 W. Va. 605; s. c. 14 S. E. 279.

³⁴⁴ *State v. Mayor &c.*, 47 N. J. L. 449; s. c. 1 Atl. 511; 11 Am. & Eng. Corp. Cas. 309.

³⁴⁵ *McGlue v. City of Philadelphia*, 10 Phila. (Pa.) 348.

councils are bound to levy the tax or otherwise raise the amount.³⁴⁶ If an appropriation has been made under such a provision in the charter of a city for a specific purpose, and the proper department incurs liabilities sufficient to exhaust it, it can make no further contracts binding on the city for that purpose.³⁴⁷ A municipal corporation may be bound upon implied contracts made by its agents and to be deduced from corporate acts without a vote of the governing body, provided the contract is within the scope of the corporate powers and is not one which the charter or law governing the corporation requires to be made in a particular way or manner.³⁴⁸

§ 880. **The same subject continued.**—It has been held that the provisions of the charter of a city prohibiting it from entering into a contract for a work or improvement at a price exceeding \$500 “until the assessment therefor has been confirmed” did not apply to the board of park commissioners, but only had reference to contracts made by the regular officers of the municipal government and not to those made by its separate independent departments.³⁴⁹ Where the power of the commissioners of public works to incur liability for materials used in the construction of sewers was limited to \$100,000, it was held that a contract for sewer materials exceeding that amount was not binding on the city, at least for the excess. But a contractor who had in good faith furnished the materials, which had been received by the city, could recover therefor where the legislature had subsequently validated the contract.³⁵⁰ It has been held that a statute prohibiting municipal corporations from contracting any debt or pecuniary liability without adopting an ordinance and providing in it the means of paying principal and interest of the debt contracted was not ap-

³⁴⁸ *Perkins v. Slack*, 86 Pa. St. 270. See also, *Tatham's Appeal*, 80 Pa. St. 465; *Donovan v. Mayor &c.*, 44 Barb. (N. Y.) 180.

³⁴⁷ *Kingsland v. Mayor &c.*, 5 Daly (N. Y.) 448. See also, *People v. Kelly*, 5 Abb. N. C. (N. Y.) 383, 468; s. c. 76 N. Y. 475.

³⁴⁸ *Kramrath v. City of Albany*, 127 N. Y. 575; s. c. 28 N. E. 400. And a corporation like an individual is liable upon the quantum meruit, when it has enjoyed the benefit of the work performed or goods purchased when no statute forbids or limits its power to make a contract therefor: *Peterson v. Mayor &c.*, 17 N. Y. 449; *Harlem Gaslight Co. v. Mayor &c.*, 3 Robt.

(N. Y.) 100; s. c. affirmed in 33 N. Y. 309; *Nelson v. Mayor &c.*, 63 N. Y. 535; *McCloskey v. Mayor &c.*, 7 Hun (N. Y.) 472.

³⁴⁹ *Bork v. City of Buffalo*, 127 N. Y. 64; s. c. 27 N. E. 355; 37 N. Y. St. 332.

³⁵⁰ *Nelson v. Mayor &c.*, 63 N. Y. 535; reversing s. c. 5 Hun (N. Y.) 190; followed in *People v. Denison*, 19 Hun (N. Y.) 137, 149; s. c. affirmed in 80 N. Y. 656; distinguished in *Bigler v. Mayor*, 5 Abb. N. C. (N. Y.) 51, 70; limited in *McDonald v. Mayor*, 68 N. Y. 23; s. c. 23 Am. R. 144; affirming 4 Sup. Ct. (T. & C.) 177; *Smith v. City of Newburgh*, 77 N. Y. 130, 137.

plicable to a demand for gas supplied to a city.³⁵¹ Under the Georgia act limiting the power of a city to levy taxes imposed for the purpose of defraying "ordinary current expenses," expenses incurred in erecting and fitting up necessary municipal offices, such as police headquarters, council chamber, court room, clerk's office, town hall and engine-house, have been held to be included therein.³⁵²

§ 881. Indebtedness for water and lights.—The establishment by the city of a water department for the supply of water to the city and its inhabitants is a "city purpose," within the meaning of a constitutional provision that "no county, city, town or village shall * * * be allowed to incur any indebtedness except for county, city, town or village purposes."³⁵³ A section of the act "to establish and maintain a water department in and for the city of Syracuse" provided for the issue of bonds by the city of Syracuse in aid of the establishment and maintenance of a water department, and make the bonds payable more than twenty years from the date of their issue, but provided for no sinking fund for their retirement at maturity. It was held that such section was not in violation of the constitution of New York, which provides that "no county containing a city of over one hundred thousand inhabitants, or any such city, shall be allowed to become indebted * * * to an amount which, including existing indebtedness, shall exceed ten per centum of the assessed valuation of the real estate subject to taxation," and that such section "shall not be construed to prevent the issue of bonds to provide for the supply of water, but the terms of" such bonds "shall not exceed twenty years, and a sinking fund shall be created on the issuing of such bonds for their redemption," it not affirmatively appearing that Syracuse con-

³⁵¹ *Laycock v. City of Baton Rouge*, 35 La. An. 475, for the reason that this demand was one of the current expenses of the city and payable out of the current revenues of the year in which the liability was contracted. As to different rulings and modifications, see *Prince v. City of Quincy*, 105 Ill. 138; s. c. 2 Am. & Eng. Corp. Cas. 66; *City of Springfield v. Edwards*, 84 Ill. 626; *Sackett v. City of New Albany*, 88 Ind. 473.

³⁵² *Mayor & c. v. McWilliams*, 67 Ga. 106. But in *Hudson v. Mayor & c.*, 64 Ga. 286, it was held that an election under the law was necessary to authorize a city to incur a debt un-

der the provisions of the constitution of that state in exchanging an old fire-engine for a new one. And in *Spann v. Board & c.*, 64 Ga. 498, it was held that a vote of citizens was necessary to authorize the purchase of iron safes for the county. The levy of a tax for expenses of jails was, however, held to be valid, being equivalent to a levy to maintain and support prisoners, which was in the power of the commissioners.

³⁵³ *Comstock v. City of Syracuse*, 5 N. Y. 874; s. c. sub nom. *Matter of Comstock*, 25 N. Y. St. 611.

tained more than one hundred thousand inhabitants and that its existing indebtedness exceeded ten per centum of the assessed valuation of its real estate subject to taxation.³⁵⁴ The construction and operation by a city of a plant for the supply of electric light to the city and its inhabitants is a city purpose, within the meaning of the constitution of New York, prohibiting cities from incurring indebtedness except for city purposes.³⁵⁵ The act of a town in authorizing its selectmen to make a contract with a water company for a supply of water, for fire and other purposes, for a term of years at a certain sum per year to be paid annually, the payments to be made out of moneys annually granted by the town and raised by taxation, is not the incurring of a debt within the meaning of the statute of Massachusetts relative to municipal indebtedness, as the statute does not apply to contracts for current expenses payable out of current revenues.³⁵⁶ Where the mayor and council of a town have the power to contract an annual indebtedness for lighting the town, they will not be enjoined, under the provision in the constitution of Georgia that a debt can not be incurred by a town without the approval of two-thirds of the voters, from carrying out a ten-years' contract for lighting, by the terms of which \$2,000 is to be paid annually, so long as such payments are made as they become due.³⁵⁷ A debt arising from a breach of contract to pay cash is not within the constitutional provisions of the state of Georgia limiting indebtedness.³⁵⁸

§ 882. **Effect of exceeding the limit.**—Where bonds are issued by a court at different times to pay for improvements, under an act limiting the total amount to be issued, the fact that bonds are issued beyond the limit does not invalidate such bonds as were issued and sold before the limit was reached.³⁵⁹ In an action on such bonds the petition need not allege that there was not an overissue, it being a matter of defense if there was.³⁶⁰ And even if it were necessary to allege that there was not an overissue, an allegation that the bonds were “duly” issued would be sufficient.³⁶¹ Where a district voted to build a school-house to cost not more than \$2,000, and the directors borrowed part

³⁵⁴ *Comstock v. City of Syracuse*, 5 N. Y. 874; s. c. sub nom. *Matter of Comstock*, 25 N. Y. St. 611.

³⁵⁵ *Hequembourg v. City of Dunkirk*, 2 N. Y. S. 447; s. c. 18 N. Y. St. 570.

³⁵⁶ *Smith v. Dedham*, 144 Mass. 177; s. c. 10 N. E. 782.

³⁵⁷ *Lott v. Mayor &c.*, 84 Ga. 681; s. c. 11 S. E. 558.

³⁵⁸ *City of Conyers v. Kirk*, 78 Ga. 480; s. c. 3 S. E. 442.

³⁵⁹ *Catron v. La Fayette Co.*, 106

Mo. 659; s. c. 17 S. W. 577.

³⁶⁰ *Catron v. La Fayette Co.*, 106 Mo. 659; s. c. 17 S. W. 577.

³⁶¹ *Catron v. La Fayette Co.*, 106 Mo. 659; s. c. 17 S. W. 577.

of the money necessary and gave an order therefor, and in erecting the house paid more than the amount authorized, it was held, in an action upon the order, that where the money was used in paying an indebtedness incurred before the authorized limit was reached the district was liable.³⁶² A contract with a water company to pay a specified annual sum for water for public uses for an indefinite period is within the meaning of a law limiting indebtedness.³⁶³ It has been held that a contract by which a city in a territory, whose assessed valuation was \$5,000,000, agreed to pay \$15,000 a year for twenty years, could not be considered as falling within an act of congress prohibiting municipal corporations in the territories becoming indebted to an amount exceeding four per cent. of the valuation.³⁶⁴ Where the indebtedness of a city incurred under a contract already exceeds the constitutional limit, and the fund appropriated for the purpose of the contract is exhausted, damages can not be recovered for a breach of the contract by the city.³⁶⁵

§ 883. Remedies of taxpayers against increase of debt.—Taxpayers have been held to have sufficient interest to enable them to maintain suits for injunction of the municipal authorities against entering into contracts which will create indebtedness in excess of the constitutional limit.³⁶⁶ The officers of a city should not be enjoined

³⁶² *Austin v. District Tp. &c.*, 51 Iowa 102; s. c. 49 N. W. 1051.

³⁶³ *State v. Atlantic City*, 49 N. J. L. 558; s. c. 9 Atl. 759.

³⁶⁴ *Davenport v. Kleinschmidt*, 6 Mont. 502; s. c. 8 Mont. 467; 13 Pac. 249; 20 Pac. 823.

³⁶⁵ *Drhew v. Altoona City*, 121 Pa. St. 401; s. c. 15 Atl. 636.

³⁶⁶ *City of Springfield v. Edwards*, 84 Ill. 626. See also, *City of Valparaiso v. Gardner*, 97 Ind. 1. But the ruling in *Searle v. Abraham*, 73 Iowa 507; s. c. 35 N. W. 612, was that they must show that they would sustain injury by the contemplated action of the municipality. See *Davenport v. Kleinschmidt*, 8 Mont. 467; s. c. 20 Pac. 823; 16 Am. & Eng. Corp. Cas. 301, as to injunction against carrying out such contracts; *Wilkinson v. Van Orman*, 70 Iowa 230; s. c. 30 N. W. 495, against issu-

ing bonds in excess; *Howell v. City of Peoria*, 90 Ill. 104, against levying and collecting a tax for the purpose of paying the indebtedness incurred; *Richards v. Supervisors*, 69 Iowa 612; s. c. 29 N. W. 630, where a taxpayer was held entitled to intervene and defend in an action against the municipal authorities to compel them to levy a tax for the payment of an indebtedness in excess of the constitutional limit, if the municipal authorities refused to set up the defense. In *East St. Louis v. People*, 6 Ill. App. 76, it was held that the power of a court to grant a writ of mandamus to compel a levy of taxes beyond the limit allowed by law was not affected by the fact that the whole of the taxes received by the municipality were absorbed by its necessary current expenses. See *City of East St. Louis v.*

from issuing lawful warrants on the treasury for lawful purposes, even though a part of the levy of taxes be unlawful and void.³⁶⁷

Board of Trustees, 6 Ill. App. 130. In *Law v. People*, 87 Ill. 385, it was held that a municipality had no power to make an appropriation for the payment of a contract void as creating a liability in excess of the limit of indebtedness or to levy a tax to pay interest.

³⁶⁷ *Fuller v. Heath*, 89 Ill. 296, in which it was held that a warrant drawn on a city treasurer reading: "From the taxes of the year 1878, appropriated and levied for the police department, when received by you, pay — — —, or bearer, the sum of \$ — —, being for services rendered [or for materials furnished], and

payable out of the appropriation for said department, and charge the same to the police fund," and adding: "The taxes to be collected for account of this fund are specially appropriated, set apart and pledged to the payment of this and all warrants drawn thereon, and which warrants do not exceed eighty-five per cent. of the appropriation made therefor," did not create any corporate liability and was not an evidence of indebtedness on the part of the city. It was but a transfer of so much of a particular tax when collected.

CHAPTER XXII.

MUNICIPAL FUNDS.

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SECTION

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(a) CARE AND DISBURSEMENT OF FUNDS.

§ 885. **Funds appropriated to specific uses.**—A California statute provided for a fund in a city treasury to be paid to the owners of property condemned to widen a street as damages, to be raised by issuing and sale of bonds, and provided for the redemption of these bonds. It was held that the money collected from taxation for the specific purpose of paying coupons attached to these bonds was payable only for their redemption and could not be used to pay damages awarded to property owners.¹ It was further held that the fact that part of the money collected from the sale of the bonds which should have been used in the payment of damages to property owners was illegally used to pay the interest on the bonds, and that the fact that the part of the money collected from taxes to pay interest was used to redeem some of the bonds did not, by operation of law, pass the money collected from taxation for the payment of coupons to the damage fund, to replace that illegally taken therefrom.² A charter of a city provided that "all moneys arising from taxation, donation or other sources shall be paid to the treasurer of the city, and no appropriation thereof shall be made, except for necessary expenses, and but by a concurring vote of six-eighths of all the councilmen." It was held that the requirement

¹ *Priet v. Reis*, 93 Cal. 85; s. c. 28 Pac. 798.

² *Priet v. Reis*, 93 Cal. 85; s. c. 28 Pac. 798, in which case a mandamus was refused on the ground that as in California the writ of mandate is issued only to enforce an act especial-

ly enjoined by law as a duty resulting from an office, trust or station, it would not lie to compel the payment of money out of a fund which the law does not allow to be applied to the use sought; following *Bates v. Porter*, 74 Cal. 224; s. c. 15 Pac. 732.

of a six-eighths vote applied only to expenditure outside of the necessary expenses.³ Under a charter provision authorizing the board of trustees of a village to organize and establish a fire department and to prescribe the powers and duties of the companies and the members thereof, the trustees have, in the absence of any other provision, power by resolution to direct the payment of the money coming into the hands of the fire department treasurer to the companies of the department in proportion to their maximum membership as fixed by the trustees.^{3a}

§ 886. Custodians of funds.—A county treasurer having done all required of him by law to entitle him to hold the office can not be deprived of it by any wilful or unjust refusal of the chairman of the county board and a committee of such board to approve his official bond as required by the statute.⁴ Where a defaulting treasurer declines to qualify and waives his statutory time for that purpose, it is the duty of the board of county commissioners to fill the vacancy without demand, and the treasurer must then hand his successor all

³ *Gardner v. City of New Berne*, 98 N. C. 228; s. c. 3 S. E. 500.

^{3a} *People v. Son*, 19 N. Y. S. 309; s. c. 64 Hun (N. Y.) 321. In *Trustees &c. v. Roome*, 29 Hun (N. Y.) 391, 396, it was held that the treasurer of the fire department (he is an officer of the village) should, under the direction of the trustees of the village or common council of the city, pay over all moneys received or recovered under N. Y. Laws 1875, ch. 465, §§ 1, 2, 3, to the fire department of the city or incorporated village in which the department is located. The mayor and council of a city in Nebraska of the second class drew an order upon the cemetery fund of such city for \$716.66, there being at the time \$1,000 in such fund in the treasury, and applied the proceeds to the payment of lands purchased as an addition to the cemetery, but no appropriation had been previously made concerning such expense. It was held that no act or ratification being proved, the mayor and clerk were liable for the amount of the

order under the statute which provides that no expense can be incurred by a city, except in specified cases, unless an appropriation has been made therefor, whether such expense has been ordered by the council or not: *City of Blair v. Lantry*, 21 Neb. 247; s. c. 31 N. W. 790.

⁴ *State v. Knight*, 82 Wis. 151; s. c. 50 N. W. 1012; 51 N. W. 1137; following *State v. Dahl*, 65 Wis. 510; s. c. 27 N. W. 343. The court said:—"Neither the county board representing pro hac vice the interests of the public, nor the respondent, can now be heard to urge a want of approval of the relator's bond occurring under circumstances establishing presumptively, at least, neglect of official duty on the part of the county board. It was their official duty to attend to the matter of the approval of the bond, and the relator was not bound to coerce the performance of that duty by legal process at the peril of losing his rights."

public moneys, books, records, accounts, papers and documents in his possession appertaining to such office, under the statutes of Dakota relating to delinquent treasurers.⁵ Where a board of county commissioners suspend a county treasurer and appoint an acting treasurer, it appearing at the time of such order that the treasurer is a defaulter, the appointment is such a removal of the treasurer as requires him under the Kansas statutes to deliver to the acting county treasurer as his successor all the books, papers and moneys in his hands by virtue of his office.⁶ And such a removed treasurer is not entitled to his salary after the date of his suspension and the taking possession of the office by the acting treasurer.⁷ An order of the commissioners' court directing a county treasurer to deposit county funds in a certain bank does not exempt him from liability for their loss through failure of the bank.⁸ Where two banks make a bond for a county treasurer upon an agreement that he will deposit equally between them the county funds, and the board of county commissioners fail to designate, as the statute requires, a responsible bank as depository, and the treasurer becomes a defaulter, the sureties having obtained an advantage or profit by their agreements with him can not limit their liability upon the bond because the statute was not complied with by the commissioners.⁹ A county treasurer in Iowa who deposited in a bank money belonging to the county has been held liable therefor upon a failure of such bank, although the county had not provided a safe place to keep the money.¹⁰ When the county court has provided a fund in the hands of the sheriff, ex officio the county treasurer, for the payment of claims against the county, and has caused to be issued and delivered to the creditor an order for his claim in form or effect as provided in the code of West Virginia, and the sheriff, without fault on the part of the court, fails or refuses to pay the order, the creditor's remedy is against the sheriff on his bond as provided by the statute, and not by mandamus to compel the county court to levy a tax to pay the same.¹¹ A county treasurer who receives from his predecessor United States bonds purchased by order of the county and belonging to it is bound to account therefor and for the premiums accruing thereon, and can not claim as against the county that they were purchased without authority.¹²

⁵ *Stutsman Co. v. Mansfield*, 5 Dak. 78; s. c. 37 N. W. 304.

⁶ *Loper v. State*, 48 Kan. 540; s. c. 29 Pac. 687.

⁷ *Loper v. State*, 48 Kan. 540; s. c. 29 Pac. 687.

⁸ *McKinney v. Robinson*, 84 Tex. 489; s. c. 19 S. W. 699.

⁹ *Loper v. State*, 48 Kan. 540; s. c. 29 Pac. 687.

¹⁰ *Lowry v. Polk Co.*, 51 Iowa 50; s. c. 49 N. W. 1049.

¹¹ *Ratliffe v. County Court*, 36 W. Va. 202; s. c. 14 S. E. 1004.

¹² *Nixon v. State*, 96 Ind. 111.

§ 887. **The same subject continued.**—The Texas statute provides that “it shall be the duty of the county treasurer to receive all moneys belonging to the county, from whatever source they may be derived, and to pay and apply the same as required by law, in such manner as the commissioners’ court of his county may require and direct.” Other provisions require the registration and classification of all claims against counties, and forbid their payment other than as provided by law. It has been held that it was no defense to an action for the proceeds against one who, as agent of the county, had sold certain of its bonds, that he had devoted the proceeds of the bonds before their sale to the payment of the contractor for the erection of the court-house at the request of the county judge, and upon the promise of the latter that the county would reimburse defendant upon final settlement, as the county judge had no authority to bind the county.¹³ A receiver of public money who has given bond for its safe-keeping is not discharged from liability therefor by the failure of the bank in which he has deposited it.¹⁴ A township trustee has no right to accept of his predecessor a note in satisfaction of a debt due the township for funds wrongfully appropriated by the latter to his own use while in office, and such debt is not thereby merged in the note so as to be affected by a discharge in bankruptcy.¹⁵ Where funds derived from the sale of bonds of a city in Kansas of the third class are received either by the city treasurer or other person acting in behalf of the city, the entire amount should, on demand, be paid into the city treasury, and such persons can not fix their own compensation for services in respect to such funds, or withhold a part of the proceeds as such compensation, but any such claim must be presented to the city council in writing and allowed in the manner prescribed by statute.¹⁶ A city treasurer has no right to apply a surplus in his hands over the yearly appropriations to the payment of debts against the city of prior years, without the direction of the council.¹⁷ And the city council can not ratify the action of a city treasurer in paying out city money in a manner not authorized by law.¹⁸ The provision of the statute of Dakota, that on going out of office the treasurer shall deliver to his successor all public moneys,

¹³ *Nolan Co. v. Simpson*, 74 Tex. 218; s. c. 11 S. W. 1098.

¹⁴ *Nason v. Directors of Poor*, 126 Pa. St. 445; s. c. 24 W. N. C. (Pa.) 60; 17 Atl. 616; following *Baily v. Commonwealth* (Pa.), 10 Atl. 764.

¹⁵ *Madison Tp. v. Dunkle*, 114 Ind. 262; s. c. 16 N. E. 593.

¹⁶ *City of Syracuse v. Reed*, 46 Kan. 520; s. c. 26 Pac. 1043.

¹⁷ *City of East St. Louis v. Flannigan*, 34 Ill. App. 596.

¹⁸ *City of East St. Louis v. Flannigan*, 34 Ill. App. 596.

books, etc., "in his possession," does not show a legislative intent to limit his liability to that of a bailee.¹⁹

§ 888. **Compensation of treasurers.**—The county treasurer is the custodian of the funds paid for school lands by virtue of his office; and under the Minnesota statute, which provides that no county treasurer shall receive for his personal services more than the sum named therein, his annual salary is intended as full compensation for his official services, and he should not be permitted to retain the fees and percentage allowed for handling the proceeds of state lands in addition to his salary; but all fees and percentage, as well from that source as others, in excess of the amount provided by that statute for his salary, are to be paid at the end of each year into the revenue fund.²⁰ The local acts relating to the compensation of the treasurers of Monroe and Seneca counties, New York, it has been held, were not to be deemed retroactive and therefore unconstitutional, nor were they objectionable otherwise. The treasurers of those counties may retain commissions on state taxes, but only for the benefit of their counties.²¹ It has been held in Arkansas that a county treasurer was entitled to commissions on school funds received from a former treasurer under a statute providing that "the county treasurer shall be allowed as commissions on the aggregate amount of school funds of the county coming into his hands in any one year the rate of two per cent. and no more."²² The whole percentage on collections can be claimed by a treasurer whose term of service is less than a year in Minnesota, as the statute giving county treasurers a percentage on collections does not provide that a less amount shall be claimed by a treasurer who holds office for less than a year.²³ A county treasurer is not entitled under the Texas statute to commissions on county scrip received for taxes, nor on the amount of bonds issued to contractors to pay for public buildings.²⁴

¹⁹ *Clay Co. v. Simonsen*, 1 Dak. 403; s. c. 46 N. W. 592.

²⁰ *Gerken v. Sibley Co.*, 39 Minn. 433; s. c. 40 N. W. 508. The special Minnesota statute which authorized the county board of Sibley county to repay to the county treasurer the fees for receiving and paying over moneys on account of sales of school land during his term of office, is not mandatory, and the question of the validity of such a claim was held to

be still open for judicial determination.

²¹ *Seneca Co. Supervisors v. Allen*, 99 N. Y. 532; s. c. 2 N. E. 459.

²² *Lawrence Co. v. Hudson*, 41 Ark. 494.

²³ *Beatty v. Sibley Co.*, 32 Minn. 470; s. c. 21 N. W. 548.

²⁴ *McKinney v. Robinson*, 84 Tex. 489; s. c. 19 S. W. 699; distinguishing *Wharton Co. v. Ahldag*, 84 Tex. 12; s. c. 19 S. W. 291.

§ 889. **The same subject continued.**—It being the duty of a county treasurer to receive, keep and disburse all money belonging to his county, in respect to which no specific provision is otherwise made, including the proceeds of the sale of county bonds issued to raise money for building a bridge, he is not entitled to extra compensation therefor, though the board of county commissioners had agreed with him to pay it.²⁵ Though no specific fee is prescribed for the county treasurer for making searches for delinquent taxes, tax sales, etc., for private persons, and making and certifying abstracts and copies from his records, he is entitled to reasonable fees for these services, and must enter and return them in his fee book as prescribed by the Nebraska statute for “each and every item of fees collected.”²⁶ Under the Texas statute providing that the county treasurer shall be entitled to commissions not exceeding a certain percentage, to be fixed by the commissioners’ court, for receiving and disbursing moneys belonging to the county (excepting school funds), a failure by the commissioners’ court to make an order regulating the allowance in a particular case raises an implied agreement on the part of the county that the treasurer shall have the maximum percentage allowed.²⁷ And where the commissioners’ court is authorized to fix the allowance of the county treasurer, within certain prescribed limits, and such court has for a long time allowed the same percentage, a failure to make an order regulating the allowance in a particular case raises an agreement by implication on the part of the county to continue to pay the same amount until it should notify the treasurer to the contrary.²⁸ So where funds which the law requires to pass through the hands of the county treasurer, and for the receiving and disbursing of which he is entitled to a commission, are received and disbursed by another officer, the treasurer is entitled to recover from the county the commissions to which he would have been entitled had he handled the funds according to law.²⁹ The commissioners and auditors of a county in Pennsylvania, in determining the compensation of a county treasurer, may, in their discretion, fix one rate on ordinary receipts and disbursements, and a less rate on money received and paid out on account of the erection of county buildings.³⁰ They may also fix it for that year instead of fixing it only once

²⁵ *Libby v. Anoka Co.*, 38 Minn. 448; s. c. 38 N. W. 205.

²⁶ *State v. Allen*, 23 Neb. 451; s. c. 36 N. W. 756.

²⁷ *Bastrop Co. v. Hearn*, 70 Tex. 563; s. c. 8 S. W. 302.

²⁸ *Bastrop Co. v. Hearn*, 70 Tex. 563; s. c. 8 S. W. 302.

²⁹ *Bastrop Co. v. Hearn*, 70 Tex. 563; s. c. 8 S. W. 302.

³⁰ *Merwine v. Monroe Co.*, 141 Pa. St. 162; s. c. 21 Atl. 509.

during the treasurer's term.³¹ Such a decision of commissioners and auditors is not reviewable by the courts.³² In Illinois, county treasurers are not entitled to any commission out of money paid in and out under the "Eminent Domain Act," providing that "the payment of the compensation adjudged may in all cases be made to the county treasurer, who shall on demand pay the same to the party entitled thereto."³³

§ 890. Settlements with treasurers.—The California county government act provides that the treasurer shall receive no money unless accompanied by the certificate of the auditor, as provided in that act, or as otherwise provided by law. The act provides that the auditor must settle the accounts of all persons holding money payable into the county treasury and certify the amount to the treasurer, and, on the filing of the treasurer's receipt therefor, give him a receipt, and charge the treasurer with the amount. The code provides that the auditor must settle with the tax collector and require from him the treasurer's receipt, or, if the treasurer is collector, require from him an immediate account for any existing deficiency. It has been held that it was sufficient, where the same person was treasurer and collector, to charge him and his sureties as treasurer, that the auditor settled with him as collector and handed him the certificate of the amount found due, which receipt was found in the county treasury, and at once credited him as collector and charged him as treasurer with such sum.³⁴ Under the Missouri statute requiring that the county treasurer shall settle his accounts with the county court semi-annually, and, if he die, his executor or administrator shall immediately make such settlement, the estate of a deceased treasurer is not in default until notice to make such settlement is served on the executrix; and until such notice the county court has no authority to make the settlement.³⁵ When a county treasurer receives money from the tax collector as county taxes, he and his sureties are estopped to deny that the money belonged to the county without regard to the form of his receipt to the collector.³⁶ A receipt given by a county treasurer to a tax collector in the form of an "I. O. U." is admissible against the sureties of the treasurer, and may be explained by parol evidence showing that it was given for county taxes received from the

³¹ *Merwine v. Monroe Co.*, 141 Pa. St. 162; s. c. 21 Atl. 509.

³² *Merwine v. Monroe Co.*, 141 Pa. St. 162; s. c. 21 Atl. 509.

³³ *Farley v. Chicago &c. R. Co.*, 36 Ill. App. 517.

³⁴ *Butte Co. v. Morgan*, 76 Cal. 1; s. c. 18 Pac. 115.

³⁵ *Cole Co. v. Schmidt (Mo.)*, 10 S. W. 888.

³⁶ *Coleman v. Pike Co.*, 83 Ala. 326; s. c. 3 So. 755.

collector to be accounted for on settlement at the end of the month.³⁷ The probate judge being authorized by a county treasurer to discharge official duties for him as agent, and as such making two settlements with the tax collector (one before and the other after the death of the treasurer), his acts and entries in connection with the first settlement, but not the second, are binding on the sureties of the treasurer and admissible as evidence against them.³⁸ It has been held in Texas that where a tax collector, who was also cashier of a bank, drew checks on such bank for the purpose of paying to the treasurer sums of money which he had collected, and the treasurer accepted such checks, indorsed them, and turned them over again to him to be placed to his credit on the books of the bank, such transaction constituted a payment to the treasurer of the sums collected by him as tax collector, he having funds on deposit in the bank to pay such checks, although as cashier he may have failed to give the treasurer credit for such checks.³⁹ Under the Nebraska statute giving the county commissioners power to appoint an examiner of the treasurer's accounts, "when the same shall appear to be necessary" in their "opinion," they are the sole judges as to when the necessity exists.⁴⁰

§ 891. Action to recover county funds.—Where a person, by conspiring with the treasurer of a county, comes into the possession of a county's money, an action may be maintained against him therefor. The county is not confined to its remedy on the treasurer's bond.⁴¹ And in such an action, the evidence tending to show that the transactions between the two, involving this money, began when the treasurer entered upon the duties of his office and were continued until his last settlement with the supervisors, evidence of statements made officially by the treasurer, as a part of his semi-annual settlements, may be admitted as tending to show the amount of money for which the treasurer was liable at different times, and, when considered with other evidence, the dealings between the two under the alleged conspiracy.⁴² In case of a failure of a sheriff to pay county creditors, as he was authorized by act to do, out of the county levy of taxes, as the act provided also that the sheriff should settle with the county treasurer and that the latter should bring suit against the former if delinquent, the county treasurer may sue for the money due the cred-

³⁷ *Coleman v. Pike Co.*, 83 Ala. 326; s. c. 3 So. 755.

³⁸ *Coleman v. Pike Co.*, 83 Ala. 326; s. c. 3 So. 755.

³⁹ *Kempner v. Galveston Co.*, 73 Tex. 216; s. c. 11 S. W. 188.

⁴⁰ *Kearney Co. v. Tuttle*, 16 Neb. 34; s. c. 19 N. W. 637.

⁴¹ *Taylor Co. v. Standley*, 79 Iowa 666; s. c. 44 N. W. 911.

⁴² *Taylor Co. v. Standley*, 79 Iowa 666; s. c. 44 N. W. 911.

itors.⁴³ It has been held in a summary proceeding by distress for a balance found due by a county tax collector during the two years he had held office that the statute should have been strictly pursued, and that by reason of neglect to require monthly settlements of this officer and the delay in issuing the warrant, the state auditor was without authority to proceed in that manner and further proceedings should be enjoined.⁴⁴ Money raised by a tax to pay town bonds is properly payable to the supervisor. Where he has received such money and paid it to the county treasurer, who failed to account for the same, such payment has been held no defense to an action on the supervisor's bond, since no law authorized its payment to the treasurer.⁴⁵ And after money has been collected and received by the supervisor as town funds, he and his sureties, in an action on his bond, are estopped from questioning the regularity of the tax under which it was collected.⁴⁶ And though the conditions of the supervisor's bond did not conform literally to the language of the statute, since the substance was within the requirements, it was sufficient.⁴⁷

§ 892. Actions on treasurer's bond.—The county is the proper party to bring action on the county treasurer's bond running to the county and state, though the treasurer had collected and failed to pay over state taxes, where the county is charged with the levy and collection of all county and state taxes, and where the state taxes are charged to the county until paid into the state treasury.⁴⁸ Where a county treasurer has resigned and failed to account for and pay to his successor the money with which he was charged, a demand before suit on the bond has been held not to be necessary in Dakota.⁴⁹ Nor need the complaint on his bond show that the commissioners have adjusted his accounts under the statute which provides that, "if any person thus chargeable shall neglect or refuse to render true accounts or settle as aforesaid," the commissioners shall adjust the accounts and ascertain the balance due the county and order suit to be brought.⁵⁰ It has been held that the Indiana statute which provides

⁴³ *Berry v. Commonwealth*, 12 Ky. L. 462; s. c. 14 S. W. 589.

⁴⁴ *Judson v. Smith*, 104 Mo. 61; s. c. 15 S. W. 956.

⁴⁵ *Purcell v. Town of Bear Creek*, 138 Ill. 524; s. c. 28 N. E. 1085.

⁴⁶ *Purcell v. Town of Bear Creek*, 138 Ill. 524; s. c. 28 N. E. 1085.

⁴⁷ *Purcell v. Town of Bear Creek*, 138 Ill. 524; s. c. 28 N. E. 1085.

⁴⁸ *Valley Co. v. Robinson*, 32 Neb. 254; s. c. 49 N. W. 356.

⁴⁹ *Clay Co. v. Simonsen*, 1 Dak. 403; s. c. 46 N. W. 592; for the reason that the statute provides that on going out of office the treasurer shall deliver to his successor all moneys, books, accounts, papers and documents in his possession.

⁵⁰ *Clay Co. v. Simonsen*, 1 Dak. 403; s. c. 46 N. W. 592.

that upon failure of a county treasurer to pay over the revenues collected for county, road and other purposes, as required by law, suit shall be instituted therefor by the prosecuting attorney against the treasurer and his bondsmen, applied to the failure of a treasurer, whose term of office had expired, to pay over the funds in his hands to his successor.⁵¹ In an action on a county treasurer's bond for his failure to pay over money to his successor, a plea alleging that the default was covered by a bond given during a former term of such treasurer was held demurrable as failing to deny that the money came into his hands as his own successor for the term for which the bond in suit was executed.⁵² Nor was an allegation in the plea that the default was covered by fees illegally allowed the treasurer by the board of supervisors, and that the statute of limitations had run against their recovery, any defense, as the allowance of such fees was void and the money remained in the treasurer's hands as funds of the county.⁵³ A treasurer must account for the money actually received, notwithstanding the charges made against him are of fictitious items instead of the true one, as, in the case cited in the note, money received of his predecessor on account of a certain gravel road fund.⁵⁴

§ 893. Public depositories.—It has been held that moneys paid as fines and forfeitures to the city treasurer, under the Kansas statutes as to cities, etc., are city funds, and for the purpose of designating a bank or a depository for them they are under the control of the mayor and council; though, when they are deposited in the bank designated, they are still subject to the order of the board of police commissioners to the same extent as they were when they were held by the city treasurer.⁵⁵ And a national bank may be a depository for such funds, and may lawfully agree to pay interest on the deposits and to give a bond for their security.⁵⁶ Where a bank was named

⁵¹ Board &c. v. Wood, 126 Ind. 168; s. c. 25 N. E. 190; Wood v. Board &c., 125 Ind. 270; s. c. 25 N. E. 188; Board &c. v. Templer, 34 Ind. 322.

⁵² McKinney v. State, 68 Miss. 284; s. c. 8 So. 648.

⁵³ McKinney v. State, 68 Miss. 284; s. c. 8 So. 648.

⁵⁴ Beaver v. State, 124 Ind. 324; s. c. 24 N. E. 242.

⁵⁵ Interstate Nat. Bank v. Ferguson, 48 Kan. 732; s. c. 30 Pac. 237. The court said:—"If it should become necessary at any time for the

board to use any of these funds for the purpose of paying the salaries of officers or of the expenses of the police department, the board might draw its order upon the city treasurer for the amount, and when such order should be presented to the city treasurer he would draw his check on the bank designated . . . in favor of the person, . . . which check or draft . . . would be promptly paid."

⁵⁶ Interstate Nat. Bank v. Ferguson, 48 Kan. 732; s. c. 30 Pac. 237.

as a county depository, it was held that the vice-president of the bank was authorized to turn over to the county treasurer notes belonging to the bank as collateral security for the deposit secured by the bond given by the bank; that the treasurer was authorized to receive and hold such collateral in addition to the bond; and that the sureties on the bond had a right to demand that these collaterals should be exhausted before their property should be taken on execution therefor.⁵⁷ Under the special Michigan local statute, which provides that the treasurer of Wayne county and the board of auditors shall designate some bank as a depository for the county funds, it has been held that the board and the incumbent treasurer can not appoint a bank to be the depository beyond the expiration of the incumbent's term of office.⁵⁸ But the newly-elected treasurer and the board should designate a depository as soon as convenient.⁵⁹ The treasurer and board have an equal voice in making the designation.⁶⁰ But the designation by a retiring treasurer is valid till the end of his term and till a new depository is designated by the board and incoming treasurer.⁶¹ And until a new designation it is the duty of an incoming treasurer to deposit the funds in the previously designated depositories.⁶² Under the Kansas statute authorizing the board of county commissioners to designate a bank in which the county treasurer shall deposit the county funds, the board has no authority to designate a depository for a definite period. Nor can it make a depository that will prevent the designation of a different depository whenever the board shall deem it for the public interest.⁶³

§ 894. Examination of county officers' accounts.—Where the files and papers relating to proceedings in a police court have been turned over by the clerk to a city comptroller, and are being used by the city council to investigate the accounts of the clerk and judge, the judge has no authority to order the comptroller to return the files and papers.⁶⁴ A board of county commissioners, under the "exclusive

⁵⁷ *Richards v. Osceola Bank*, 79 Iowa 707; s. c. 45 N. W. 294.

⁵⁸ *City Sav. Bank v. Huebner*, 84 Mich. 391; s. c. 47 N. W. 690.

⁵⁹ *City Sav. Bank v. Huebner*, 84 Mich. 391; s. c. 47 N. W. 690.

⁶⁰ *City Sav. Bank v. Huebner*, 84 Mich. 391; s. c. 47 N. W. 690.

⁶¹ *City Sav. Bank v. Huebner*, 84 Mich. 391; s. c. 47 N. W. 690.

⁶² *City Sav. Bank v. Huebner*, 84 Mich. 391; s. c. 47 N. W. 690.

⁶³ *First Nat. Bank v. Peck*, 43 Kan. 643; s. c. 23 Pac. 1077.

⁶⁴ *Schwartz v. Barry*, 90 Mich. 267; s. c. 51 N. W. 279. The court said:—"These files and papers were in the first place lawfully in the hands of the comptroller as the chief financial officer of the city, and without objection of any one. The common council had a right to investigate this matter of fees which belonged to the city treasury, and to have ac-

jurisdiction" granted them by the statute of Georgia providing for such a board, "in examining and auditing the accounts of all officers having the care, management, collecting or disbursing of the money of the county, and in bringing said officers to a speedy settlement," have the power to audit and examine the accounts of a tax collector, and if the examination shows him indebted to the county and the amount not paid over to the county treasurer, to bring him to a speedy settlement by issuing an execution against him.⁶⁵ The Georgia legislature has the power to pass separate and distinct acts for any counties which require county commissioners, and it is not necessary that these acts shall be uniform in all such counties.⁶⁶

§ 895. Liability of custodians of funds.—Sureties of a surrogate are not liable for a partial loss of the proceeds of the sale of a decedent's real estate deposited by the surrogate in a bank, then of good standing, which afterwards failed.⁶⁷ Where a county treasurer, who by law is forbidden to buy or sell or in any manner deal in county warrants, on payment of a county warrant neglects to cancel it, but marks it "Not paid, for want of funds," and puts it into circulation, a subsequent holder, though he purchases for value and in good faith, can not maintain an action against the sureties on the treasurer's official bond for alleged malfeasance in office.⁶⁸ Under the Nebraska statute requiring the county clerk, ex officio register of deeds, to keep an index of the deeds, such index becomes a public record, the fees for a certified copy of which he is required to account for to the county board.⁶⁹ If a county clerk receives money in his official capacity and unlawfully converts it, he is liable on his official bond without regard to whether he had the right to distribute the money or not.⁷⁰ Though the clerk of a board of supervisors gives his deputy entire charge of his office, he is not liable to the purchaser of county warrants fraudulently issued by the deputy, who used for that purpose the blanks furnished by the county, signing thereto the names of the clerk and the president of the board, and attaching the clerk's official seal.⁷¹ Where paper purporting to be the obliga-

cess to these papers, and it was not in the power of the police judge to take them into his possession while this investigation was going on."

⁶⁵ *Pulaski Co. v. Thompson*, 83 Ga. 270; s. c. sub nom. *Pulaski Co. v. Pollock*, 9 S. E. 1065.

⁶⁶ *Pulaski Co. v. Thompson*, 83 Ga. 270; s. c. sub nom. *Pulaski Co. v. Pollock*, 9 S. E. 1065.

⁶⁷ *People v. Faulkner*, 107 N. Y. 477; s. c. 14 N. E. 415.

⁶⁸ *McConnell v. Simpson*, 36 Fed. 750.

⁶⁹ *State v. Sovereign*, 17 Neb. 173; s. c. 22 N. W. 353.

⁷⁰ *Henry v. State*, 98 Ind. 381.

⁷¹ *Whyte v. Mills*, 64 Miss. 158; s. c. 8 So. 171.

tion of a township has been issued without consideration, the holder, whether the payee or an assignee, has no right of action on the bond of the trustee, under the Indiana statute providing for such liability only in cases where the trustee contracts *debt* in the name or in behalf of the township, contrary to certain provisions of the statute.⁷²

§ 896. **Liabilities on bonds of custodians of school funds.**—Where, in an action on the bond of a school trustee for a shortage in the funds, it appears that he paid moneys out of the special school fund on account of the common school fund, he should be given credit for the amount thus paid, and not be charged with the entire shortage in the special fund.⁹³ And this credit should not be denied him because his answer alleges that the overpayments were made for the benefit of the special school fund, while the proof shows that they were made for the benefit of the common school fund.⁹⁴ Under the Minnesota statute which requires the treasurer of a school district to give a bond with sureties, conditioned for the faithful performance of the duties of his office and that he will turn over to his successor in office all money in his hands belonging to the district, and further provides that for any breach of such bond the board shall cause an action to be commenced thereon, a vote of the school district and of the board of education, without consideration, to discharge the legal obligations of a treasurer who has lost the school funds by burglary without fraud, has been held to be ineffectual.⁹⁵ The fact that such treasurer has lost the funds by burglary, although without his own fault, constitutes no defense to an action on his official bond for the failure to pay over to his successor the money received and not disbursed by him.⁹⁶ The treasurer of a board of education deposited school moneys in the name of and along with the funds of a private corporation, of which he was the manager, with the knowledge of a bank's official, which deposit was subject to his check for both school and private purposes. His drafts as manager of the private corporation were so large as to leave a deficit in the amount due by him to the board of education. This board shortly afterwards required of him a new bond. It was held that as funds of the private corporation sufficient in amount to make up this deficit were soon afterwards deposited by him, this was a payment of that deficit. Therefore, the sureties on the second

⁷² State v. Hawes, 112 Ind. 323; s. c. 14 N. E. 87; followed in State v. Brown, 112 Ind. 600; s. c. 14 N. E. 487, and Grimsley v. State, 116 Ind. 130; s. c. 17 N. E. 928.

⁹⁴ Finney v. State, 126 Ind. 577; s. c. 26 N. E. 150.

⁹⁵ Board &c. v. Jewell, 44 Minn. 427; s. c. 46 N. W. 914.

⁹⁶ Board &c. v. Jewell, 44 Minn. 427; s. c. 46 N. W. 914.

c. 26 N. E. 150.

bond were held liable for a deficit existing at the expiration of his term as treasurer.⁹⁷ The board of education, being the general representative of the school organization as a corporation, and not the successor in office of the treasurer of the board, is the proper party to commence an action on the bond of the treasurer for failure to pay over to his successor the balance due the board.⁹⁸ The final report made by a school township treasurer and the entries in his books made by him in such capacity are conclusive evidence against him and his sureties as to the amount due in an action on his bond.⁹⁹

§ 897. Investment of school funds.—It has been held in Nebraska, under the provisions of the constitution and statutes, that the board of educational land and funds has authority to invest the permanent school fund in the United States three per cent. bonds and to pay premiums therefor, if necessary, and that such premiums should be paid out of the permanent school fund.¹⁰⁰ But it can not, after investing them in those bonds, sell or convert them into high rate of interest registered county bonds; but when paid they may be re-invested in such bonds.¹⁰¹ Nor can they, in purchasing high rate of interest coupon bonds, detach coupons therefrom so that the remaining coupons will net the state six per cent. from the date of purchase to maturity.¹⁰² And the payment of premiums in the purchase of county bonds must be made from the temporary school fund.¹⁰³

§ 898. Loan of school funds.—By one provision of an Indiana statute the several counties are made liable for so much of the public school funds as is intrusted to them and the annual payment of interest thereon. By another it is made the duty of the county auditor, when premises mortgaged to secure a loan of such funds fail to sell for a sum sufficient to satisfy the principal and interest, to bring suit on the notes in the name of the state. It has been held that the county might pay the deficiency before the auditor brought suit.¹⁰⁴ Under the Missouri statute authorizing the county court to invest

⁹⁷ *Gilbert v. Board &c.*, 45 Kan. 31; s. c. 25 Pac. 226.

⁹⁸ *Gilbert v. Board &c.*, 45 Kan. 31; s. c. 25 Pac. 226.

⁹⁹ *Longan v. Taylor*, 31 Ill. App. 263; s. c. affirmed in 130 Ill. 412; 22 N. E. 745.

¹⁰⁰ *In re School Fund*, 15 Neb. 684; s. c. 50 N. W. 272.

¹⁰¹ *In re School Fund*, 15 Neb. 684; s. c. 50 N. W. 272.

¹⁰² *In re School Fund*, 15 Neb. 684; s. c. 50 N. W. 272.

¹⁰³ *In re School Fund*, 15 Neb. 684; s. c. 50 N. W. 272.

¹⁰⁴ *Lopp v. Woodward*, 1 Ind. App.

105; s. c. 27 N. E. 575.

and manage school funds and loan them on specified security, such court can not discharge a surety from his liability on a bond given for the loan of school money, upon his delivering "in payment" his note with personal security, as that is in effect a re-loan, and the statute requires that all loans of school funds shall be secured by mortgage.¹⁰⁵ Nor can a county court delegate its power under those statutes to make loans or to compromise those already made, without requiring the final approval by the court of the security.¹⁰⁶ And a person who signs as surety after delivery, a bond under seal given to secure a loan of school moneys, can not escape liability by showing that no order requiring additional security was entered of record, without also showing that there was no other consideration, as the seal imports a consideration.¹⁰⁷ Where the statute requires two or more sureties upon a loan of school funds, and there are several signers to a note for such loan, it will be presumed that such note was executed in conformity with the law, and that at least two of such signers are sureties.¹⁰⁸

§ 899. Liability of officers and agents of towns.—If a township trustee, relying entirely upon the judgment of the board of directors, and against his own judgment, loans money belonging to the school fund on insufficient security, whereby a loss occurs, his official bond is liable therefor.¹⁰⁹ In an action on such a bond for a loss caused by the trustees loaning moneys of the school fund on insufficient security, it was held to be error to permit witnesses to testify that they never heard any dissatisfaction expressed in regard to the loan by any person.¹¹⁰ In the absence of fraud, or consequent damage or loss, the fact that school directors knowingly drew a warrant on a fund to the credit of which there was no money wherewith to meet such warrant at the date thereof, such draft for any school year on any fund having been limited to the amount to be derived from all sources during that year, has been held not to be such an illegal exercise of authority as will render directors personally liable for the amount of the warrant.¹¹¹ Where a contract for building a schoolhouse contained the names of the school directors, and their description as such as contracting parties, and was signed by them as directors,

¹⁰⁵ *Montgomery Co. v. Auchley*, 103 Mo. 492; s. c. 15 S. W. 626.

¹⁰⁶ *Montgomery Co. v. Auchley*, 103 Mo. 492; s. c. 15 S. W. 626.

¹⁰⁷ *Montgomery Co. v. Auchley*, 103 Mo. 492; s. c. 15 S. W. 626.

¹⁰⁸ *Trustees &c. v. Southard*, 31 Ill. App. 359.

¹⁰⁹ *Board of Trustees v. Baker*, 34 Ill. App. 620.

¹¹⁰ *Board of Trustees v. Baker*, 34 Ill. App. 620.

¹¹¹ *Jacquemin v. Andrews*, 40 Mo. App. 507.

but did not expressly show that they were acting on behalf of the district, or intended to make the instrument the contract of the district, it has been held that the directors were individually liable.¹¹² The trustees of a township are not personally liable for the non-payment of a town order executed by them as such trustees and given in payment for a machine purchased by them for the use of the township.¹¹³ An allegation that such an order was invalid in so far as it purported to bind the township, and that the trustees had no authority to make the purchase for which the order was given, will not render the trustees personally liable in an action on the order.¹¹⁴ Agents of a town who sold bonds issued under a special act to furnish seed wheat to sufferers from the ravages of grasshoppers, and collected the notes of the farmers and paid the sums collected to the purchasers of the bonds, except a sum which they retained for the expenses of litigation, the nature of which was not disclosed, were held liable personally for the amount thus retained.¹¹⁵ A county in its corporate capacity may sue the county treasurer on his bond for failure to pay over the school fund for which the county commissioners are authorized to levy a tax.¹¹⁶

§ 900. Miscellaneous expenditures.—It is not the province of courts to determine what city expenditures are necessary. That is in the sound discretion of the municipal authorities.¹¹⁷ Where a contract is a cash transaction based on money on hand and legally applicable for the payment, it is valid, though no provision is made for interest or a sinking fund, as required by the constitution and charter.¹¹⁸ The maintenance of public schools out of the revenues of a city may not be, strictly speaking, a municipal function, yet it may be made so by statute.¹¹⁹ Expenditures for entertainments are not legal unless power is expressly conferred.¹²⁰

¹¹² *Sharp v. Smith*, 32 Ill. App. 336.

¹¹³ *Willett v. Young*, 82 Iowa 292; s. c. 47 N. W. 990.

¹¹⁴ *Willett v. Young*, 82 Iowa 292; s. c. 47 N. W. 990.

¹¹⁵ *Powell v. Heisler*, 45 Minn. 549; s. c. 48 N. W. 411. But it was held also, that if such bonds were issued under a void statute, these agents, having followed the statute in their disposition of the proceeds of the bonds, would not be held liable for the price paid by one who purchased with notice of the act under which the bonds were issued, and the pur-

pose for which the money would be used.

¹¹⁶ *Aiken Co. v. Murray*, 35 S. C. 508; s. c. 14 S. E. 954; following *Greenville Co. v. Runion*, 9 S. C. 1.

¹¹⁷ *White v. Mayor &c.*, 119 Ala. 476; s. c. 23 So. 999.

¹¹⁸ *Berlin Iron Bridge Co. v. City of San Antonio (Tex.)*, 50 S. W. 408.

¹¹⁹ *White v. Mayor &c.*, 119 Ala. 476; s. c. 23 So. 999.

¹²⁰ *Black v. Common Council &c.*, 119 Mich. 571; s. c. 78 N. W. 660. Constitution and laws of Texas construed; and held, that the actual levy

(b) APPROPRIATIONS.

§ 901. **Appropriations out of special funds.**—Street improvement bonds issued by agreement with a contractor to be paid “out of a special” fund, by warrants showing on their face that they are so payable, create a liability payable out of a particular fund, and not out of the treasury generally.¹²¹ It being shown in an action to collect the amounts due on certain county warrants that the special fund provided for the payment of these warrants had been illegally withdrawn and appropriated to other purposes by the county authorities, a proceeding by mandamus would be useless, and an action in assumpsit has been held maintainable.¹²² The fact that there is not quite enough money in a county treasury to pay the price of land legally purchased for a court-house is not ground for restraining such payment, where the deeds for the land have been accepted and filed for record; it appearing that, when the warrants were drawn, the county treasurer had stated to the county court that there was enough money to pay the appropriation, and the county court having the right to anticipate the revenue of the county to the extent of the revenue provided for that year.¹²³ Where a county court has ordered an appropriation for the construction of certain highway bridges, it may, before any contract or individual rights have become involved, rescind the order, if in the exercise of its discretion it deems the appropriation unwise.¹²⁴ It has been held in Connecticut that after appropriating a certain amount for the erection of a school-house, a vote, during the building, that a tax of two mills be laid and applied to building account, does not indicate that the town ratified expenditures beyond the amount first appropriated.¹²⁵ A city has

of a required tax at the time a contract for a bridge is made which is to be paid for in bonds is not required to render the bonds valid: *Wade v. Travis Co.*, 174 U. S. 499; s. c. 19 S. Ct. 715. Construction of ordinance as to payment of interest, —see *Barr v. City of Philadelphia*, 191 Pa. St. 438; s. c. 43 Atl. 335.

¹²¹ *Baker v. City of Seattle*, 2 Wash. 576; s. c. 27 Pac. 462. Indebtedness payable from a special fund can not be paid from another fund: *Affeld v. City of Detroit*, 112 Mich. 560; s. c. 71 N. W. 151. An appropriation for the contingent expenses of the law department can not be used to pay for services not rendered to that

department: *City of Chicago v. Williams*, 182 Ill. 135; s. c. 55 N. E. 123. Where there is an appropriation as a contingent fund for the expenses of a department no special appropriation is required to employ a stenographer to report police trials when police officers are defendants: *City of Chicago v. Williams*, 80 Ill. App. 33.

¹²² *Hockady v. Board &c.*, 1 Colo. App. 362; s. c. 29 Pac. 287.

¹²³ *Sheidley v. Lynch*, 95 Mo. 487; s. c. 8 S. W. 434.

¹²⁴ *Crittenden Co. v. Shanks*, 88 Ky. 475; s. c. 11 S. W. 468.

¹²⁵ *Turney v. Town of Bridgeport*, 55 Conn. 412; s. c. 12 Atl. 520.

no power to appropriate public money for the erection of a building to be used in part by a certain Grand Army post during its existence as an organization, since that is not a public use.¹²⁶

§ 902. Appropriations anticipating revenue.—A debt payable in the future, or payable upon a contingency or the happening of some event, such as the rendering of services or the delivery of property, as well as a debt payable presently and absolutely, is within the constitutional inhibition, it making no difference whether the debt be for current expenses or for something else. But appropriations may be made or warrants drawn upon the treasury in anticipation of taxes to be thereafter collected, provided the tax, at the time of appropriation, be actually levied, and the legal effect of the contract between the corporation and the individual, made at the time of the appropriation, be such that it shall operate to prevent any liability accruing on the contract against the corporation. Where a fund is provided to meet the same, the appropriation or warrant creates no liability, but one thing is simply exchanged for another.¹²⁷ The rule is thus stated in another case: A municipal corporation which has reached the constitutional limit of its power to create indebtedness may, when a tax is levied but not yet collected, draw against the fund thus levied and thus appropriate and virtually assign the amount specified in the warrant, and when collected the holder will have the right to receive it. But the corporation must be discharged, and the holder must look exclusively to the tax thus levied, and to the officers, for his pay.¹²⁸ But the procuring of “temporary loans” by the corporation, which would be payable at all events, would be the creation of corporate indebtedness, and, therefore, if in excess of the constitutional fund, not a permissible mode of anticipating such taxes.¹²⁹

¹²⁶ *Kingman v. City of Brockton*, 153 Mass. 255; s. c. 26 N. E. 998.

¹²⁷ This rule is laid down in *City of Springfield v. Edwards*, 84 Ill. 626. See also, as to the rule that when liabilities are created and appropriations are made which are within the limits of the revenue accruing to meet them, they are not debts within the meaning of the constitution, *Grant v. City of Davenport*, 36 Iowa 396; *Koppikus v. State Capitol Com'rs*, 16 Cal. 253; *State v. McCauley*, 15 Cal. 429, 455; *State v. Med-*

bery, 7 Ohio St. 522; *State v. Mayor &c.*, 23 La. An. 358. These cases maintain the doctrine that revenues may be appropriated in anticipation of their receipt, as effectually as when actually in the treasury; that the appropriation of moneys when received meets the services as they are rendered—thus discharging the liabilities as they arise, or rather anticipating and preventing their existence.

¹²⁸ *Law v. People*, 87 Ill. 385.

¹²⁹ *Law v. People*, 87 Ill. 385.

§ 903. **Special funds.**—Under the Texas statute which provides that cities shall have power “to provide by ordinance special funds for special purposes, and make the same disbursable only for the purpose for which the fund was created, and any officer of the city misappropriating such special fund shall be deemed guilty of malfeasance in office,” the city has no power to loan money realized from the sale of water-works bonds; and the bondsmen of a city treasurer are entitled to an injunction restraining him from carrying out an agreement to loan such fund.¹³⁰ Nor does another statute making it the “duty of the comptroller to see that a tax is levied and collected, * * * and to create a sinking fund,” authorize the loaning of money realized from the sale of water-works bonds as a sinking fund.¹³¹ Coal used in running draining-machines, and lumber in making repairs not capable of being identified as separate improvements, have been held not to be “permanent improvements” within the meaning of the Louisiana statute which required the city of New Orleans to set aside in each year twenty per cent. of her revenues of that year to pay for “permanent improvements.”¹³² Nor do those acts repeal the statute which provides that the city of New Orleans shall devote the revenues of each year to the expenses of that year; and debts for permanent improvements of one year can not legally be left unpaid and the “revenue fund” for that year applied towards paying for improvements made in a previous year.¹³³

§ 904. **The same subject continued—Construction of statutes.**—Where a council appropriates for a sewer a certain sum over and above the amount appropriated for that purpose by the appropriation bill of the preceding year, and the same is made on special assessment against certain property, but afterwards a new assessment is ordered and the excess is taken off of the said property and appropriated from the general fund, the property owners can not be heard to complain that the appropriation was not submitted to the electors of the city.¹³⁴ The Arkansas statute which provides that “no county court or agent of any county * * * shall make any contract on behalf of the

¹³⁰ *City of Bonham v. Taylor*, 81 Tex. 59; s. c. 16 S. W. 555.

¹³¹ *City of Bonham v. Taylor*, 81 Tex. 59; s. c. 16 S. W. 555.

¹³² *Barber Asphalt Paving Co. v. City of New Orleans*, 43 La. An. 464; s. c. 9 So. 484.

¹³³ *Barber Asphalt Paving Co. v. City of New Orleans*, 43 La. An. 464; s. c. 9 So. 484. The twenty per cent. reve-

nue for permanent improvements is made part of the budget by the statutes, and can be drawn against by special ordinances for permanent improvements during the year, although not made part. in express terms, of the annual budget of expenses.

¹³⁴ *Townsend v. City of Manistee*, 88 Mich. 408; s. c. 50 N. W. 321.

county unless an appropriation has been previously made therefor, and is wholly or in part unexpended," applies to contracts for building bridges; and the fact that an appropriation was made to pay for preliminary work in securing a bridge does not authorize the board of commissioners to let a contract for the building of a bridge before an appropriation has been made to pay for the same in whole or in part.¹³⁵ A creditor having a judgment against a city authorized by the constitution of its state to levy sufficient taxes to pay all legal debts is entitled to a mandamus to compel a sufficient levy to pay such judgment; and the fact that there are certain uncollected taxes levied for creditors generally does not limit the right of such creditor to a pro rata payment from such funds.¹³⁶ Under the statute of New York directing certain funds raised by taxes on the property in a city to be paid to the railroad commissioners, and by them applied to the interest on certain bonds, an indorsement to a bank by the railroad commissioners of an order for such fund drawn on the city treasurer by the city members of the board of county commissioners gives the bank no title to the fund, to authorize mandamus to the city treasurer to pay over the amount of the order.¹³⁷ Where an ordinance provides for the purchase of water-pipe, but not for payment, and afterwards a fund is raised to build reservoirs and purchase and lay water-pipes, the cost of the pipe is properly payable out of such fund.¹³⁸ Under the provision in the constitution of Arkansas that no county, city or town, or other municipal corporation, shall appropriate money or loan its credit to any corporation, institution or individual, the common council of a town has no power to appropriate money to aid the building of a court-house in such town.¹³⁹

§ 905. Statutory provisions further considered.—The code of Iowa provides that on final settlement with the supervisors of road districts the township trustees, if there shall be no money in the treasury, shall order the clerk to issue orders for the amount due with the number of the district to which they belong, which shall be received as money in payment of highway tax in such district. It also authorizes the trustees to levy a tax for township road funds, and requires them to set apart for the use of the whole township a sum sufficient to purchase tools, machinery and guide-posts. The supervisor of each dis-

¹³⁵ *Fones Hardware Co. v. Erb*, 54 Ark. 645; s. c. 17 S. W. 7.

¹³⁶ *Voorhies v. Mayor &c.*, 70 Tex. 331; s. c. 7 S. W. 679.

¹³⁷ *People v. Stupp*, 49 Hun (N. Y.) 544; s. c. 2 N. Y. S. 537.

¹³⁸ *Drhew v. City of Altoona*, 121 Pa. St. 401; s. c. 15 Atl. 636.

¹³⁹ *Russell v. Tate*, 52 Ark. 541; s. c. 13 S. W. 130.

trict is the collector of its road tax, and is not required to pay any part of it to the clerk, except that portion required for tools, etc. The balance must be expended exclusively in the district in which it is levied. It has been held that road orders given supervisors on general settlements for labor done in their respective districts, and not including outlay for tools, etc., can not be paid out of the general fund, but each must be confined to the particular district.¹⁴⁰ Under the South Carolina statute which provides that county commissioners shall not draw any checks for the payment of any claims until notified by the county treasurer that there are sufficient sums in the county treasury applicable to the payment thereof, the county commissioners have no authority to draw any check to pay the claim of a sheriff for feeding prisoners in jail until they receive such notice, even though there might be funds at the time applicable to some other object of county expenditure.¹⁴¹ A Nebraska statute provides that the city council of a city shall every year pass an ordinance—the “annual appropriation bill”—in which such corporate authorities may appropriate such sums of money as may be deemed necessary to defray all necessary expenses and liabilities, not exceeding in the aggregate the amount of tax to be levied during that year; and that no further appropriation shall be made during the fiscal year, unless the proposition therefor has been sanctioned by a majority of the legal voters. It has been held that where a proposition to borrow money for a specific purpose has been sanctioned by a majority of the legal voters, the money borrowed and placed in the treasury is appropriated to the purpose intended, and is subject to the disposal of the mayor and council without the ordinance mentioned in the act.¹⁴² Under the provision of the California constitution that no county shall incur any liability or indebtedness in any manner or for any purpose, exceeding in any year its annual revenues, except by authority of a two-thirds vote of the electors, it has been held that each year’s income and revenue is intended to pay each year’s indebtedness and liability, and no indebtedness or liability incurred in any one year should be paid out of the income or revenue of any future year.¹⁴³

§ 906. **Appropriations for schools.**—A Kentucky statute appropriated the fines and forfeitures recovered in the name of the common-

¹⁴⁰ *Bradley v. Love*, 76 Iowa 397; s. c. 41 N. W. 52.

¹⁴¹ *Hunter v. Mobley*, 26 S. C. 192; s. c. 1 S. E. 670.

¹⁴² *State v. Martin*, 27 Neb. 441; s. c. 43 N. W. 244.

¹⁴³ *Shaw v. Statler*, 74 Cal. 258; s. c. 15 Pac. 833. See also, *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641; *Schwartz v. Wilson*, 75 Cal.

wealth to the board of trustees of the town of Harrodsburg, to be expended on public improvements, and also legalized any previous appropriation of such funds by the trustees consistent with the statute, and not inconsistent with another statute which appropriated such funds to the common schools. It has been held that the statute did not legalize any previous appropriation of such money to any other purposes than common schools.¹⁴⁴ Under the provision of the constitution of Nebraska that "all fines, penalties and license moneys arising under the general laws of the state shall belong and be paid over to the counties, respectively, where the same may be levied or imposed," and shall be appropriated to the support of the schools of the respective subdivisions where the same may accrue, money received for a liquor license issued by a county board belongs exclusively to the support of the common schools of the county in which the license was issued, and not to the school district in which the liquors are sold.¹⁴⁵ The Florida statute providing that the county revenue collectors pay over to the treasurers of their respective counties all funds collected by them on account of the one-mill tax for the common schools, and that the said treasurers shall disburse such moneys as other school funds for school purposes are disbursed, has been held to be in contravention of that section of the constitution which provides that provision shall be made by law for the distribution of the common-school fund among the different counties in proportion to the number of children residing therein between the ages of four and twenty-one years,—this section including the one-mill tax and furnishing the method of its apportionment,—where another section of the constitution provides that the *interest* of the common-school fund shall be exclusively applied to school purposes.¹⁴⁶ A Nebraska village was partly in three school districts, the schoolhouse in each of said districts being outside of its corporate limits. The sum of one thousand dollars was received by the corporate authorities of that village for liquor licenses therein. It was held that under the provision of the constitution that license fees shall be used for the support of schools in the subdivision where they accrue, as the formation of the school districts was a power bestowed on the county superintendent, the presumption was that the districts were so formed for the convenience of

¹⁴⁴ Board of Trustees v. Harrodsburg Educational Dist., 9 Ky. L. 605; s. c. 7 S. W. 312.

¹⁴⁵ State v. Fenton, 29 Neb. 348; s. c. 45 N. W. 464. Where portions of three school districts are within the limits of an incorporated village,

the moneys received by the village authorities for liquor licenses will be equally divided between such districts: State v. White, 29 Neb. 288; s. c. 45 N. W. 631.

¹⁴⁶ State v. Barnes, 22 Fla. 8.

the pupils, or to include taxable property, or both causes combined, and were entitled to an equal division of the money.¹⁴⁷ The statute of Indiana providing that before a trustee of a township shall incur, on behalf of his township, debts exceeding the fund on hand, and to be derived from "the tax assessed against his township for the year in which such debt is to be incurred," he shall procure an order from the county commissioners authorizing such indebtedness, which shall not be granted until he shall file in the auditor's office a petition setting forth the purposes for which the indebtedness is to be made, of which he shall have given notice, has been held to apply to expenses for the furniture of a schoolhouse.¹⁴⁸

§ 907. The same subject continued.—The charter of Long Island City provides that a sum equal to the estimate of the board of education, not exceeding three-fourths of one per cent. on the valuation of taxable property, shall be apportioned for school purposes, and paid by the city treasurer on drafts drawn by the board. The common council appropriated fifty thousand dollars for work in certain schoolhouses, and the board drew warrants against such appropriation. It was held to be the duty of the city treasurer to pay such warrants out of moneys of the board in his hands until the aggregate of the drafts on the fund should reach the amount of the limitation.¹⁴⁹ Where it is provided by statute that warrants issued under it "shall show upon their face that they are payable solely from said taxes when collected and not otherwise," there is a sufficient compliance with the statute when the warrants read that they are "payable only from the appropriation of the taxes * * * appropriated and levied for the street-light fund when collected."¹⁵⁰ A Nevada act authorizing a transfer of surplus money remaining in the railroad interest and sinking fund of a county to the school fund has been held to authorize the transfer of moneys to the school fund that were due the railroad interest and sinking fund at the time of its passage, though they were not then actually in the hands of the treasurer.¹⁵¹ Nor was that act repealed by the statute of Nevada of 1881, page 32, authorizing the county commissioners to transfer surplus moneys

¹⁴⁷ *State v. Brodboll*, 28 Neb. 254; s. c. 44 N. W. 186.

¹⁴⁸ *Jefferson School Tp. v. Litton*, 116 Ind. 467; s. c. 19 N. E. 323.

¹⁴⁹ *Pierce Mfg. Co. v. Bleckwenn*, 16 N. Y. S. 768; s. c. 62 Hun (N. Y.) 265. See also, *People v. Kelly*, 76 N. Y. 475.

¹⁵⁰ *City of East St. Louis v. Flannigan*, 36 Ill. App. 50, holding warrants drawn for gas furnished after a tax levy against a fund appropriated for that purpose valid.

¹⁵¹ *State v. Commissioners*, 17 Nev. 96; s. c. 28 Pac. 122.

from one fund to another, and to "transfer the same back to the fund or funds from which such surplus money was taken."¹⁵²

§ 908. **Budget.**—The Illinois statute requiring cities to pass appropriation ordinances within the first quarter of each fiscal year does not apply to a city organized under a special charter requiring no such ordinance.¹⁵³ An Illinois statute provides that city councils shall pass an annual appropriation bill within the first quarter of each fiscal year. Such a bill was passed by the city council on the last day of the quarter. Afterwards one of the items was vetoed by the mayor and passed again by the council for a less sum, whereupon the bill was duly approved by the mayor. It was held that the bill had been passed within the first quarter.¹⁵⁴ A Colorado statute provides that city councils or boards of trustees of towns shall, during the last quarter of each fiscal year, pass an annual appropriation bill for the next fiscal year, which shall specify the purposes of the appropriations; and that no other appropriations shall be made unless the question is submitted to a popular vote, and that no more shall be appropriated than the estimated revenue for the year. The records of the town being carelessly kept, parol evidence was introduced that such ordinance was passed by the requisite majority on the call for yeas and nays; that it contained amounts for different purposes, including streets, but the amount could not be shown; and that the witness believed that the street appropriation was left contingent on the vote of the people. This was held not sufficient evidence of a compliance with the statute and of the appropriation for street purposes.¹⁵⁵ It has been held that the statute of Louisiana providing that the council of New Orleans shall not, on any pretext, appropriate funds for the government of the corporation to the full extent of the revenues, but shall reserve twenty per cent. of the revenues with sums, etc., from miscellaneous or contingent sources for permanent public improvements, did not make any exception in favor of a paving contractor, to relieve him from the force of the statute depriving the state courts of authority to enforce payment of a claim against the city not reduced to judgment by mandamus to its fiscal officers so as to enable him to coerce the comptroller to issue his warrant, the treasurer to pay it, and the council and these officers to set apart twenty per cent. of the revenues collected for the year, and to confine appropriations for other purposes than public improvements to

¹⁵² *State v. Commissioners*, 17 Nev. 96; s. c. 28 Pac. 122.

¹⁵⁴ *King v. City of Chicago*, 111 Ill. 63.

¹⁵³ *Culbertson v. City of Fulton*, 127 Ill. 30; s. c. 18 N. E. 781.

¹⁵⁵ *Sullivan v. City of Leadville*, 11 Colo. 483; s. c. 18 Pac. 736.

twenty per cent. of such revenues; since the "revenues" mentioned in the act are not those actually collected, but those estimated in the budget for the year, which is to be formed on the basis of all necessary expenses of the year with the addition of the twenty per cent. authorized by section 66 for public improvements.¹⁵⁶

§ 909. **Annual appropriations.**—The provision of the charter of a city in Connecticut which calls for an annual classified appropriation by the council of amounts deemed necessary for the expenses of the various departments of the city government, and forbids any city or department officer or board to exceed such appropriations, has been held to be intended for the protection of the city against its officers, and not to prevent the city itself, through the council, from incurring additional expenditures not provided for by annual appropriations.¹⁵⁷ Nor does the statute of Connecticut providing for the punishment of any agent or executive officer of any community who shall wilfully authorize or contract for the expenditure of any money or the creation of any debt in excess of appropriations prohibit incurring expenditures not provided for by the annual appropriations.¹⁵⁸ The provisions of the Nebraska statute limiting the power of a city council to appropriate money to the annual appropriation bill and to such sums as in the aggregate shall not exceed the amount of tax authorized to be levied during that year do not apply to money authorized to be borrowed by such city for a specific purpose, and where a proposition to apply the same thereto has been sanctioned by a majority of the legal voters of such city, either by a petition signed by them, or at a general or special election duly called therefor.¹⁵⁹

§ 910. **Appropriation of taxes to sinking fund.**—The failure of a county treasurer to set apart the moneys received by him for taxes on a certain railroad as a sinking fund for the redemption of township aid bonds, as required by the statutes of New York, does not give rise to the presumption that he misappropriated the funds in the absence of proof that any part of them has ever been used for any purpose

¹⁵⁶ *State v. Board &c.*, 40 La. An. 298; s. c. 3 So. 584.

¹⁵⁷ *Whitney v. City of New Haven*, 58 Conn. 450; s. c. 20 Atl. 666.

¹⁵⁸ *Whitney v. City of New Haven*, 58 Conn. 450; s. c. 20 Atl. 666.

¹⁵⁹ *State v. Martin*, 27 Neb. 441; s. c. 43 N. W. 244, in which a mandamus was issued to compel the mayor to sign a warrant on this money to

pay an amount for which a claim for constructing water-works had been compromised; the court holding that the power to compromise and settle claims of that kind existed in the mayor and city council of cities in their legislative capacity, growing out of their general corporate powers and the necessities of such cases.

whatever; but the presumption is that they have gone into the general fund of the county, especially where that has always been considerably in excess of the railroad taxes.¹⁶⁰ The fact that no taxes were specially raised to redeem the township aid bonds, and to create a sinking fund, will not affect the duty of the county treasurer so to apply the taxes paid by the railroad company, as the law itself makes the appropriation.¹⁶¹ Where the railroad taxes have remained in the county treasurer's hands without misappropriation, the duty imposed on him by statute to use them as a sinking fund for the redemption of the township aid bonds is continuous; and hence the statute of limitations has no application to an action to compel him so to do, nor is it necessary that the particular moneys paid by the railroad company should be identified.¹⁶² The fact that the predecessors of the treasurer failed to make the appropriation of the railroad taxes required by law, and paid them over to their successors in office, will not excuse the treasurer from making the appropriation, as he holds the money by virtue of his office and subject to the duties imposed on him by law.¹⁶³

§ 911. **Validity of appropriations.**—The subject of appropriation of public funds is one of such importance and public interest that, usually, there are to be found charter or statutory provisions in relation to the manner of making, the formalities to be pursued, the time when to be made, and other particulars, all designed to conserve the public interests and protect public funds from illegal expenditure. Where the statute requires all ordinances and resolutions appropriating or expending moneys to be passed in a certain way, or by a certain vote, it is essential to the validity that it be done.¹⁶⁴ Where the statute provides that an appropriation shall specify the amount for each purpose an appropriation for the purpose of paying salaries and defraying the expense of erecting, completing and installing an electric light plant, without specifying how much is for each, is void.¹⁶⁵ A statute prohibiting the making of contracts for an improvement unless an appropriation shall have been made therefor does not preclude the making of a contract where the appropriation may be provided

¹⁶⁰ *Spaulding v. Arnold*, 125 N. Y. 194; s. c. 26 N. E. 295; affirming s. c. 6 N. Y. S. 336. *Matter of Clark v. Sheldon*, 106 N. Y. 104; s. c. 12 N. E. 341.

¹⁶¹ *Spaulding v. Arnold*, 125 N. Y. 194; s. c. 26 N. E. 295.

¹⁶² *Spaulding v. Arnold*, 125 N. Y. 194; s. c. 26 N. E. 295.

¹⁶³ *Spaulding v. Arnold*, 125 N. Y. 194; s. c. 26 N. E. 295. See also,

¹⁶⁴ *Higgins v. San Diego Water Co.*, 118 Cal. 524; s. c. 45 Pac. 824; 50 Pac. 670; *Suburban Electric Co. v. City of Elizabeth*, 59 N. J. L. 134; s. c. 36 Atl. 673.

¹⁶⁵ *Engstad v. Dinnie*, 8 N. D. 1; s. c. 76 N. W. 292.

for in the general appropriation bill enacted during the first quarter of the fiscal year in which the contract is made.¹⁶⁸ The common council of the city of Chicago has power to change the fiscal year, and may properly make appropriations at the beginning of such new fiscal year, but it shall not have the power of making two fiscal years out of one or more than one fiscal year out of each current year.¹⁶⁷

§ 912. **Appropriations held to be void.**—The following are instances in which appropriations have been held void: Appropriation for the expenses of a committee to attend a convention of American municipalities;¹⁶⁸ to reimburse tax collectors for money lost by failure of bank;¹⁶⁹ appropriations in the city of New Orleans to pay debts of previous years.¹⁷⁰ Where a city has on hand and under its control a fund at the time of making an indebtedness, from which it intends the indebtedness shall be paid, the debt is valid although not paid from the fund.¹⁷¹ After an appropriation for a department has been made a committee of the council in charge of that department may incur debts and audit bills to be paid out of the appropriation.¹⁷² Light and water for a municipal corporation constitute current expense, payable from current revenue.¹⁷³

(c) UNLAWFUL EXPENDITURES.

§ 913. **The New York statute providing for investigation.**—Unlawful expenditures are not those resulting from errors of judgment

¹⁶⁸ *City of Danville v. Danville Water Co.*, 180 Ill. 235; s. c. 54 N. E. 224.

¹⁶⁷ *First Nat'l Bank v. Keith*, 183 Ill. 475; s. c. 56 N. E. 179.

¹⁶⁹ *Waters v. Bonvouloir*, 172 Mass. 286; s. c. 52 N. E. 500.

¹⁶⁸ *Mercer v. Floyd*, 53 N. Y. S. 433; s. c. 24 Misc. (N. Y.) 164.

¹⁷⁰ *Badger v. City of New Orleans*, 49 La. An. 804; s. c. 21 So. 870. The constitution of California prohibits municipalities making gifts of public money, and statute of 1895, p. 107, providing relief for disabled firemen, is void: *Taylor v. Mott*, 123 Cal. 497; s. c. 56 Pac. 256; *Conlin v. Board &c.*, 99 Cal. 17; s. c. 33 Pac. 753; *Bourn v. Hart*, 93 Cal. 321; s. c. 28 Pac. 951; *Patty v. Colgan*, 97 Cal. 251; s. c. 31 Pac. 1133. Under the cities, villages and

towns act, ch. 24, a town can not contract an indebtedness to be paid out of the general fund without first having made an appropriation therefor: *Village of Marysville v. Schoonover*, 78 Ill. App. 189; *City of Chicago v. Shober &c. Co.*, 6 Ill. App. 560.

¹⁷¹ *Winston v. City of Ft. Worth (Tex.)*, 47 S. W. 740.

¹⁷² *Pope Mfg. Co. v. Granger*, 12 R. I. 298; s. c. 43 Atl. 590.

¹⁷³ *Foland v. Town of Frankton*, 142 Ind. 546; s. c. 41 N. E. 1031. Construction of laws of Mo. 1860-61, in relation to appropriations: *State v. Mason*, 153 Mo. 23; s. c. 54 S. W. 524. Construction of Ill. Rev. St., ch. 24, art. 7, § 1, in reference to appropriations: *City of Danville v. Danville Water Co.*, 180 Ill. 235; s. c. 54 N. E. 224.

or unbusiness-like methods whereby public moneys are wasted, under the statute of New York providing "for the summary investigation of unlawful and corrupt expenditures by officers of towns or incorporated villages and for restraining the same."¹⁷⁴ It has been held that the before-mentioned statute is remedial and must be liberally construed.¹⁷⁵ Also that it is not material in a proceeding under that act that bills, payment of which is sought to be restrained, have been audited by the town board.¹⁷⁶ Nor does the fact that petitioners have other remedies affect their right to a summary investigation, as the statute specifically gives them this remedy.¹⁷⁷ Under the New York statute providing that the village street commissioners shall employ some one to cut weeds growing in the streets, provided the occupants of premises abutting thereon shall fail to do so within a specified time after written notice, the village trustees can not be held liable for unlawful expenditure of public moneys in having weeds cut from the streets, unless it appears that they did so without notice to the occupants of the abutting premises.¹⁷⁸ Proof that men employed to do public work did not work full time will not sustain a charge that the village trustees were guilty of unlawful expenditures where it appears that the trustees did not know this, and that the men worked well when the trustees were present and were idle when the trustees were temporarily absent.¹⁷⁹ Where a committee appointed by a town to procure plans and contract for the erection of a schoolhouse at a cost not to exceed a fixed sum authorized expenditures in excess of that sum, the town is not liable for such excess.¹⁸⁰ And the taking possession and use by a town of a schoolhouse erected on its land is not such a ratification of unauthorized expenditures in its erection as to make the town liable therefor.¹⁸¹ And a person contracting with the committee of a town to erect a schoolhouse, excepting certain parts, for an agreed price, in doing extra work under the direction of the committee is bound to take notice of the amount the committee were authorized to expend and of the price to be paid for the parts excepted.¹⁸² A taxpayer can not be relieved

¹⁷⁴ *In re East Syracuse*, 20 Abb. N. C. (N. Y.) 131.

¹⁷⁵ *In re Town of Eastchester*, 53 Hun (N. Y.) 181; s. c. 6 N. Y. S. 120.

¹⁷⁶ *In re Town of Eastchester*, 53 Hun (N. Y.) 181; s. c. 6 N. Y. S. 120.

¹⁷⁷ *In re Town of Eastchester*, 53 Hun (N. Y.) 181; s. c. 6 N. Y. S. 120.

¹⁷⁸ *In re East Syracuse*, 20 Abb. N. C. (N. Y.) 131.

¹⁷⁹ *In re East Syracuse*, 20 Abb. N. C. (N. Y.) 131.

¹⁸⁰ *Turney v. Town of Bridgeport*, 55 Conn. 412; s. c. 12 Atl. 520.

¹⁸¹ *Turney v. Town of Bridgeport*, 55 Conn. 412; s. c. 12 Atl. 520.

¹⁸² *Turney v. Town of Bridgeport*, 55 Conn. 412; s. c. 12 Atl. 520.

from the payment of taxes on the ground that they are being improperly expended by the authorities.¹⁸³

(d) CLAIMS.

§ 914. **Presentation of claims for allowance.**—In most of the states there exist charter or statutory provisions requiring the presentation of claims against the municipality for allowance or rejection, either to the city council, an auditing board, or some other designated body, within a specified time after the claim has matured, or injury occurred. These statutes are so dissimilar and the decisions based thereon so lacking in harmony that no rules of general application can be derived therefrom. The wisdom and necessity for some stringent statutory regulation of the character indicated, and particularly so in matters of personal injury, is well recognized by all. It is a matter of common observation to every one conversant with municipal government in large cities that the prosecution of personal injury cases, usually for alleged injury from defective sidewalks, is a vast and fruitful field, and opportunity for the perpetration of fraud is abundant. To meet evils of this nature the legislature in many states has wisely adopted safeguards, more or less stringent, and designed to protect the city from imposition and fraud. It has sometimes been made a condition precedent that persons having claims against the municipality shall present them for allowance within the time specified, or be barred from future action. The proper presentation, substantially in the mode specified, is made mandatory,¹⁸⁴ and where this is true defects in the notice can not be cured by amendments after suit,¹⁸⁵ or at least such statutes are to be strictly construed.¹⁸⁶ Where the statute requires all demands against a city to be presented to and audited by the board of trustees failure so to demand damages for maintaining a nuisance is fatal to suit. In such case torts as well as contracts are covered by the statute.¹⁸⁷ But where a written claim is presented to the council as required by the city charter an action is not barred by reason of the claimant's at-

¹⁸³ *Anderson v. City of Mayfield*, 93 Ky. 230; s. c. 19 S. W. 598.

¹⁸⁴ *Trost v. City of Casselton*, 8 N. D. 534; s. c. 79 N. W. 1071.

¹⁸⁵ Defects in notice can not be cured after the suit is brought where the notice is a condition precedent to the action: *Maloney v. Cook*, 21 R. I. 471; s. c. 44 Atl. 692.

¹⁸⁶ *McDonald v. City of New York*, 59 N. Y. S. 16; s. c. 42 App. Div. (N. Y.) 263.

¹⁸⁷ *Adams v. City of Modesto*, 131 Cal. 501; s. c. 61 Pac. 957. That such statutes are a condition precedent to suit, see *Morgan v. City of Rhinelander*, 105 Wis. 138; s. c. 81 N. W. 132; *Kellogg v. Mayor &c.*, 44 N. Y. S. 39; s. c. 15 App. Div. (N. Y.) 326; *City of Ft. Worth v. Shero*, 16 Tex. Civ. App. 487; s. c. 41 S. W. 704.

torney not producing further witnesses of the transaction as promised.¹⁸⁸

§ 915. Notice—Sufficiency, etc.—The notice is sufficient if it gives facts sufficient to enable the city to investigate the claim.¹⁸⁹ The purpose being to give the city the time, circumstances, and items that make up the claim, the notice should be precise, definite and in no matter misleading. But it must be understood of course that the notice, in the nature of things, can not have the precision of a formal pleading, and mere irregularities will not invalidate it. Where a claim is not properly verified and may be rejected on that ground in thirty days, if not rejected on that ground in that time it will be deemed sufficient.¹⁹⁰ Notice required to be verified is sufficient if the notary's certificate states that the party was sworn though the notice was unsigned.¹⁹¹ Where the statute requires notice to be served on the corporation counsel and it was served on the city comptroller, who sent it to the corporation counsel, who filed it in his office and acted on it, it is a sufficient compliance.¹⁹² A claim properly presented but not forwarded by the officer is not a defense. The sufficiency of the notice, it being a written instrument, is a question of law for the court.¹⁹³

§ 916. Notices which have been held sufficient or insufficient.—Notice stating that an injury was caused by a defective cross-walk and the complaint describing the place where the injury occurred as a sidewalk, is an immaterial variance.¹⁹⁴ Notice is sufficient where the injury claimed is "severe and permanent injury to my head and body," where the injury is to the eye.¹⁹⁵ Notice is sufficient although it contains no express statement of an intention to sue, where it is entitled in the matter of the claim of plaintiff against the city and declares that the plaintiff claims and demands from the city damages for personal injuries and is signed by plaintiff and attorneys with

¹⁸⁸ *Monje v. City of Grand Rapids*, 122 Mich. 645; s. c. 81 N. W. 574.

¹⁸⁹ *Place v. City of Yonkers*, 60 N. Y. S. 171; s. c. 43 App. Div. (N. Y.) 380.

¹⁹⁰ *Sweet v. City of Buffalo*, 158 N. Y. 695; s. c. 53 N. E. 1132.

¹⁹¹ *Place v. City of Yonkers*, 60 N. Y. S. 171; s. c. 43 App. Div. (N. Y.) 380.

¹⁹² *Misano v. Mayor &c.*, 160 N. Y. 123; s. c. 54 N. E. 744.

¹⁹³ *McDonald v. City of New York*, 59 N. Y. S. 16; s. c. 42 App. Div. (N. Y.) 263; *Trost v. City of Casselton*, 8 N. D. 534; s. c. 79 N. W. 1071.

¹⁹⁴ *Piper v. City of Spokane*, 22 Wash. 147; s. c. 60 Pac. 138.

¹⁹⁵ *Place v. City of Yonkers*, 60 N. Y. S. 171; s. c. 43 App. Div. (N. Y.) 380.

post-office address in formal legal proceedings.¹⁹⁶ Formalities required by law in the presentation of claims against a municipality may be waived.¹⁹⁷ The statute usually designates the person on whom the notice shall be served or with whom filed. Where the charter requires notice to be served on the street commissioner, or sidewalk superintendent, or alderman of the ward, service on the mayor and city clerk is not sufficient.¹⁹⁸

§ 917. **Statute applies to claims for tort.**—In the absence of an express provision in the charter it is not settled whether the presentation and allowance of claims based on tort is intended to be included. It has been held that a charter provision that no suit shall be maintained on account of a claim until such claim shall be presented to the council has no reference to actions *ex delicto*.¹⁹⁹ On the other hand it has been held that a statute requiring all claims to be presented to the city council within six months in cases of negligence or default applies to claims for personal injury.²⁰⁰

§ 918. **Decision based upon notice not final.**—Unless there is an express provision making it so, and the validity of such a provision may well be doubted, the provision of a charter requiring claims to be presented to village trustees for audit and allowance does not render their decision final.²⁰¹ There is usually found a provision for appeal, and where such provision exists it must be strictly followed and is not subject to waiver by city officers.²⁰²

¹⁹⁶ *Sheehy v. City of New York*, 160 N. Y. 139; s. c. 54 N. E. 749.

¹⁹⁷ *Kriseler v. Le Valley*, 122 Mich. 576; s. c. 81 N. W. 580.

¹⁹⁸ *Harris v. City of Fond du Lac*, 104 Wis. 44; s. c. 80 N. W. 66. As to the sufficiency of the notices in various particulars, see *Small v. Town of Prentice*, 102 Wis. 256; s. c. 78 N. W. 415; *Coleman v. City of Fargo*, 8 N. D. 69; s. c. 76 N. W. 1051; *Kennedy v. City of New York*, 54 N. Y. S. 261; 34 App. Div. (N. Y.) 311; *City of Lincoln v. O'Brien*, 56 Neb. 761; s. c. 77 N. W. 76; *Piper v. City of Spokane*, 22 Wash. 147; s. c. 60 Pac. 138; *Maloney v. Cook*, 21 R. I. 471; s. c. 44 Atl. 692; *Currier v. Concord*, 68 N. H. 294; s. c. 44 Atl. 386; *Hutchings v. Inhabitants &c.*, 90 Maine 131; s. c. 37 Atl. 883; *Spaulding v. Village of Waverly*, 44

N. Y. S. 112; s. c. 12 App. Div. (N. Y.) 594; *Bacon v. City of Antigo*, 103 Wis. 10; s. c. 79 N. W. 31; *La Flamme v. City of Albany*, 158 N. Y. 699; s. c. 53 N. E. 1127; *Roberts v. Village of St. James*, 76 Minn. 456; s. c. 79 N. W. 519; *Lyons v. City of Red Wing*, 76 Minn. 20; s. c. 78 N. W. 868; *Kelly v. City of Minneapolis*, 77 Minn. 76; s. c. 79 N. W. 653.

¹⁹⁹ *Snyder v. City of Albion*, 113 Mich. 275; s. c. 71 N. W. 475. Cf. *Jones v. City of Albany*, 151 N. Y. 223; s. c. 45 N. E. 557; *Giffen v. City of Lewiston (Idaho)*, 55 Pac. 545.

²⁰⁰ *Davidson v. City of Muskegon*, 111 Mich. 454; s. c. 69 N. W. 670.

²⁰¹ *Port Jervis Water Works Co. v. Village of Port Jervis*, 151 N. Y. 111; s. c. 45 N. E. 388.

²⁰² *Oshkosh Water-Works Co. v. City of Oshkosh*, 106 Wis. 83; s. c.

§ 919. **Miscellaneous matters concerning presentation.**—Where a charter provides that a claim not acted on within sixty days after presentation shall be deemed disallowed, the allowance after that time is a nullity.²⁰³ A claim acted on warrants a presumption that another claim under the same contract and presented at the same time has been presented in sufficient time to be acted on.²⁰⁴ The officer to whom claims are required to be presented is not estopped to show that they were not properly presented.²⁰⁵ The declarations of a clerk as to the reasons of the council for refusing payment are not binding on the city.²⁰⁶ To excuse a failure to give notice required by statute there must be such physical or mental incapacity to make it impossible for the injured person to procure the notice to be served.²⁰⁷ Where claims against a city are required to be verified by the claimant or his agent the husband of the claimant may do so as agent.²⁰⁸ The statute applies to infants as well as adults.²⁰⁹

§ 920. **Interest on claims.**—A city is not liable for interest on claims against it in the absence of a contract for interest except where the money has been wrongfully obtained and illegally withheld.²¹⁰ Not so, however, where the money has been wrongfully obtained and illegally withheld.²¹¹ In the absence of an agreement a city is not chargeable with interest on a claim.²¹² An express pro-

81 N. W. 1040. As to the time for appeal from disallowance of claim allowed by council but vetoed by the mayor, see *Oshkosh Water-Works Co. v. City of Oshkosh*, 106 Wis. 83; s. c. 81 N. W. 1040.

²⁰³ *State v. Bardon*, 103 Wis. 297; s. c. 79 N. W. 226.

²⁰⁴ *Ludington Water Supply Co. v. City of Ludington*, 119 Mich. 480; s. c. 78 N. W. 558.

²⁰⁵ *McDonald v. City of New York*, 59 N. Y. S. 16; s. c. 42 App. Div. (N. Y.) 263.

²⁰⁶ *Brush & Co. v. City Council &c.*, 114 Ala. 433; s. c. 21 So. 960.

²⁰⁷ *Barclay v. City of Boston*, 167 Mass. 596; s. c. 46 N. E. 113. Costs not awarded to plaintiff where notice of claim not presented as required by law: *Brewster v. City of Hornellsville*, 54 N. Y. S. 915; s. c. 35 App. Div. (N. Y.) 161.

²⁰⁸ *City of Ottawa v. Black*, 10 Kan. App. 439; c. c. 61 Pac. 985.

²⁰⁹ *Donovan v. City of Oswego*, 59 N. Y. S. 759; s. c. 42 App. Div. (N. Y.) 539. Minn. Laws of 1897 construed with reference to claims, in *Doyle v. City of Duluth*, 74 Minn. 157; s. c. 76 N. W. 1029.

²¹⁰ *Vider v. City of Chicago*, 164 Ill. 354; s. c. 45 N. E. 720.

²¹¹ *La Salle Co. v. Simmons*, 5 Gilm. (Ill.) 513. Or where there has been a breach of trust: *Pike Co. v. Hosford*, 11 Ill. 170; *City of Pekin v. Reynolds*, 31 Ill. 529; *City of Chicago v. People*, 56 Ill. 327; *Friend v. City of Pittsburgh*, 131 Pa. St. 305; s. c. 18 Atl. 1060; *Donnelly v. City of Brooklyn*, 121 N. Y. 9; s. c. 24 N. E. 17. The allowance is governed by the same rules that apply to individuals: *Shipley v. Hacheney*, 34 Or. 303; s. c. 55 Pac. 971.

²¹² *City of Danville v. Danville Water Co.*, 180 Ill. 235; s. c. 54 N. E. 224.

vision of the statute is necessary to entitle a municipal treasurer to the interest on public funds.²¹³

§ 921. Compromise of claims.—A city having the right to sue and be sued may compromise suits against it,²¹⁴ or claims.²¹⁵ An action against a city on an improvement contract may be settled by the corporation counsel with the approval and advice of the city authorities.²¹⁶ Where it is sought to show in an action to recover for a violation of a city ordinance a release by the city attorney it must be shown that he had authority from the council.²¹⁷ A settlement by the corporation counsel with the advice and approval of the corporate authorities is valid.²¹⁸ But a compromise by the mayor and finance committee is not valid until ratified by the council.²¹⁹ In such case the adoption of an ordinance carrying out the terms of a compromise of a litigation effected by the mayor and finance committee and appropriating money for such purpose is a ratification.²²⁰ The power of the comptroller of New York City to settle and adjust claims does not deprive the corporation counsel of such power.²²¹ An assignment of a claim against a city is not binding on the latter unless it assents.²²²

§ 922. Presentation of claims continued.—In presenting a claim all that is required is a detailed statement of the items and their dates when necessary to their proper identification.²²³ An account rendered against a county by a county assessor for services of a clerk, F., in the following form: "County of A. to F., Dr.: Services: Assessment, 1886, June, 16 days, \$6, \$96,"—F. being a clerk of defendant,—is "itemized," as required by the statute of Colorado.²²⁴ A voucher "for current expenses of the police department \$200, police and all other salaries and current expenses," approved by the board of police commissioners, and duly certified by its president and secretary, has been held not to be "in proper and fully itemized form"

²¹³ *Incorporated Village of Inglehart v. Glenville*, 19 Ohio C. C. 285.

²¹⁴ *City of San Antonio v. San Antonio St. R. Co.*, 22 Tex. Civ. App. 148; s. c. 54 S. W. 281.

²¹⁵ *O'Brien v. Mayor &c.*, 55 N. Y. S. 50.

²¹⁶ *O'Brien v. Mayor &c.*, 57 N. Y. S. 1039.

²¹⁷ *City of Marshall v. Cleveland &c. R. Co.*, 80 Ill. App. 531.

²¹⁸ *O'Brien v. Mayor &c.*, 160 N. Y. 691; s. c. 55 N. E. 1098.

²¹⁹ *City of San Antonio v. San Antonio St. R. Co.*, 22 Tex. Civ. App. 148; s. c. 54 S. W. 281.

²²⁰ *City of San Antonio v. San Antonio St. R. Co.*, 22 Tex. Civ. App. 148; s. c. 54 S. W. 281.

²²¹ *Bush v. Coler*, 53 N. Y. S. 679.

²²² *Cook v. City of Menasha*, 103 Wis. 6; s. c. 79 N. W. 26.

²²³ *Board &c. v. Wertz*, 112 Ind. 268; s. c. 13 N. E. 874.

²²⁴ *Roberts v. People*, 9 Colo. 458; s. c. 13 Pac. 630.

which would authorize the auditor of the city to audit and allow it.²²⁵ A written order of a county auditor directing the county commissioners to pay one a certain sum for "clerical services rendered in his office from July 1 to November 20, 1875," on which the commissioners simply made an indorsement "examined and approved," was held not to be an audit of an itemized and verified account as required by law.²²⁶ The provisions of the code of Iowa requiring the presentation of unliquidated demands to the board of supervisors before suit can be brought thereon against a county are applicable to actions for infringement of patent rights.²²⁷ The bonds and notes of a county issued for loans authorized by law are not open accounts for county charges which must be presented to the board for audit.²²⁸ The certificate of the judge of the district court that a claim for compensation to counsel appointed by such court to conduct the defense of a person charged with felony has "been examined and allowed by the court" is not conclusive upon the county commissioners as to the amount which should be allowed for such services. They may re-examine the account, and allow so much as they may think just.²²⁹

§ 923. The same subject continued.—A charter of a city provided that an action against the city could not be maintained until the demand had been presented to the council, and it had had reasonable time to investigate and pass on it. It has been held that a person had waited long enough who did not bring a suit until more than two months after presenting his claim, during which time the council had had four meetings, at which no action was taken in regard to the claim.²³⁰ The claim of a purchaser of land at a tax sale against a county, under the Nebraska revenue law making the county liable to the purchaser at a tax sale of land which was not subject to taxation for the amount paid by him with interest, is a claim within the statute of Nebraska requiring claims against a county to be presented to the county board, and giving a right of appeal to the district court in case it is disallowed by the board.²³¹ The filing of a sworn statement with a board of supervisors by a county superintendent, of the time he has been engaged in discharge of his duties and his necessary expenses, etc., authorized by the code of Iowa, has been

²²⁵ *State v. Smith*, 89 Mo. 408; s. c. 14 S. W. 557.

²²⁶ *State v. Appleby*, 25 S. C. 100.

²²⁷ *May v. Cass Co.*, 30 Fed. 762; following *May v. Buchanan Co.*, 29 Fed. 469.

²²⁸ *Parker v. Board &c.*, 106 N. Y. 392; s. c. 13 N. E. 308.

²²⁹ *Boone Co. v. Armstrong*, 23 Neb. 764; s. c. 37 N. W. 626.

²³⁰ *Whitney v. City of Port Huron*, 88 Mich. 268; s. c. 50 N. W. 316.

²³¹ *Fuller v. Colfax Co.*, 33 Neb. 716; s. c. 50 N. W. 1044.

held not to be conclusive upon the board, and that the board have a right to examine it the same as other claims.²³² The statute of Florida providing that every claim against any county in the state shall be presented to the board of county commissioners within one year from the time it became due or it shall be barred does not apply to orders or warrants drawn by the commissioners on the county treasury, but only to such claims as have never been presented, audited or allowed.²³³ Minutes of a meeting of a town board, not held at the time or place prescribed by law for the auditing or allowing of claims, nor at a time or place to which a regular meeting had been adjourned, are inadmissible to establish a claim audited at such meeting.²³⁴ It has been held that under the New York statute requiring all claims against a town to be audited by the town board, and the statute providing that such claims must, for that purpose, be presented in items and verified by the oath of a creditor, the treasurer of Queens county could not pay himself, out of the trust funds in his hands and fees allowed by statutes, for striking off lands to a town at a sale for taxes, without a previous audit of his claim.²³⁵ Interest will begin to run on a claim against a municipal government only from the time of a demand for payment.²³⁶ A complaint alleging presentation of the claim sued for to the board of supervisors, an affidavit accompanying the claim, which was for a certain number of dollars, that it "is true and correct and that the same is due and owing from the county to defendant," substantially complies with the provisions of the California statute requiring an allegation of the presentation of the claim to the board of supervisors, together with an affidavit "that the amount claimed is fully due," as a condition precedent to maintaining an action therefor.²³⁷ A complaint in an action against a county which fails to state that the claim on which it is based has been presented to the county court and disallowed as required by statute has been held to be bad on demurrer.²³⁸ The general statute of Arkansas requiring ordinary demands against counties to be authenticated when presented for allowance in the county court has no application to a demand the right to sue for which is given by special act.²³⁹ Where

²³² *Bean v. Board &c.*, 51 Iowa 53; s. c. 49 N. W. 1049.

²³³ *Johnson v. Wakulla Co.*, 28 Fla. 720; s. c. 9 So. 690.

²³⁴ *Jackson v. Collins*, 41 N. Y. St. 590; s. c. 16 N. Y. S. 651.

²³⁵ *Warrin v. Baldwin*, 105 N. Y. 534; s. c. 12 N. E. 49.

²³⁶ *Donnelly v. City of Brooklyn*, 7 N. Y. 49.

²³⁷ *Rhoda v. Alameda Co.*, 69 Cal. 523; s. c. 11 Pac. 57.

²³⁸ *Fenton v. Salt Lake Co.*, 4 Utah 466; s. c. 11 Pac. 611.

²³⁹ *Perry Co. v. Conway Co.*, 52 Ark. 430; s. c. 12 S. W. 877, an action by one county against another, which had received a detached portion of its territory, to recover its proportion of the indebtedness of the

a board of county commissioners, upon the advice of competent attorneys, allow certain claims which are not strictly legal charges against the county, their official action in so doing will not render them liable to the charge of corruption or forfeiture of office, if the allowances were honestly made and the board acted merely upon a mistake or error of law as to the liability of the county.²⁴⁰

§ 924. The same subject continued—Verification of claim.—A claim for damages for personal injuries is a "claim" within the meaning of the consolidation act of New York City, authorizing the comptroller to require any person presenting for settlement an account or claim against the corporation to be sworn before him as to any facts relative to its justness.²⁴¹ Under a charter requiring that all claims against the city for injuries shall be presented to the comptroller, duly verified, it is sufficient, in the absence of objection, if the original claim, signed and verified, is shown to the comptroller and a copy left with him.²⁴² The mayor is under no legal duty to sign a warrant for the payment of a bill against the city which is passed by the common council without being sworn to as required by the charter.²⁴³ Under the California statute providing that a demand against the city treasury shall be barred unless "presented for payment, properly audited, within one month after such demand became due and payable; or, if it be a demand which has to be passed and approved by the board of supervisors," etc., "then within one month after the next regular session of the board held next after the demand accrued," etc.,—a claim for a salary, due at the end of each month, having never been presented for payment, nor presented to the board of supervisors, is barred after the lapse of one month.²⁴⁴ In an action against a city of the third class for services, where the evidence shows that the claim was presented to the council and referred to a committee, who reported in favor of the allowance of part of the claim, the claimant will be presumed to have complied with the Kansas statute requiring claims to be presented in writing with a full account of the items, and sworn to be correct, reasonable and just.²⁴⁵

§ 925. Presentation of claims for injuries.—A claim for damages against a municipal corporation arising from negligence does not come within the New York statute which provides that "costs can not

plaintiff which the special act provided it should pay.

²⁴⁰ *State v. Scates*, 43 Kan. 330; s. c. 23 Pac. 479.

²⁴¹ *In re Dasent*, 2 N. Y. S. 609.

²⁴² *Magee v. City of Troy*, 48 Hun

383; s. c. 1 N. Y. S. 24.

²⁴³ *State v. Daly*, 50 N. J. L. 356; s. c. 13 Atl. 6.

²⁴⁴ *Ames v. City of San Francisco*, 76 Cal. 325; s. c. 18 Pac. 397.

²⁴⁵ *City of Enterprise v. Fowler*, 38 Kan. 415; s. c. 16 Pac. 703.

be awarded to the plaintiff in an action against a municipal corporation in which the complaint demands a judgment for a sum of money only, unless the claim upon which the action is founded was, before the commencement of the action, presented for payment to the chief fiscal officer of the corporation."²⁴⁶ The failure to give the notice required by the Wisconsin statute to be given to the city authorities within ninety days after the happening of injuries resulting from a defect in a street, in order to entitle the party injured to recover against the city, will not defeat an action brought by an administrator to recover against the city for damages for death from injuries resulting from such a defect, when the death occurs within ninety days from the happening of the injury.²⁴⁷ A court held pursuant to adjournment is not a new term, but a continuance of the former term; and it may, under the New Hampshire statute authorizing it, "at the trial term thereof," to allow the required statement to be filed with the city clerk, allow a statement of claim against a city for injuries caused by a defective way to be filed at such adjourned session.²⁴⁸ A claim against a village for injuries sustained by reason of the non-repair of a street is not required to be presented to and acted on by village auditors as preliminary to bringing suit, under the New York statutes making such requirement with reference to "all claims and demands of every name and nature," enumerating, as included therein, those contracted or authorized by village boards and officers.²⁴⁹ A claim for damages for an injury sustained by reason of a defective way, or other tort, is not required to be presented to the common council, although the charter of a city gives to that body the exclusive power to make appropriations, and provides that "no claim against the city" shall be paid until it is audited and allowed by the common council.²⁵⁰ Under the Massachusetts statute which requires the service of a notice by a person claiming compensation for injuries caused by a defect in a highway on "the mayor, the city clerk, or the treasurer," a notice handed by the person injured to an alderman, who caused it to be acted upon by the board of aldermen, after which it was delivered to the city clerk in the regular course of the business of the board, is sufficiently served.²⁵¹ The notice to the town council re-

²⁴⁶ *Gage v. Village of Hornellsville*, 106 N. Y. 667; s. c. 12 N. E. 817; *Hunt v. City of Oswego*, 107 N. Y. 629; s. c. 14 N. E. 97.

²⁴⁷ *McKeigue v. City of Janesville*, 68 Wis. 50; s. c. 31 N. W. 298.

²⁴⁸ *Eastman v. Concord*, 64 N. H. 263; s. c. 8 Atl. 822.

²⁴⁹ *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459; s. c. 11 N. E. 43.

²⁵⁰ *Sheridan v. City of Salem*, 14 Or. 328; s. c. 12 Pac. 925.

²⁵¹ *Wormwood v. City of Waltham*, 144 Mass. 184; s. c. 10 N. E. 800.

quired by the Rhode Island statute before bringing an action against the town is sufficient, in case of a claim for unliquidated damages, if it states the facts from which the claim arises, though it does not state the amount of the claim.²⁵²

§ 926. Presentation as a condition precedent to right of action.—

Where a charter of a city requires all claims against it for personal injuries to be submitted to the council in writing and that the law department shall consider such claim and report thereon to the council within three months from the date of reference, the presentation of such claim to the council and an opportunity to investigate the same are conditions precedent to the right to maintain an action thereon; and such an action, brought within the three months, without allegations or proof to show lack of diligence in the law department, or any matter affording ground for curtailing the statutory period, can not be sustained.²⁵³ The Arizona statute provides that all claims against a county must be duly presented to the board of supervisors in writing; in another place that "the board may allow the claim in part and draw a warrant for the portion allowed on the claimant's signing a receipt in full for his account;" again, that a claimant dissatisfied "with the amount allowed him on his account may sue the county therefor." Where a board allowed a claimant's claim in part, issued a warrant therefor and entered into a written agreement with him whereby he should receive the warrant and receipt for the same without affecting his right to the further amount not allowed, it was held that the claimant, having accepted an allowance of part of his claim, had no right of action for the balance, the agreement being void.²⁵⁴ An action will not lie against a county in Arizona for a claim until after it is presented for allowance.²⁵⁵ A counter-claim arising under a special act providing that a county should pay to the treasurer of another county formerly a part of it a share of the taxes collected in 1886 within thirty days after the return of the delinquent list has been held not subject to an objection that the claim was not presented to the county board before action was brought for the

²⁵² *Burdick v. Richmond*, 16 R. I. 502; s. c. 17 Atl. 917. The court said:—"The manifest purpose of the statute is to enable the town council to investigate the claim, and to afford them an opportunity to settle it without subjecting the town to the expense of a suit. If, therefore, the facts upon which the claim arises are set forth in the notice with suf-

ficient fulness and particularity to enable the town council to make such investigation, the purpose of the statute is answered."

²⁵³ *Jones v. City of Albany*, 17 N. Y. S. 232.

²⁵⁴ *Yavapai County v. O'Neil* (Ariz.), 29 Pac. 430.

²⁵⁵ *Yavapai County v. O'Neil* (Ariz.), 29 Pac. 430.

balance due the new county.²⁵⁶ Where the trustees of a township have considered a claim of a physician under a statute which makes the township liable for relief afforded by him to the poor "only in such amount as the trustees determine to be just and reasonable," and acting in good faith have rejected it, no action can be maintained against the township.²⁵⁷ The laws of New York (sec. 1104, ch. 410, Laws 1882) respecting the presentation of claims against the city of New York to the comptroller for adjustment before bringing suit only apply to such claims as can be prosecuted in the state courts by the actions or proceedings mentioned in section 1103.²⁵⁸

§ 927. **Allowance of claims.**—The board of supervisors of a county in passing upon a claim against the county act as a quasi-judicial body, and their allowance and settlement of the claim is an adjudication which is conclusive.²⁵⁹ It is the duty of a board of supervisors to allow a claim against a county where the amount is undisputed, and its refusal to do so is not a mere error of law, but a breach of duty which the courts will remedy by mandamus.²⁶⁰ It was held in Wisconsin that where the action of a county board in allowing a claim against a county is intended ultimately to charge a liability on one of the towns within the county, the town has a right to insist on a substantial compliance with the statute which requires the claimant to file with the county clerk an itemized account stating separately the nature and amount of each item.²⁶¹ It is for the board of county commissioners to fix the time and place where they will consider claims against the county and hear the proof, giving only such notice of their time and place of sitting as occurs in the course of their proceedings, and parties having claims must present due proof thereof, an affidavit that an account is just not being sufficient.²⁶² Under the criminal code of Kansas it has been held that the board of county commissioners may allow a moderate compensation for medical services, fuel, bedding and medical attendance furnished for prisoners

²⁵⁶ *Lincoln Co. v. Oneida Co.*, 80 Wis. 267; s. c. 50 N. W. 344.

²⁵⁷ *Trustees v. White*, 48 Ohio St. 577; s. c. 29 N. E. 47. The court said:—"The right of the claimant, in the first instance, is to have the board determine what is just and reasonable; when that is determined the amount so ascertained constitutes the legal demand against the township. If nothing is found due, then no legal claim exists." See *Commissioners v. Ranney*, 13 Ohio

St. 388; *Commissioners v. Osborn*, 46 Ohio St. 271; s. c. 20 N. E. 333.

²⁵⁸ *Gamewell Fire & Co. v. Mayor & Co.*, 31 Fed. 312.

²⁵⁹ *Placer Co. v. Campbell* (Cal.), 11 Pac. 602; following *Colusa Co. v. De Jarnett*, 55 Cal. 373.

²⁶⁰ *People v. Board & Co.*, 56 Hun (N. Y.) 459; s. c. 10 N. Y. S. 88.

²⁶¹ *Outagamie Co. v. Town of Greenville*, 77 Wis. 165; s. c. 45 N. W. 1090.

²⁶² *Hickey v. Board & Co.*, 62 Mich. 94; s. c. 28 N. W. 771.

committed to the county jail, which shall be paid out of the county treasury; but the allowance of such claims is wholly discretionary with the county board, and the liability of the county for the same can only arise upon an order made by the county commissioners when duly convened and acting as a board.²⁶³ Under the California statute known as the "Consolidation Act," which provides that any person may appeal from the rejection of his claim by the county auditor to the county board, whose decision thereon shall be final, a writ of mandate may be issued against the auditor to pay a claim allowed by the county board on appeal from a rejection by him, though the rejection may have been justified on its first presentation.²⁶⁴

§ 928. The same subject continued—Procedure.—The Dakota statutes which provide for an appeal from the action of a board of county commissioners in regard to the allowance of claims presented for payment do not give the adverse decision of such a board the force and effect of a final judgment, so as to enable it to be pleaded in bar of an action on such claim.²⁶⁵ On appeal from the decision of a board of county commissioners in South Carolina refusing to allow a claim, the decision was reversed by the circuit court and the case remanded to the board for further hearing, upon the ground that "it appeared that the respondents did not require such further evidence of the truth and propriety of the charges of the appellant as is required by law." It was held that the provision of the statute designating the method of allowing claims by county commissioners is only permissive and not mandatory as to requiring further evidence, and an omission to require it is not an error of law.²⁶⁶ A New York statute authorizes the board of town auditors to audit and allow "the account of all charges and claims payable by their respective towns." Another statute authorizes the board of supervisors "to audit the accounts of town officers and other parties against their respective towns, and to direct the raising of such sums as may be necessary to defray the same." It has been held that their jurisdiction to audit accounts against the town being concurrent, the supervisors could not allow accounts after they had been rejected by the auditors on their merits, though they might allow claims presented in proper form which had been rejected by the auditors because "not itemized."²⁶⁷ A claim by

²⁶³ *Hendricks v. Board &c.*, 35 Kan. 483; s. c. 11 Pac. 450.

²⁶⁴ *Falk v. Strother*, 84 Cal. 544; s. c. 22 Pac. 676.

²⁶⁵ *Spencer v. Sully Co.*, 4 Dak. 474; s. c. 33 N. W. 97.

²⁶⁶ *Green v. County Com'rs*, 27 S. C. 9; s. c. 2 S. E. 618.

²⁶⁷ *McCrea v. Chahoon*, 54 Hun (N. Y.) 577; s. c. 8 N. Y. S. 88.

a sole commissioner of highways for money expended in repairing bridges without the authority of the board of auditors, as required by the New York statute, but which the board has audited and allowed, may, on being again presented by the commissioner, be re-examined and passed on by the board.²⁶⁸ A county board of supervisors can not review an audit after the roll has been signed and the warrant delivered.²⁶⁹ A petition to the county commissioners is filed when presented to the chairman in the presence of the full board with the request that it be filed, although it is not indorsed by the clerk as filed for an hour afterwards.²⁷⁰

§ 929. The same subject continued—Adjudication by the board.—

While commissioners, in passing upon claims against a county, act judicially, it is not essential or even proper for them to enter a formal judgment after the manner of courts of law. It is sufficient if it appear that the claim was duly presented, and that it was allowed or rejected.²⁷¹ Mandamus will issue in a proper case to compel a county board to act upon a claim against the county where final action has been refused; but in a proceeding in mandamus the court will not determine the validity of any offset set up by the county.²⁷² To authorize an appeal from the action of a county board in allowing or rejecting claims against the county, it must appear from the proceedings of the board that they have taken final action upon such claim by either allowing or rejecting the same in whole or in part.²⁷³ Under the California statute providing that gas inspectors "shall be entitled to a salary to be paid and allowed" by the board of supervisors, a claim for such salary need not be presented to the auditor.²⁷⁴ A local Pennsylvania statute fixes the pay of Fayette county auditors at three dollars per day, but gives them no mileage. Another statute fixes the pay of county auditors throughout the state at three dollars per day with a certain allowance of mileage. It has been held that Fayette county auditors are not entitled to mileage under the latter.²⁷⁵ Where a statute providing for a boundary commission and the auditing of the expenses of a survey defining the boundary lines between certain counties authorized this commission to ascertain the expense, and to certify the amount to the county commissioners, when it is so

²⁶⁸ *People v. Barnes*, 114 N. Y. 317, 330; s. c. 21 N. E. 739.

²⁶⁹ *People v. Board &c.*, 34 Hun (N. Y.) 266.

²⁷⁰ *City of Brockton v. Cross*, 138 Mass. 297.

²⁷¹ *Black v. Commissioners &c.*, 8 Neb. 440; s. c. 1 N. W. 144.

²⁷² *State v. Slocum*, 34 Neb. 368; s. c. 51 N. W. 969.

²⁷³ *State v. Slocum*, 34 Neb. 368; s. c. 51 N. W. 969.

²⁷⁴ *Ames v. City of San Francisco*, 76 Cal. 325; s. c. 18 Pac. 397.

²⁷⁵ *Morrison v. Fayette Co.*, 127 Pa. St. 110; s. c. 17 Atl. 755.

ascertained and certified the county commissioners have no power to review the action of the boundary commission or to demand from the surveyor an itemized bill of such expenses.²⁷⁶ The allowance of a claim by a city council, with the condition annexed to it, "to be paid when there is money in the treasury to pay with," is binding on the city, and the condition will not defeat an action to recover a judgment thereon.²⁷⁷ The allowance of a claim by less than a quorum of a city council is validated by a resolution at a subsequent full meeting adopting, ratifying and confirming the proceedings of the prior meeting.²⁷⁸

§ 930. Conclusiveness of adjudication.—The powers and duties of a board of supervisors are executive, not judicial, and its allowance of a claim is not an adjudication and does not bar it from contesting the validity of the claim, and pleading the statute of limitations when a mandamus is applied for to compel payment.²⁷⁹ In the absence of fraud or collusion, and where there has been a substantial compliance with the statute, the allowance by a county board of the accounts of commissioners to review the equalization of assessments of a town for their services and expenses is binding upon the town which is

²⁷⁶ *Kornburg v. Board &c.*, 10 Mont. 325; s. c. 25 Pac. 1041.

²⁷⁷ *National Lumber Co. v. City of Wymore*, 30 Neb. 356; s. c. 46 N. W. 622.

²⁷⁸ *Curtis v. Gowan*, 34 Ill. App. 516.

²⁷⁹ *Board &c. v. Catlett*, 86 Va. 158; 9 S. E. 999, where a claim of an agent appointed by a county court in 1863, for an agreed compensation, was presented and allowed in 1871, but not paid, and in 1873 was disallowed. In 1887 a mandamus was applied for to compel its payment. It was held that the claim was barred by the lapse of five years between its accrual and the filing of the application. See also, as to powers of boards in such matters, *Abernathy v. Phifer*, 84 N. C. 711, holding that an allowance of a claim by a county board was not final and conclusive, and that it may be re-examined by the board itself; *Gurnee v. Brunswick Co.*, 1 Hughes 270, where Chief Justice Waite said:—"The board are the representatives of the people

elected to supervise the business of the county, which has been by law committed to their care. They constitute a branch of the executive department, not of the judiciary. . . . When an account is presented to them, it is for allowance, not for adjudication. In settling and allowing they do not act judicially. . . . Their duties are purely administrative." See, to the same effect, opinion of Judge Dillon in *Shirk v. Pulaski Co.*, 4 Dill. 209, ruling that an allowance by a board of supervisors did not estop the county from setting up a defense to the claim when subsequently sued upon it. See also, *Webster Co. v. Taylor*, 19 Iowa 117; *Clark v. City of Des Moines*, 19 Iowa 199; *Clark v. Polk Co.*, 19 Iowa 248; *School District v. Lombard*, 2 Dill. 493; *Commissioners &c. v. Keller*, 6 Kan. 510; *Goodnow v. Board &c.*, 11 Minn. 31; 1 Dillon Munic. Corp., § 412; *Mayor &c. v. Ray*, 19 Wall. 468; *High Extr. Leg. Rem.*, § 354.

chargeable therewith.²⁸⁰ But if such accounts are not properly itemized, as required by the Wisconsin statute, their allowance by the county board is not binding upon such town.²⁸¹ An account for "seventy days' service as commissioner, \$280;" and one for "fifty days' service of livery for commissioners, at \$4.50-\$225," it appearing that such services were performed between May 9 and August 8, 1888, were held to have been sufficiently itemized, although they did not give the date of each day's service. But an account for "hotel expenses and railroad fare, etc., \$171.42," was held not sufficiently itemized.²⁸² And such commissioners being empowered to conduct their proceedings "after the usual manner of a judicial hearing," may, within reasonable limits, make a view of the real estate in a county, and are properly entitled to their per diem and necessary expenses while so engaged.²⁸³

§ 931. Proceedings after disallowance of claim.—Claims for damages for torts against a city are not embraced in the words "claim or demand" in the statutes which are to be allowed or disallowed by a common council and an appeal allowed therefrom. Certain steps are to be taken under the statute which are a condition precedent to a right of action for a tort; but when a "claim or demand" arising *ex contractu* is disallowed, by an appeal only is the action maintained on it.²⁸⁴ And though a circuit court may have jurisdiction of the subject-matter and of the person by the consent of the parties in such an appeal, it should dismiss the appeal where it has not obtained jurisdiction over it in accordance with the statute.²⁸⁵ In a case where a physician sued a county for a medical bill, it was argued that the evidence did not support the verdict because it failed to show a pre-

²⁸⁰ *Outagamie Co. v. Town of Greenville*, 77 Wis. 165; s. c. 45 N. W. 1090.

²⁸¹ *Outagamie Co. v. Town of Greenville*, 77 Wis. 165; s. c. 45 N. W. 1090.

²⁸² *Outagamie Co. v. Town of Greenville*, 77 Wis. 165; s. c. 45 N. W. 1090.

²⁸³ *Outagamie Co. v. Town of Greenville*, 77 Wis. 165; s. c. 45 N. W. 1090.

²⁸⁴ *Vogel v. City of Antigo*, 81 Wis. 642; s. c. 51 N. W. 1008. See also, *Bradley v. City of Eau Claire*, 56 Wis. 168; s. c. 14 N. W. 10; *Kelley v. City of Madison*, 43 Wis. 638; *Rugles v. City of Fond du Lac*, 53 Wis. 436; s. c. 10 N. W. 565. In *Sheel v. City of Appleton*, 49 Wis. 125; s. c. 5 N. W. 27, the decision to the con-

trary was based altogether on the broad words in the charter as to submitting to the council for allowance or disallowance "claims or demands of any kind whatever, whether arising from contract or otherwise," which this court held to embrace torts.

²⁸⁵ *Vogel v. City of Antigo*, 81 Wis. 642; s. c. 51 N. W. 1008. See also, *Plano Mfg. Co. v. Rasey*, 69 Wis. 246; s. c. 34 N. W. 85; *Fleming v. City of Appleton*, 55 Wis. 90; s. c. 12 N. W. 462; *Watson v. City of Appleton*, 62 Wis. 267; s. c. 22 N. W. 475.

sentation to the board of commissioners and a disallowance by them before suit brought. To this the court said: "This relates solely to the matter of jurisdiction, and the presumption in favor of the jurisdiction of the circuit court is such in all cases as to cast the burden of its overthrow upon him who denies it."²⁸⁶

§ 932. Malfeasance in overallowance.—The statute of Kansas providing that the compensation of each county commissioner for attending the regular and special meetings of the board shall not exceed \$100 in any one year does not prevent the members of the board of county commissioners from charging additional compensation while attending meetings to equalize assessments, to levy taxes or to canvass the returns of elections; and an indictment of a county commissioner for receiving for his services more than \$100, and the testimony offered in support thereof, should show that such compensation was received by him only for attending the regular and special meetings of the board.²⁸⁷ An indictment of defendant, as chairman of a board of county commissioners, for unlawfully, wilfully and corruptly voting for and allowing a claim against the county in a larger sum than was due is not sustained by testimony showing that all the members of the board voted for and allowed the claim in the proper sum, but that the chairman, without any other vote or direction, issued a county warrant for more than the amount so allowed.²⁸⁸

§ 933. Proper and improper charges against a county.—A county has been held liable in an action on a claim of its county clerk for money paid out by him for the service of assistants in bringing up the work of his office neglected by his predecessor, under the code of Iowa, which provides that "when a county officer receiving a salary is compelled by the pressure of the business of his office to employ a deputy the board of supervisors may make a reasonable allowance to such deputy."²⁸⁹ When a statute made it the duty of the collector

²⁸⁶ Board &c. v. Osburn, 4 Ind. App. 590; s. c. 31 N. E. 541; Bass Foundry v. Board &c., 115 Ind. 234, 239; s. c. 17 N. E. 593; Board &c. v. Leggett, 115 Ind. 544; s. c. 18 N. E. 53.

²⁸⁷ State v. Corning, 44 Kan. 442; s. c. 24 Pac. 966. See also, Burroughs v. Board &c., 29 Kan. 196.

²⁸⁸ State v. Corning, 44 Kan. 442; s. c. 24 Pac. 966. See also, State v. Spidle, 44 Kan. 439; s. c. 24 Pac. 965, holding that where an indictment charged the defendant, a mem-

ber of the board of county commissioners, with corruptly voting for and allowing a claim in a sum too large, it was error to permit the introduction of evidence to prove that a warrant had been issued in payment of said claim in a sum larger than the amount of the claim as allowed without proving that the defendant voted to issue the warrant for said larger sum.

²⁸⁹ Gamble v. Marion Co., 85 Iowa 675; s. c. 52 N. W. 556; following

of taxes to execute deeds of lands struck off to a territory at tax sales without charge, the fees of a notary public for certifying the acknowledgment of such deeds were held not to be a proper charge against the county.²⁹⁰ It is not error to refuse an attorney's application for allowance of a fee against the county for services in a suit wherein the county tax collector was a party, it not being shown that he was appointed by order of the court, under the Arkansas statute providing for an allowance to the collector for attorney's fees and expenses incurred in defending suits against him for performing his duty.²⁹¹ Services performed at the request of a judge of a county, acting as a committing magistrate, in taking testimony in the case of the state against another party, do not constitute a claim against the county; and a judgment rendered against the county in a justice's court upon such a claim, where it has not appeared and answered in the action, will be reversed on writ of review.²⁹² A board of county supervisors which has provided suitable accommodation for the surrogate can not be compelled to pay for other accommodations.²⁹³

§ 934. The same subject continued.—On appeal from a decision of the board of county commissioners allowing a claim for services voluntarily rendered in constructing a public levee, it is a question of law for the court to determine upon all the facts whether the decision appealed from made an allowance for voluntary services, which is within the discretion of the board, and from which no appeal lies.²⁹⁴ The county court (which is in Arkansas the ruling power in county government) has no authority to order the payment in advance of any part of the amount contracted to be paid for the building of a courthouse or jail before any part of the contract is performed.²⁹⁵ And

Harris v. Chickasaw Co., 77 Iowa 345; s. c. 42 N. W. 313.

²⁹⁰ *Heney v. Pima Co.* (Ariz.), 17 Pac. 263.

²⁹¹ *Simmes v. Chicot Co.*, 50 Ark. 566; s. c. 9 S. W. 308.

²⁹² *Union Co. v. Slocum*, 16 Or. 237; s. c. 17 Pac. 876.

²⁹³ *People v. Board &c.*, 34 Hun (N. Y.) 599.

²⁹⁴ *Gemmil v. Arthur*, 125 Ind. 258; s. c. 25 N. E. 283, it being held that where parties voluntarily constructed a levee on private property subsequently dedicated to the public, the power of the board of county commissioners to reimburse them de-

pended wholly upon whether the board could have employed them to do the work at the time it was done, and unless it had power to do so its allowance of a claim for such services was illegal, however beneficial the work may have been to the public; and any taxpayer feeling aggrieved might have relief by appeal. See as to allowances, where the boards could have constructed, *Waymire v. Powell*, 105 Ind. 328; s. c. 4 N. E. 886; *Miller v. Embree*, 88 Ind. 133.

²⁹⁵ *Armstrong v. Truitt*, 53 Ark. 287; s. c. 13 S. W. 934. See also, *Shirk v. Pulaski Co.*, 4 Dill. 209;

a taxpayer has a right to appeal from an order to pay in advance for such work, as it would amount to an allowance by the county authorities.²⁹⁶ The statute of Iowa names the June meeting of each even-numbered year as the date of fixing the salary of county attorneys by the supervisors of counties. It has been held that where an order increasing such salary has been adopted, any resident and taxpayer of a county might maintain an action by certiorari to reverse such order.²⁹⁷ The fact that services performed by a county auditor may be regarded by him and by the board of commissioners as "extra services" does not warrant the board in allowing him compensation beyond that provided for by statute.²⁹⁸ It has been further held that a county auditor was not entitled to compensation from the county for filing papers.²⁹⁹ The Missouri constitution and the charter of St. Louis prohibiting the increasing of an officer's salary during his term have been held to apply to the assessor and collector of water rates, and to the time during which he holds over after the expiration of his four years' term.³⁰⁰

§ 935. Apportionment of indebtedness upon division of a county.—

Wisconsin statutes authorized a certain county to borrow of the trust fund of the state money to aid the construction of a railroad, payable in fifteen annual instalments. The railroad company was required to pay into the state treasury a percentage of its gross earnings in lieu of license fees, the amount to be credited on the county loan. By statute a new county was formed out of part of this county, the public property divided, and the county railroad loan apportioned; new certificates of indebtedness to the state being issued. No provision as to the apportionment of the amount paid into the treasury by the railroad company was made. It was held that the sum should be apportioned between the counties in the ratio of the portions of debt assumed by each.³⁰¹ Where a county court of a county in Arkansas from which another was afterwards formed had directed commissioners to pay certain proportions of the contract price for building a jail as the work progressed, until the "walls were up and the building inclosed," and to retain the balance until its completion, and at the time when the county was divided the building was inclosed, it was

Desha Co. v. Newman, 33 Ark. 788; ²⁹⁸ *Board &c. v. Johnson*, 127 Ind.

Goyne v. Ashley Co., 31 Ark. 552; 238; s. c. 26 N. E. 821.

State v. Hinkle, 37 Ark. 532. ²⁹⁹ *Stiffler v. Board &c.*, 1 Ind. App.

²⁹⁶ *Armstrong v. Truitt*, 53 Ark. 368; s. c. 27 N. E. 641.

287; s. c. 13 S. W. 934. ³⁰⁰ *State v. Smith*, 87 Mo. 158.

²⁹⁷ *Goetzman v. Whitaker*, 81 Iowa 527; s. c. 46 N. W. 1058. ³⁰¹ *State v. Harshaw*, 73 Wis. 211; s. c. 40 N. W. 641.

held to be a fair inference, in ascertaining the amount of indebtedness to be apportioned between a new and the old county, that the amount authorized to be paid for the jail up to that time had been paid, though the commissioners' report was not filed until two months after the division, and failed to show the date of payments.³⁰² Under the constitution of Colorado providing that, "in all cases of the establishment of new counties, the new county shall be held to pay its ratable proportion of all the then existing liabilities of the county or counties from which such new county shall be formed," the legislature may itself ascertain or determine what such ratable portion is, but it is eminently proper to remit the matter to the local authorities.³⁰³ A Montana statute creating a new county from two old counties apportioned a part of the debt of one of the latter to the new county, amounting to \$30,000, and provided that commissioners of the new county should cause to be issued at their first regular session warrants on the general fund for said amount; which warrants, if not paid when presented to the treasurer, should be indorsed, "Not paid for want of funds," and thereafter bear interest; or the commissioners "may issue coupon bonds of said county, bearing interest at not more than six per cent. per annum, payable in seven years, and due in fifteen years, in payment of said debt, and to pay current expenses for the first year. Said bonds shall not be sold for less than par, and shall be issued as near as may be in conformity with general law." It was held that the statute did not give the commissioners of the new county the right to elect to pay the indebtedness by issuing coupon bonds and turning them over to the old county in payment; but if they elected to issue coupon bonds, they were required to negotiate them, and pay the proceeds to the old county.³⁰⁴

§ 936. **Claims of contractors for extra work.**—Contractors constructing a free gravel road on a contract with the board of commissioners of a county, who with their engineer made a change of contract which necessitated extra work done at their request, can recover of the county for such extra work. And such action can not be resisted on the ground that the board had no authority to change the contract.³⁰⁵ The court said: "It has been held that even where the cost of an improvement is to be paid directly by property owners, the municipal authorities have some discretion as to directing changes in the contract, or in the mode of doing the work; and as shown in the

³⁰² *Hempstead Co. v. Howard Co.*, 51 Ark. 344; s. c. 11 S. W. 478.

³⁰³ *In re House Bill No. 231*, 9 Colo. 624; s. c. 21 Pac. 472.

³⁰⁴ *Territory v. Board &c.*, 8 Mont. 396; s. c. 20 Pac. 809.

³⁰⁵ *Board &c. v. Newlin*, 132 Ind. 27; s. c. 31 N. E. 465.

cases referred to, this discretion must necessarily exist, or the work may become utterly valueless because of some unforeseen cause."³⁰⁶ Under the statutory provisions in Indiana it has been repeatedly held that a contractor with a municipality may be paid for extra work in cases where it becomes necessary and is properly ordered.³⁰⁷ The claim of a contractor for extra work in constructing a gravel road does not constitute a general debt of a county.³⁰⁸ But while this is true it is also true that where the contractor shows that the board made a contract with him, that he performed his part of the contract, and that the board refused payments for the sum due, a *prima facie* case is stated.³⁰⁹

§ 937. Claims for services to indigent persons.—A bill of items of services presented to a board of county commissioners in South Carolina by a physician enumerated several examinations of persons for lunacy, but the verification thereof did not state that such persons were paupers, nor that the examinations were made at the request of the proper officers. It was held that the bill was properly rejected by the commissioners.³¹⁰ A physician attended a boy who had been injured by a railroad train, and the boy being unable to pay the railroad company refused to pay the physician's bill. The bill was approved as correct by two justices of the peace, and the physician sued the poor district. It was held that the physician was entitled to recover from the district compensation for his services.³¹¹ A and B, physicians, rendered medical and surgical services to indigent persons in a county in cases of emergency. A also had a contract with a railroad company to attend professionally persons injured on the railroad within certain limits, "if called upon by the general su-

³⁰⁶ *Board &c. v. Newlin*, 132 Ind. 27; s. c. 31 N. E. 465. See *Sims v. Hines*, 121 Ind. 534; s. c. 23 N. E. 515, where it was held that the governing body of a city may, within reasonable limits, modify and change contracts for the improvement of streets: *Board v. Silvers*, 22 Ind. 491; *Hellenkamp v. City of La Fayette*, 30 Ind. 192; *Ross v. Stackhouse*, 114 Ind. 200, 203; s. c. 16 N. E. 501; *Elliott Roads & Streets* (2d ed.), § 531.

³⁰⁷ *Board &c. v. Fullen*, 111 Ind. 410; s. c. 12 N. E. 298; *Spidell v. Johnson*, 128 Ind. 235; s. c. 25 N. E. 889; *Martin v. Neal*, 125 Ind. 547, 555; s. c. 25 N. E. 813; *Rogers v.*

Voorhees, 124 Ind. 469, 471; s. c. 24 N. E. 374; *Board v. Fullen*, 118 Ind. 158; s. c. 20 N. E. 771; *Board v. Hill*, 115 Ind. 316; s. c. 16 N. E. 156; *Board v. Fahlor*, 114 Ind. 176; s. c. 15 N. E. 830.

³⁰⁸ *Strieb v. Cox*, 111 Ind. 299; s. c. 12 N. E. 481; *Vigo Tp. v. Board &c.*, 111 Ind. 170; s. c. 12 N. E. 305; *Spidell v. Johnson*, 128 Ind. 235; s. c. 25 N. E. 889.

³⁰⁹ *Board &c. v. Newlin*, 132 Ind. 27; s. c. 31 N. E. 465.

³¹⁰ *Green v. County Commissioners*, 27 S. C. 9; s. c. 2 S. E. 618.

³¹¹ *Poor District v. Byers* (Pa.), 11 Atl. 242.

perintendent or officer or employe representing it." A and B charged the county with the cases to which they had attended. The county claimed that it was not liable for services rendered in those cases of injuries incurred on the railroad. It was held liable for services rendered to all persons in the county, except such as A had been called upon to attend by the general superintendent, officer or employe of the railroad company.³¹² When a husband abandons his wife she becomes the head of the family, and aid furnished to her children at her request is aid furnished to her, and chargeable to the town of her settlement.³¹³ A wife can not recover of a town for the support of her husband's father, who lived in the family, where the town, with her knowledge and consent, paid her husband by the month for such support, it appearing that her services were rendered on account of her husband and as his wife.³¹⁴ A village organized under the general laws of Wisconsin which makes no provision for the support of the poor therein is liable to the town in which it is situated for certain license moneys received, under the Wisconsin statute which provides that "all such license moneys received by any village which under its charter does not provide for the support of the poor therein shall be paid to the town treasurer of the town in which the village is situated."³¹⁵ County superintendents of the poor are bound to pay for the services of an attorney employed by them in bastardy proceedings. They have no power to audit and cut down a reasonable charge, notwithstanding their general power to audit claims.³¹⁶

§ 938. Proceedings to enforce payment of judgments.—A judgment against the city of New Orleans, reversible only in an appellate court, and not affected by any appeal, either suspensive or devolutive, was, within the two years allowed by the United States statute for writ of error, capable of registration under the act of the legislature of Louisiana abolishing execution against the city, and submitting therefor registration, since execution might have issued thereon before the act.³¹⁷ If a county court in Missouri, in levying and collecting a tax to pay a judgment obtained against the county, does not proceed in the manner in which it is by statute required to do in such cases, the judges may be enjoined. The fact that the levy is being made

³¹² *Directors of Poor v. Donnelly* (Pa.), 7 Atl. 204.

³¹³ *Town of Rockingham v. Springfield*, 59 Vt. 521; s. c. 9 Atl. 241.

³¹⁴ *O'Keefe v. Northampton*, 145 Mass. 115; s. c. 13 N. E. 382.

³¹⁵ *Town of Plainfield v. Village of*

Plainfield, 67 Wis. 525; s. c. 30 N. W. 672.

³¹⁶ *Neary v. Robinson*, 98 N. Y. 81; reversing s. c. 27 Hun (N. Y.) 145.

³¹⁷ *United States v. City of New Orleans*, 31 Fed. 537.

in pursuance of a mandate of a federal court, in which the judgment was obtained directing it, is immaterial.³¹⁸ When a judgment is recovered against a county for a valid debt evidenced by warrants duly issued by county authorities, they have power to levy a tax to pay the debt, and though the judgment is invalid, a county treasurer should not be enjoined from paying such indebtedness with the money raised for that purpose, as the warrants are undoubted evidence of the debt.³¹⁹ In a proceeding against a city to compel payment of a judgment in full by peremptory mandamus, it is no defense that the city had provided a revenue by a proper levy, which had not been collected, where it is shown that the city authorities had full power to require the collector to pay over moneys in a reasonable time if collected, or, if not, to remove him and appoint another collector.³²⁰ The court declined to decide in advance the legal status of a judgment obtained upon county warrants, void because issued after the limit of constitutional indebtedness had been reached, in an action to compel the receiving of such warrants in payment of taxes.³²¹ Under the Michigan statutes providing that city supervisors, upon receiving a properly certified transcript of a judgment against a city, shall assess the same as a part of the city tax upon the then next city tax-roll, it is not necessary that the city council or the county supervisors should authorize the same to be assessed, but it is the duty of the supervisors of the city to apportion the same among the wards of the city within a reasonable time after receiving such transcript.³²²

§ 939. Mandamus to county officers.—A city, by ordinance, extended a water-main through a street, the expense to be borne by the property benefited. The county supervisors refused to levy a tax for the amount due the city for the county property on the street. A trial

³¹⁸ *State v. Hagar*, 91 Mo. 452; s. c. 3 S. W. 844.

³¹⁹ *Bush v. Wolf*, 55 Ark. 124; s. c. 17 S. W. 709.

³²⁰ *Mayor &c. v. Voorhies*, 70 Tex. 356; s. c. 8 S. W. 109.

³²¹ *People v. May*, 9 Colo. 414; s. c. 15 Pac. 36.

³²² *Shippy v. Mason*, 90 Mich. 45; s. c. 51 N. W. 353. The court said:—"The common council have no power to pass upon its [the judgment's] validity or to prevent its assessment. It would be within the province of the council to insert the amount of this judgment in its annual appro-

priation bill and to certify it to the clerk of the board of supervisors, and this would be a very proper thing to do; but by neglecting to do so it can neither defeat nor postpone its collection or assessment. . . . The board of supervisors can not, by any neglect or refusal to act upon the assessment of this judgment, defeat or defer its collection. Their approval is not necessary to its levy upon the taxable property of the city." They have no more power than the city council to annul a judgment of a proper court.

of a mandamus to compel a levy resulted in judgment for defendant on account of informalities in the proceedings of the city council. Afterwards in a statute it was provided that the board of supervisors should be authorized, by majority vote, to raise by a tax the amount due the city for the water-main; it was held that the statute was passed to enable the supervisors to discharge a just claim, and mandamus would lie to compel them to perform the duty.³²³ The words "by a majority vote of said board," when considered with the general provisions of the act and its title, "An act to authorize the board * * * to raise by tax, and * * * reimburse the city," require the construction rendering it mandatory, and the power conferred by it a duty imposed on the board.³²⁴ An ordinary of a county in Georgia, being authorized by law to raise funds for a certain purpose, followed his authority and had the funds deposited with the county treasurer, who, upon demand and presentation of the orders approved by the ordinary, refused to pay the same. It was held, in an action for mandamus, that the treasurer, in the absence of a pretense of fraud or mistake as to the orders, should not go back of the directions of the ordinary, and the mandamus should issue.³²⁵ Under the New Jersey criminal procedure act, providing that all necessary expenses incurred by the prosecutor of pleas in securing the arrest and prosecution of criminals, when approved by the presiding judge of the court of oyer and terminer, shall be paid by the board of chosen freeholders of the county, such a claim, so certified, does not need to be audited, and mandamus will not lie against the county auditor to compel him to audit it.³²⁶ An account having been duly allowed against a county, in a case where the county board had jurisdiction, if the board fails to include it in its estimates of the taxes to be levied for the ensuing year, it may be compelled by mandamus to do so.³²⁷ The amount of bonds of a municipality and rate of interest being fixed, a demand on the auditor to compute the amount necessary to be paid by each taxpayer for the purpose of paying the annual interest is sufficient to authorize mandamus to compel him to perform his duty, without any formal assessment of the amount by the board.³²⁸

(c) WARRANTS.

§ 940. Character of warrants as evidences of indebtedness.—An order on the treasurer of a county is a direct liability of the county,

³²³ *People v. Board &c.*, 49 Hun (N. Y.) 32; s. c. 1 N. Y. S. 460.

³²⁴ *People v. Board &c.*, 49 Hun (N. Y.) 32; s. c. 1 N. Y. S. 460.

³²⁵ *Shannon v. Reynolds*, 78 Ga. 760; s. c. 3 S. E. 653.

³²⁶ *State v. Applegate*, 49 N. J. L. 376; s. c. 8 Atl. 505.

³²⁷ *State v. Cather*, 22 Neb. 792; s. c. 36 N. W. 157.

³²⁸ *State v. Bacon*, 31 S. C. 120; s. c. 9 S. E. 765.

and although negotiable in form, no demand or notice is necessary to fix the county's liability thereupon.³²⁹ A claim upon a county duly allowed and certified to in the form of a draft by one or more officers on another is an adjusted liability of the county on which it may be sued by an alien in a federal court.³³⁰ The cancellation of county warrants and the issuance of new ones in lieu thereof does not conclude a county as to equitable defenses.³³¹ County warrants in Arkansas are not negotiable paper in any other sense than that they are transferable by delivery.³³² A special statutory execution against a county in Pennsylvania operates as an injunction upon commissioners restraining them from drawing any warrant or making any payment for any purpose whatever, until the judgment upon which it was issued is satisfied.³³³ After the service of a mandamus execution upon county commissioners in Pennsylvania, the county treasurer has no authority to receive county orders of a date subsequent to the rendition of the judgment in payment of taxes, and thus divert the funds of the county from the appropriation of them made by law for the payment of the execution.³³⁴ Where a mandamus execution authorized by the statutes of Pennsylvania has been served upon county commissioners, it is their duty: (1) If there be any money in the treasurer's hands unappropriated the exigencies of this writ require it to be paid to the party. (2) If there be not money enough in the treasury to satisfy the whole judgment, it is their duty to pay it out of the first money received. (3) If the taxes of the current year are insufficient to pay the judgment and other expenses of the county, it is their duty to assess and collect on the next year sufficient

³²⁹ *Lyell v. Supervisors &c.*, 6 McLean 446, 459. A county order is not a bill of exchange or draft.

³³⁰ *Lyell v. Supervisors &c.*, 6 McLean 446, 459. And assumpsit is the proper remedy for a demand on a county which has been duly audited and liquidated by an order for payment on the treasurer.

³³¹ *Wall v. Monroe Co.*, 103 U. S. 74, 79.

³³² *Wall v. Monroe Co.*, 103 U. S. 74, 79. The purchaser of county warrants takes them subject to defenses, which challenge the merit of the claims: *Speer v. Board &c.*, 88 Fed. 749. They are not negotiable in that the legality of issue can not be inquired into: *Bardsley v. Stern-*

berg, 17 Wash. 243; s. c. 49 Pac. 499. And the holder is not protected against defenses: *City of Hammond v. Evans*, 23 Ind. App. 501; s. c. 55 N. E. 784; *Gilman v. Gilby Tp.*, 8 N. D. 627; s. c. 80 N. W. 889.

³³³ *Pollock v. Lawrence Co.*, 2 Pittsb. (Pa.) 137. If the county has no unappropriated moneys, a special statutory execution must be paid "out of the first moneys that shall be received for the use of said county."

³³⁴ *Loute v. Allegheny*, 2 Pittsb. (Pa.) 411, holding that such payment of county orders by the treasurer was a contempt of the mandamus execution issued by the court and punishable as such.

for this purpose. (4) The judgment of the court is an appropriation of all the money in the treasury not already drawn or appropriated by previous county orders in payment of previous demands audited and allowed by the comptroller, and also of the first money thereafter received for the use of the county.³³⁵ Although private persons may enjoin the collection of illegal taxes by a municipality, they can not on their own behalf restrain the disposition of municipal funds derived from taxes already collected.³³⁶ A school district issued fraudulent warrants in payment for the erection of schoolhouses, etc. They were purchased by a third party with knowledge that there was wrong in their issue at fifty cents on the dollar. He brought suit, and by collusion with officers obtained a judgment for their face value. This judgment, on a bill filed for the purpose, was set aside for fraud and a decree made as prayed, for what was deemed equitably due for the consideration received by the district.³³⁷ County warrants are prima facie proof of the validity of the debts they evidence.³³⁸ A warrant for an assessment in the hands of a contractor who has made an improvement for a municipal corporation is prima facie evidence of its regularity and correctness and of the validity of prior proceedings and acts of the city council on which the assessment depends.³³⁹ But a warrant in excess of the limit of indebtedness is void.³⁴⁰ The presentation of warrants for payment or indorsement as provided by statute is necessary to start the running of interest.³⁴¹ A provision

³³⁵ *Loute v. Allegheny*, 2 Pittsb. (Pa.) 411.

³³⁶ *Coulson v. City of Portland*, Deady 481.

³³⁷ *School District v. Lombard*, 2 Dill. 493; the court holding that warrants of this character had not the quality of negotiable paper which prevented an inquiry into its fraudulent character or its condition when in the hands of innocent holders for value before due; citing *Clark v. City of Des Moines*, 19 Iowa 199; *Clark v. Polk Co.*, 19 Iowa 248; *Shepherd v. District Tp.*, 22 Iowa 595; *Taylor v. District Tp.*, 25 Iowa 447. In this respect such warrants are unlike authorized negotiable bonds issued by public or municipal corporations. The holders of these warrants are in no better situation than the payee, and they are open to

all defenses which might have been made against the party to whom they were originally issued.

³³⁸ *Board of Com'rs v. Aetna L. Ins. Co.*, 90 Fed. 222; *Speer v. Board &c.*, 32 C. C. A. 101; s. c. 88 Fed. 749; *Wall v. Monroe Co.*, 103 U. S. 74; *Thompson v. Searcy Co.*, 6 C. C. A. 674; s. c. 57 Fed. 1030; *Board &c. v. Sherwood*, 27 U. S. App. 458; s. c. 11 C. C. A. 507; 64 Fed. 103; *Commissioners &c. v. Keller*, 6 Kan. 510. They are prima facie evidence of just debts of the county: *Speer v. Board &c.*, 88 Fed. 749; s. c. 32 C. C. A. 101.

³³⁹ *Pacific Pav. Co. v. Mowbray*, 127 Cal. 1; s. c. 59 Pac. 205.

³⁴⁰ *Municipal Sec. Co. v. Baker Co.*, 33 Or. 338; s. c. 54 Pac. 174.

³⁴¹ *City of New Orleans v. Warner*, 175 U. S. 120; s. c. 20 S. Ct. 44; *Montieth v. Parker*, 36 Or. 170; s. c. 59

in a contract that no assignment of any right thereunder should create a cause of action against the county, or prevent its settling with the contractor in full, is not a defense for a refusal to deliver warrants to a third person on the contractor's order.³⁴²

§ 941. **How drawn.**—The charter of Denver divides sewers into three classes,—public, district, and private,—and provides that the cost of public sewers shall be met by an appropriation out of the public revenue. The only provision made for payment of the cost of district sewers is by assessment on the lots of the district, to be collected like other taxes. It also requires warrants drawn by the city government to specify out of what funds they are payable. It was held that, on the presumption that officers do their duty, a warrant, not expressed as payable out of the public sewer fund, but “out of the 20th St. sewer fund, on account of the 20th St. sewer cont.,” is drawn on a particular district fund, and that the city could not be sued thereon without an allegation that there was money in that fund to pay it.³⁴³ Under the California statute authorizing the auditor of San Francisco to audit sums allowed and ordered by the board of supervisors, by authority of the act, and giving the board power to order judgments against the city and county to be paid, where the board has ordered payment of a judgment to the judgment creditor, the auditor can not draw the warrant in favor of an assignee of the judgment, although he had notice of the assignment.³⁴⁴ In 1858 the legislature of Louisiana adopted a system of drainage for the city of New Orleans, the work to be controlled by commissioners, and the expense to be defrayed by assessments on the land benefited. A statute abolished the boards of commissioners and intrusted the control of the work to the board of administrators of the city. The assessments collected were to be used only as a drainage fund, and the expenses paid by warrants payable therefrom. A constitutional amendment taking effect afterwards prohibited the city from increasing its indebtedness, but allowed the increase of the debt of the drainage fund. Warrants to complainants were drawn on the drainage fund after the adoption of said amendment. It was held that the city could

Pac. 192. Interest on warrants held legal, in *Shipley v. Hacheney*, 34 Or. 303; s. c. 55 Pac. 971.

³⁴² *State v. Van Wyck*, 20 Wash. 39; s. c. 54 Pac. 768. Requisites of ordinance under Cal. Civ. Code, § 274: *Stevens v. Truman*, 127 Cal. 155; s. c. 59 Pac. 397. Charter of New Orleans construed in reference to issu-

ing of warrants: *State v. City of New Orleans*, 50 La. An. 880; s. c. 24 So. 666.

³⁴³ *Travelers' Ins. Co. v. City of Denver*, 11 Colo. 434; s. c. 18 Pac. 556.

³⁴⁴ *Scheerer v. Edgar*, 76 Cal. 569; s. c. 18 Pac. 681.

not be made liable for the amount of the warrants as a municipal corporation, for mismanagement of the drainage fund, whereby a deficit occurred so as to increase its general indebtedness.³⁴⁵ The same rule, it was held, applied to warrants issued for the purchase of machinery authorized by a statute which required payment to be made by warrants on the drainage fund.³⁴⁶ Also, that the city would not be liable on the theory that it had falsely held out that there was a fund available for the payment of the warrants.³⁴⁷ Nor would failure to collect the assessments and complete the drainage render the city liable for the amount of the warrants when it appeared that the assessments had been uncollected by the commissioners, before the city took charge of the work, for thirteen years, and that they were uncollectible without incurring cost equal to their amount, and that the system of drainage was itself so impracticable that failure to complete it was inevitable.³⁴⁸

§ 942. **Mandamus to compel the signing of a warrant.**—A mayor having vetoed an appropriation by a city council to pay for the services of a stenographer employed by its committee to report the evidence as to the right of contesting parties to a seat in that body, the council passed it over the veto. A mandamus was ordered to compel the mayor to countersign a warrant drawn for such appropriation.³⁴⁹ It was held, however, in another case that a mayor is under no legal duty to sign a warrant for the payment of a bill against the city which was passed by the common council without being sworn to as required by the city charter.³⁵⁰ A school voucher issued by a county

³⁴⁵ *Peake v. City of New Orleans*, 38 Fed. 779.

³⁴⁶ *Peake v. City of New Orleans*, 38 Fed. 779.

³⁴⁷ *Peake v. City of New Orleans*, 38 Fed. 779.

³⁴⁸ *Peake v. City of New Orleans*, 38 Fed. 779. And the city having retired bonds issued on the drainage fund as authorized by act of 1872, No. 73, and issued in lieu thereof its own bonds, it would be entitled to a credit for the amount of which it had relieved the drainage fund, though the act required the bonds retired to be replaced by bonds payable out of the same fund.

³⁴⁹ *State v. Haynes*, 50 N. J. L. 97; s. c. 11 Atl. 151. There was a recognition of the claim by the ac-

tion of the council and a due appropriation of money to pay it. See *State v. Fiedler*, 43 N. J. L. 400, where the charter of this city (Newark) was examined, and it was determined that whenever an appropriation of money from the city treasury has been duly made, the duty of the mayor in signing a warrant to draw the money was a ministerial one, enforceable in a proper case by mandamus.

³⁵⁰ *State v. Daly*, 50 N. J. L. 356; s. c. 13 Atl. 6. The facts were that the bill according to the statute had been properly itemized and sworn to before the city treasurer, but when passed by the council the jurat had not been signed by the treasurer. The action of the council was held

superintendent was filed in the county commissioners' court for audit, and after the court had allowed the claim the county judge under its direction indorsed it, "August 13, 1883. The court finds \$291.31 due on this claim. [Signed] J. B., County Judge." No formal entry of this action was then made on the record kept of ordinary proceedings. The commissioners at a subsequent term, and without notice to the holder of the voucher, entered an order that as there was no money in the treasury no warrant should issue. It was held that mandamus would lie to compel the issue of a warrant on the county treasurer, to be paid out of the general fund.³⁵¹ An officer may refuse to sign orders for warrants for bills for lighting where the company has violated an ordinance requiring it to light all police and fire stations free of cost.^{351a} The city comptroller may properly refuse to countersign a warrant issued in payment of an unauthorized claim.^{351b} A mayor may be compelled by mandamus to sign a warrant.^{351c} The mayor of Denver has no power to withhold his approval of warrants, under the charter.^{351d}

§ 943. How payable—From what fund.—In the absence of restrictions warrants may be payable in gold coin.³⁵² Where there is no intention to pay for an improvement out of any fund except a special assessment, a warrant showing on its face that it is issued in payment for lumber for improving an avenue sufficiently shows that it is payable out of such special assessment.³⁵³ Warrants issued against a fund agreed to be raised by special assessment for street improvements do not render the city liable thereon, although it has neglected to collect

irregular, and under the authority of *State v. Daly*, 49 N. J. L. 403; s. c. 8 Atl. 526, this ruling was made.

³⁵¹ *Brown v. Ruse*, 69 Tex. 589; s. c. 7 S. W. 489. It has been held in Florida that county commissioners can not be compelled by mandamus to issue a warrant as a reward for killing a wildcat until the county judge has certified in terms of the statute that the scalp was exhibited to him within ten days after the killing. A certificate that the person claiming the reward represented that the animal was killed within the time prescribed was insufficient: *Johns v. County Com'rs*, 28 Fla. 626; s. c. 10 So. 96. The court said:—"He has no right to compel respondents to issue the warrant

until he has complied with all that the statute requires as conditions precedent to the accruing of his right to the warrant." See also, *Canova v. State*, 18 Fla. 512; *State v. Cooper*, 20 Fla. 547.

^{351a} *Kensington Electric Co. v. City of Philadelphia*, 187 Pa. St. 446; s. c. 41 Atl. 309.

^{351b} *James v. City of Seattle*, 22 Wash. 654; s. c. 62 Pac. 84.

^{351c} *Rice v. Gwinn (Idaho)*, 49 Pac. 412.

^{351d} *State v. City of New Orleans*, 50 La. An. 880; s. c. 24 So. 666.

³⁵² *Kenyon v. City of Spokane*, 17 Wash. 57; s. c. 48 Pac. 783.

³⁵³ *Jones v. City of Portland*, 35 Or. 512; s. c. 58 Pac. 657.

the assessment and the assessment is no longer available.³⁵⁴ When warrants of a subsequent issue and number are paid from an assessment fund, the city is liable in damages to the holder of warrants prior in issue and number payable from such assessment fund.³⁵⁵ Contractors for illegal work, who receive warrants therefor, who connive with the officers in securing payment in anticipation of an action are liable for repayment.³⁵⁶ The income of each year must be used to pay the debts of that year to the exclusion of prior warrants presented for payment and not paid for want of funds. Priority of payment, in the order of presentation, applies to warrants for the particular year.³⁵⁷ Where the statute provides that warrants shall be paid in the order of their registration, the erroneous denial by a court of a peremptory writ of mandamus on the treasurer to pay such warrants will be no excuse for his successor in refusing to obey the law.³⁵⁸ One who buys warrants for value and in good faith and is paid therefor is not liable for a repayment in a suit by taxpayers for injunction and repayment, where the work has been partially performed.³⁵⁹ Warrants in the hands of innocent purchasers must be paid, although the funds for their payment were lost in an insolvent bank.³⁶⁰ Where money in the hands of a treasurer is embezzled by him and the city accepts property in payment of the sum the holder of a warrant against such fund is not obliged to wait until the property is sold.³⁶¹ Where warrants are payable in the order of their registration, and subsequent warrants are paid, and the holder is not notified and the money not set apart for his use as required, he is entitled to recover thereon.³⁶²

§ 944. **Duty of officers in drawing warrants.**—Where the law makes it the duty of a county auditor at a certain time to draw his warrant on the county treasurer, it is his duty to do it without waiting for a request from the person entitled to it.³⁶³ County officers have no authority to bind the county to pay more in county warrants than the cash value of the thing to be paid for, though such

³⁵⁴ *Northwestern Lumber Co. v. City of Aberdeen*, 22 Wash. 404; s. c. 60 Pac. 1115.

³⁵⁵ *Northwestern Lumber Co. v. City of Aberdeen*, 22 Wash. 404; s. c. 60 Pac. 1115.

³⁵⁶ *Webster v. Douglas Co.*, 102 Wis. 181; s. c. 77 N. W. 885; 78 N. W. 451.

³⁵⁷ *Phillips v. Reed*, 107 Iowa 331; s. c. 76 N. W. 850; 77 N. W. 1031.

³⁵⁸ *First Nat'l Bank v. Arthur*, 12 Colo. App. 90; s. c. 54 Pac. 1127.

³⁵⁹ *Webster v. Douglas Co.*, 102 Wis. 181; s. c. 77 N. W. 885; 78 N. W. 451.

³⁶⁰ *New York Security & Co. v. City of Tacoma*, 21 Wash. 303; s. c. 57 Pac. 810.

³⁶¹ *Potter v. City of New Whatcom*, 20 Wash. 589; s. c. 56 Pac. 394.

³⁶² *Shannon v. City of Huron*, 9 S. D. 356; s. c. 69 N. W. 598.

³⁶³ *Wilson v. Neal*, 23 Fed. 129.

warrants are depreciated.³⁶⁴ Under the code of Mississippi, requiring an order of the board of supervisors allowing a claim against a county to be entered on the minutes, specifying the amount allowed, the page and section of the law under which the allowance is made, etc., and the clerk to issue a warrant for the amount, the clerk is justified in refusing to issue such warrant where the order fails to state the names of the parties and the section of the law, as required.³⁶⁵ In drawing warrants upon the county treasurer for the several funds in his hands apportioned to the several townships, the county auditor does not act as the agent of the county, but as a governmental agent for the benefit of the townships, and, not being drawn to satisfy a county or corporate obligation, they create no liability against the county.³⁶⁶ A county treasurer is not subject to penalty under the Nebraska statutes for failure to register a warrant presented to him within ten days after it is issued, that being the time in which an appeal may be taken by a taxpayer, and within which the county clerk is prohibited from delivering the warrant.³⁶⁷

§ 945. **Validity of warrants.**—It has been held in Alabama that provisions purchased and used for the support of the indigent in a confederate state during the war, but not used in promotion of the confederate government, constitute a valid consideration for a warrant.³⁶⁸ Where a county made an illegal contract for the purchase of corn, a part of which was not delivered, and subsequently purchased and used the undelivered portion for a legal purpose, giving a warrant therefor, the consideration of the warrant was held to be valid, the former illegality being purged by the new and legally executed contract.³⁶⁹ A plaintiff in a case in North Carolina claimed to have lost a county order, and the defendant county, pursuant to resolution, issued a duplicate, which was never taken by plaintiff, the original having been found. Subsequently the duplicate was canceled. It was held that the issue and cancellation of the duplicate were not an admission or recognition of the validity of the original.³⁷⁰ A publication of an order of a county court, calling in county warrants for redemption, in one newspaper, is not such a compliance with the Arkansas statute requiring such notice to be published in *newspapers*

³⁶⁴ Dorsey Co. v. Whitehead, 47 Ark. 205; s. c. 1 S. W. 97.

³⁶⁵ Land v. Allen, 65 Miss. 455; s. c. 4 So. 117.

³⁶⁶ Vigo Tp. v. Board &c., 111 Ind. 170; s. c. 12 N. E. 305.

³⁶⁷ Means v. Webster, 23 Neb. 432; s. c. 36 N. W. 809.

³⁶⁸ Grayson v. Latham, 84 Ala. 546; s. c. 4 So. 200.

³⁶⁹ Grayson v. Latham, 84 Ala. 546; s. c. 4 So. 200.

³⁷⁰ Royster v. Board &c., 98 N. C. 148; s. c. 3 S. E. 739.

as will render void warrants not presented in obedience to such notice.³⁷¹ There is no presumption, conclusive or otherwise, raised in favor of due publication of an order calling in county warrants for redemption, by a recital in a subsequent order, reissuing some of the warrants, that "due legal notice of the order calling in had been given as required by law."³⁷² But a county warrant issued after the constitutional limit of indebtedness has been reached by the county, which is general in form, and does not purport to be payable from any particular fund or out of the revenue from the taxes of any specified year, is not a valid assignment.³⁷³ It is not necessary that a warrant shall show on its face that the council has directed its issuance or for what purpose issued, or from what fund payable unless payable from a specific fund.³⁷⁴ Where a town is without authority to discount its warrants, and it is done indirectly through a bank, they are illegal.³⁷⁵ An unauthorized reissue does not bind the city.³⁷⁶ Warrants negotiable in form issued for an unwarranted purpose are void in the hands of any holder, with knowledge of the facts, notwithstanding the recitals.³⁷⁷ One who purchases warrants which are void can not recover from the city the amount paid therefor.³⁷⁸ The city may be estopped from setting up the invalidity of its warrants.³⁷⁹

§ 946. **Actions upon warrants.**—A Dakota statute requires the seal of the county to be attached to every county warrant. This makes such a warrant "a sealed instrument" within the meaning of the statute providing that actions on sealed warrants shall be brought within twenty years.³⁸⁰ An ordinary county warrant on the general fund,

³⁷¹ *Lusk v. Perkins*, 48 Ark. 238; s. c. 2 S. W. 847.

³⁷² *Lusk v. Perkins*, 48 Ark. 238; s. c. 2 S. W. 847.

³⁷³ *People v. May*, 9 Colo. 404; s. c. 12 Pac. 838.

³⁷⁴ *Minor v. Loggins*, 14 Tex. Civ. App. 15; s. c. 37 S. W. 1086.

³⁷⁵ *Million v. Soule*, 15 Wash. 261; s. c. 46 Pac. 234.

³⁷⁶ *Bardsley v. Sternberg*, 17 Wash. 243; s. c. 49 Pac. 499.

³⁷⁷ *Watson v. City of Huron*, 97 Fed. 449.

³⁷⁸ *Watson v. City of Huron*, 97 Fed. 449.

³⁷⁹ *Warner v. New Orleans*, 167 U. S. 467; s. c. 17 S. Ct. 892.

³⁸⁰ *Heffleman v. Pennington Co.*, 3 S. Dak. 162; s. c. 52 N. W. 851. See also, *Dillon Munic. Corp.* (4th ed.),

§ 190; *Borough of Port Royal v. Graham*, 84 Pa. St. 426, overruling a plea of the statute of limitations on simple contract; *Benoist v. Inhabitants &c.*, 8 Mo. 250, sustaining a demurrer to the complaint on the ground that it was declared on as a simple contract and not "a sealed instrument;" *Gilman v. School District*, 18 N. H. 215, holding that assumpsit would not lie on such contract for building a schoolhouse, as the sealing constituted the contract a specialty. In *Crudup v. Ramsey*, 54 Ark. 168; s. c. 15 S. W. 458, the court held the action on a county warrant barred though it was sealed, but placed the decision upon the fact that the seal was not required to county warrants by law, and the mere affixing it by an official could

regularly issued, constitutes a prima facie cause of action against the county, and an action will lie directly on it.³⁸¹ Where such a warrant is in form payable to bearer, its possession and presentation by plaintiff at the trial is prima facie evidence of plaintiff's ownership, even though such ownership is denied in defendant's answer.³⁸² It has been held that a warrant issued by city authorities for the amount necessary to redeem the lands from tax sale of certain taxpayers upon their payment of a fixed amount on account of back taxes due the city was valid, as the council could make such a compromise, and that the holder of the certificate of the tax sale from which the land was redeemed was entitled to recover the amount from the auditor who had the warrant in his possession turned over to him by his predecessor,³⁸³ and his right of action was not barred by failure to

not give it more dignity. They thus intimated that if the seal had been authorized as required it would have impressed the instrument with a different character. In *Goldman v. Conway Co.*, 10 Fed. 888, are Judge Caldwell's remarks suggestive in the same direction. So in *Pelton v. Supervisors &c.*, 10 Wis. 63, where the law requires no seal to county warrants. Under a law similar to the one in Dakota, warrants have been held not valid unless the county seal was duly affixed, in *Springer v. Clay Co.*, 35 Iowa 241; *Smeltzer v. White*, 92 U. S. 390. See also, on the same point, *City v. Lamson*, 9 Wall. 477; *City of Lexington v. Butler*, 14 Wall. 282.

³⁸¹ *Heffleman v. Pennington Co.*, 3 S. Dak. 162; s. c. 52 N. W. 851. The court said:—"The statute is very explicit as to how a claim against a county shall be passed upon by its board of county commissioners. The duty of the board is to judicially investigate the validity and justice of the claim, and to allow or disallow the same in whole or in part, as to such board shall appear just or lawful. While the immediate purpose of the warrant is to enable the claimant to whom it is delivered to draw from the county treasurer the amount of money therein named,

yet it rests upon, and its issue and payment could only be justified upon, the theory that after a full investigation the county had found itself to be so indebted; so that the warrant is a formal and deliberate acknowledgment by the county of such indebtedness." In *Board &c. v. Day*, 19 Ind. 450, a county warrant regularly issued was said to be "in legal effect the promissory note of the county." See also, *Edinburg &c. Co. v. City of Mitchell*, 1 S. Dak. 593; s. c. 48 N. W. 131; *Savage v. Supervisors &c.*, 10 Wis. 49; *Commissioners v. Keller*, 6 Kan. 510; *Clark v. Polk Co.*, 19 Iowa 248 (holding that while county warrants were not negotiable under the law merchant, still they might be sued on and an action maintained thereon either by the original payee or his assignee); *Brown v. Town of Jacobs*, 77 Wis. 27; s. c. 45 N. W. 679; *Terry v. City of Milwaukee*, 15 Wis. 490; *International Bank v. Franklin Co.*, 65 Mo. 105; *City of Scranton v. Hyde Park Gas Co.*, 102 Pa. St. 382; *Grayson v. Latham*, 84 Ala. 546; s. c. 4 So. 200; *People v. Board &c.*, 50 Ill. 213.

³⁸² *Heffleman v. Pennington Co.*, 3 S. Dak. 162; s. c. 52 N. W. 851.

³⁸³ *Hintrager v. Richter*, 85 Iowa 222; s. c. 52 N. W. 188.

commence an action against some of the defendant's predecessors in office.³⁸⁴

§ 947. Mandamus to compel payment of warrants.—An order of a board of county commissioners requiring that county warrants previously issued shall be presented for re-examination by the board, and providing that all such scrip not presented by a stated day shall be of no effect or "repudiated," is, though published according to the terms of the order, no defense to mandamus to compel the payment of warrants not presented.³⁸⁵ The authorities in the note hold that where the claim of the relator is one of a character whose payment the law imposes on the county or municipality, and it has been audited and ordered to be paid by officers having the authority to audit it and order its payment, a county treasurer or other paying officer should not refuse to pay if he has the money with which to pay it unless the claim is for some reason fraudulent. The duty to pay where the paying officer has the funds with which to pay, and the officers auditing and ordering payment have acted within the scope of their powers, and there is no fraud attached to the claim, is merely ministerial, and mandamus will lie to compel its payment. The right to this remedy has been doubted but not decided.³⁸⁶ But such right is affirmed in the later New York cases. As to the return made to the mandamus in the Florida case, the court held it defective in that it did not state with such precision and certainty that the court might be fully advised, all the particulars necessary to enable it to

³⁸⁴ *Hintrager v. Richter*, cited in the preceding note, his right of action not accruing against defendant until the latter received the warrant. See also, *Hintrager v. Richter*, 76 Iowa 406; s. c. 41 N. W. 55.

³⁸⁵ *Ray v. Wilson*, 29 Fla. 342; s. c. 10 So. 613. The court said:—"County and city orders issued by the proper officers are prima facie binding and legal. Such officers are presumed to have done their duty, and the orders constitute a prima facie cause of action, the impeachment of which must come from the defendant." See also *Dillon Munic. Corp.*, § 502; *Board &c. v. Day*, 19 Ind. 450; *Commissioners v. Keller*, 6 Kan. 510; *Clark v. City of Des Moines*, 19 Iowa 199, 211; *Cheaney v.*

Inhabitants &c., 60 Mo. 53; *City of Connersville v. Hydraulic Co.*, 86 Ind. 184. As to mandamus in such cases, see *State v. Mayor &c.*, 22 Fla. 21; *Commonwealth v. Johnson*, 2 Binn. (Pa.) 275; *Baker v. Johnson*, 41 Maine 15; *Potts v. State*, 75 Ind. 336; *State v. Gandy*, 12 Neb. 232; s. c. 11 N. W. 296; *Johnson v. Campbell*, 39 Tex. 83; *Hendricks v. Johnson*, 45 Miss. 644; *Clayton v. McWilliams*, 49 Miss. 311; *State v. Treasurer*, 43 Mo. 228; *People v. Edmonds*, 15 Barb. (N. Y.) 529; s. c. 19 Barb. (N. Y.) 468; *People v. Haws*, 36 Barb. (N. Y.) 59; *People v. Wendell*, 71 N. Y. 171; *People v. Board &c.*, 64 N. Y. 600.

³⁸⁶ *People v. Lawrence*, 6 Hill (N. Y.) 244.

pass upon the sufficiency of the return.³⁸⁷ On mandamus to a county treasurer to pay plaintiff warrants held by him, where it appears on the return of the alternative writ that defendant had funds sufficient to pay such warrants when presented to him, applicable to their payment, and that the warrants were legal claims against the county, a peremptory writ should issue for payment forthwith.³⁸⁸ A Colorado statute provides that county warrants or orders not taken up at the date of presentation shall be paid according to the order of time in which they may be presented to the county treasurer. It has been held that a county treasurer could not divert money, raised for the purpose of funding these warrants, to pay warrants subsequently issued by the county commissioners to meet current expenses, under the statute which provides that the board may draw warrants for such purposes to the extent of eighty per cent. of the incoming revenue for the current year.³⁸⁹ The holder of city warrants, however, is not bound to proceed by mandamus against the city treasurer, but may sue the city directly on the warrants.³⁹⁰ Where, in proceedings for mandamus to compel a county treasurer to pay a plaintiff warrants held by him, duly drawn upon the treasurer, it is ascertained in an issue made upon the return of an alternative writ that the respondent had funds sufficient to pay such warrants at the time they were presented to him applicable to the payment thereof, and that the warrants presented were legal claims against the county, the judgment should direct the issuance of a peremptory writ commanding the respondent to pay the warrants forthwith, and the plaintiff is entitled to his costs.³⁹¹

§ 948. Defenses to actions on warrants.—A county commissioners' court passed an order that all warrants not registered under a certain act of the legislature should not be paid. It was held, in an action brought more than four years after such order on a warrant issued before the order, that, in the absence of any knowledge on the part of the plaintiff from any source of the order, the statute of limitations was not set in operation against him.³⁹² The code of North Carolina provides that "all claims against the several counties, cities and towns

³⁸⁷ *State v. Mayor &c.*, 22 Fla. 21; citing *Board &c. v. Johnson*, 21 Fla. 578; *High Extra. Leg. Rem.*, §§ 470, 472, 474. ³⁸⁸ *Travelers' Ins. Co. v. City of Denver*, 11 Colo. 434; s. c. 18 Pac. 556.

³⁸⁹ *Bush v. Geisey*, 16 Or. 355; s. c. 19 Pac. 123.

³⁹⁰ *Bush v. Geisey*, 16 Or. 355; s. c. 19 Pac. 123. ³⁹¹ *Leach v. Wilson Co.*, 68 Tex. 353; s. c. 4 S. W. 613.

³⁹² *People v. Austin*, 11 Colo. 134; s. c. 17 Pac. 485.

of this state, whether by bond or otherwise, shall be presented to the chairman of the board of county commissioners, or to the chief officers of said cities and towns, as the case may be, within two years after the maturity of such claims, or the holders of such claims shall be forever barred from a recovery thereof." The plaintiff purchased a county order issued on January 2, 1877. On October 14, 1879, he presented it for payment to the sheriff and treasurer of the county, and prior to said date he presented it to the sheriff who went out of office in 1877. Plaintiff commenced suit on the order in 1883. It was held that the action was barred by the statute.³⁹³ A suit was brought on a warrant issued in pursuance of an order of the county commissioners reciting that it was in payment of a balance due certain contractors for building a court-house. The warrant was indorsed in blank by one of the contractors, but he testified that he had no recollection whatever of the warrant, and that his firm had been paid for the court-house from other sources, by the conveyance of land from a judgment debtor of the county. There was other evidence strongly suggestive of fraud in the issuance of the warrant. The plaintiff's theory was that there was a balance coming to the judgment debtor of the county on the conveyance of his land to the contractor, and that the warrant was issued in settlement of that balance. It was held that an instruction to the jury to the effect that, if the contractors had been paid for the court-house outside of the warrant, they should find for the defendant, leaving out of view the theory of plaintiff, was erroneous.³⁹⁴ A plaintiff having proved his warrant, that it had been registered, that the proper time had come for payment according to its place on the register, and that payment had been demanded and refused, or that a demand was unnecessary, the burden was held to be on defendants to overturn the presumption of liability.³⁹⁵ The fact that a warrant was issued in recognition of a debt contracted in the purchase of provisions during the war for the maintenance of the families of soldiers who were serving, or were disabled, or had lost their lives in the confederate army, has been held to be a valid defense to an action on the warrant.³⁹⁶ Also, that to vacate a warrant issued for the purchase of corn, evidence was not admissible to show that no prior order had been granted authorizing the purchase, as the lack of such order constituted no defense if the county commissioners had allowed the claims and authorized the issue of the war-

³⁹³ *Royster v. Board &c.*, 98 N. C. 148; s. c. 3 S. E. 739.

³⁹⁴ *Leach v. Wilson Co.*, 68 Tex. 253; s. c. 4 S. W. 613.

³⁹⁵ *Grayson v. Latham*, 84 Ala. 546; s. c. 4 So. 200.

³⁹⁶ *Grayson v. Latham*, 84 Ala. 546; s. c. 4 So. 200.

rant.³⁹⁷ It was also held that hearsay testimony as to the purchase of the corn, the use of it, etc., and as to matters pertaining to the validity of the warrant, was inadmissible.³⁹⁸ Also, that the fact that a warrant sued on was never authorized by the commissioners might be shown by oral proof where the records had been burned.³⁹⁹ A municipal corporation, having issued warrants which on their face bear interest and are payable when certain assessments are collected, can not escape liability for interest subsequently accruing by showing that it was there ready to pay the warrant.⁴⁰⁰ Where negotiable certificates of indebtedness issued by a city have been sued upon by the payee and declared invalid for want of power to issue negotiable instruments, the payee may maintain an action for money had and received, provided the city had power to make the contract out of which the indebtedness arose; and the fact that the payee was not a party to that contract is immaterial when the certificates were issued to him at the request of the contractor, and the money was received by the city and paid over to the contractor.⁴⁰¹

§ 949. **Notes of counties.**—It has been held in New York that a county is not liable on notes issued by its treasurer without authority, though they recite that they were issued in pursuance of a resolution of the board; nor as for money had and received, the proceeds of the notes being placed by the payee to the credit of the treasurer and applied on his indebtedness to the state treasurer on account of taxes.⁴⁰² A county being largely indebted on account of county and town bounties to volunteers, represented by short loans for which annual taxes were levied, the treasurer was authorized to obtain extensions thereof as the towns might desire, by resolutions of the board each year until 1875. The treasurer assumed the authority of borrowing money on notes of the county signed by himself officially, and giving new notes for old notes and bonds. The board being empowered under the New York statute to borrow money and renew its obligations for bounties,

³⁹⁷ Grayson v. Latham, 84 Ala. 546; s. c. 4 So. 200.

³⁹⁸ Grayson v. Latham, 84 Ala. 546; s. c. 4 So. 200.

³⁹⁹ Grayson v. Latham, 84 Ala. 546; s. c. 4 So. 200. Also, that the time and place of purchase of this corn and the persons by whom this contract was made, when and how the delivery was effected, whether or not the claims were properly audited, and all such matters pertaining to the warrant and the pur-

pose for which it was given, were admissible in evidence.

⁴⁰⁰ Read v. City of Buffalo, 74 N. Y. 463. There is no principle of law which permits a municipal corporation to set up in bar of a debt that they were willing and offered to pay.

⁴⁰¹ Bangor Savings Bank v. City of Stillwater, 49 Fed. 721.

⁴⁰² First National Bank v. Saratoga Co., 106 N. Y. 488; s. c. 13 N. E. 439.

which statute also ratified subsisting obligations of that nature, it was held that the treasurer's acts were binding on the county.⁴⁰³ Acts of a county treasurer in procuring extensions of and renewing certain indebtedness in pursuance of resolutions of the board are binding on the county, there being no mistake as to the debt intended, although the resolutions give it the name of a debt which does not exist.⁴⁰⁴ Resolutions of a county board authorizing the treasurer to procure extensions "of such portion of the town bounty debt as the several towns owing the same may desire extended" give no authority to create new debts or allow doubtful or disputed claims, but merely to extend such debt as is represented by notes, bonds and obligations of the county.⁴⁰⁵ Where a treasurer was authorized to renew and extend certain subsisting indebtedness as the towns owing the same might desire, and to give new obligations not exceeding the amount of the debt actually extended, it was not a sufficient defense to an action on such new obligations to show that the treasurer had fraudulently given notes largely in excess of the amount requested without proof that the notes in suit represented part of such excess.⁴⁰⁶

§ 950. Notes of towns.—Where the notes of a Connecticut town have been issued by its treasurer without legal authority, such an act of a treasurer can not be ratified at a subsequent town meeting, unless the subject of ratifying it is specified in the notice of the meeting; nor can any acts of the town operate as a ratification, unless done with intent to ratify and with knowledge of all the material facts; nor as an estoppel, unless the plaintiff is shown to have relied upon them.⁴⁰⁷ A town treasurer has no authority to take up notes for

⁴⁰³ *Parker v. Board &c.*, 106 N. Y. 392; s. c. 13 N. E. 308.

⁴⁰⁴ *Parker v. Board &c.*, 106 N. Y. 392; s. c. 13 N. E. 308.

⁴⁰⁵ *Parker v. Board &c.*, 106 N. Y. 392; s. c. 13 N. E. 308.

⁴⁰⁶ *Parker v. Board &c.*, 106 N. Y. 392; s. c. 13 N. E. 308.

⁴⁰⁷ *Bloomfield v. Charter Oak Bank*, 121 U. S. 121; s. c. 7 S. Ct. 865. The object of this notice is that all the inhabitants (whose property will be subject to be taken to satisfy the obligations of the town) may know in advance what business is to be transacted at the meeting. If the subject of the vote is not specified in the notice or warning, the vote has no legal effect

and binds neither the town nor the inhabitants. No one can rely upon a vote as giving him any rights against the town without proving a sufficient notice of warning of the meeting at which the vote was passed. The importance of this is from the fact that towns in Connecticut as in the other New England states differ from trading companies, and even from municipal corporations elsewhere. They are territorial corporations into which the state is divided by the legislature from time to time at its discretion for political purposes and the convenient administration of government. They have those powers only which have been expressly conferred

money loaned to the town by giving a new note therefor; and a vote of the town in the year in which the new note was given, but before its execution, authorizing him "to hire money for the use of the town, when necessary, upon the approval of the selectmen," would not confer such authority in itself.⁴⁰⁸ Where a town treasurer of his own authority took up notes for money loaned the town by giving a new note therefor, it was held that the transaction was not within the exceptions of the Massachusetts statute providing that thereafter no debt should be created by any town, except (1) for temporary loans payable out of the taxes for that or the next year; (2) debts incurred upon a two-thirds vote; (3) debts contracted for purposes for which towns may lawfully expend money; and the note created no valid indebtedness against the town.⁴⁰⁹ It is beyond the scope of the authority of a township board, on settlement with the treasurer, to take notes payable at a future day for an amount less than that found due, and the board's acceptance of such notes will not stay the township's right of action on the treasurer's bond.⁴¹⁰

§ 951. **Township orders.**—Mandamus will not lie to compel payment of township orders, repudiated as outlawed, when respondent board sets up in addition to that ground that it has no knowledge as to the validity or consideration of the orders, or whether relator owns them; that no one but a third person ever appeared before it, or claimed them; and it appears that all the orders but two were more than six years old when payment was demanded and suit brought, and one of the others was never indorsed by the payee.⁴¹¹ The defendant in this case, one of the board of selectmen, signed and delivered to the chairman a town order in blank, to be used for a legiti-

upon them by statute, or which are necessary for conducting municipal affairs; and all the inhabitants of the town are members of the quasi-corporation: 1 *Swift's System* 116, 117; *Town of Granby v. Thurston*, 23 Conn. 416; *Webster v. Town of Harwinton*, 32 Conn. 131. Also in Connecticut as in Massachusetts and Maine, by common law and immemorial usage, the property of any inhabitant may be taken in execution upon a judgment against a town: *Atwater v. Inhabitants &c.*, 6 Conn. 223, 228; *McLoud v. Selby*, 10 Conn. 390; *Beardsley v. Smith*, 16 Conn. 368; 5 *Dane Abr.* 158; *Chase v. President &c.*, 19 *Pick. (Mass.)* 564, 569;

Gaskill v. Dudley, 6 *Met. (Mass.)* 546; *Adams v. President &c.*, 1 *Greenl. (Maine)* 361; *Fernald v. Lewis*, 6 *Greenl. (Maine)* 264; *Hopkins v. Town of Elmore*, 49 *Vt.* 176. See also, *Reynolds v. Inhabitants &c.*, 6 *Met. (Mass.)* 340; *Third School Dist. v. Atherton*, 12 *Met. (Mass.)* 105; *Moor v. Newfield*, 4 *Greenl. (Maine)* 44; *Ch. 11, vol. 1.*

⁴⁰⁸ *Abbott v. Inhabitants &c.*, 145 *Mass.* 484; s. c. 14 *N. E.* 754.

⁴⁰⁹ *Abbott v. Inhabitants &c.*, 145 *Mass.* 484; s. c. 14 *N. E.* 754.

⁴¹⁰ *Otsego Lake Tp. v. Kirsten*, 72 *Mich.* 1; s. c. 40 *N. W.* 26.

⁴¹¹ *Avery v. Township Board*, 73 *Mich.* 622; s. c. 41 *N. W.* 818.

mate purpose. The chairman issued it to plaintiff, who loaned and advanced to him the money thereon, relying upon his sole assurance that the town was in need of the money, and that the board was authorized by the town to borrow it. Defendant was wholly ignorant of such disposition of the town order, and the false representations made by the chairman. It was held that defendant was not liable in a suit by plaintiff for false warranty.⁴¹² A township order is not negotiable, and the mere blank assignment thereof does not vest in the holder the right to maintain an action in his own name against the township for the amount of the order.⁴¹³ A township order will not bear interest.⁴¹⁴

§ 952. **The same subject continued.**—A delay for more than six years to demand payment of township and highway orders, or to apply for mandamus to compel such payment, if unexplained, will bar such relief.⁴¹⁶ Where orders on a town treasurer are signed by the chairman of the town board and countersigned by the town clerk, and purport on their face to have been issued for demands against the town, it will be presumed that the claims for which they were drawn have been properly audited and allowed, and that the clerk was authorized to issue the orders, and a complaint in an action thereon need not contain these averments.⁴¹⁷ It has been held that an indorsement on a county order dated more than thirty days before the bringing of a suit and purporting to be signed by the county treasurer, which recites that it was presented for payment and refused for want of funds, has been held sufficient evidence of such presentation to warrant the bringing of a suit thereon.⁴¹⁸ There being no provision of law authorizing town officers to establish a separate road fund, town orders, though in terms drawn on the road fund, will be deemed payable out of the general fund; and in an action on the orders a complaint is not demurrable for failure to allege that there is any money in the road fund from which they can be paid.⁴¹⁹ Receiving

⁴¹² *Fuller v. Mower*, 81 Maine 380; s. c. 17 Atl. 312.

⁴¹³ *Snyder Tp. v. Bovaird*, 122 Pa. St. 442; s. c. 15 Atl. 910, where it was held that where a township order has been assigned, the supervisors have no authority to take it up and issue a new one to the assignee.

⁴¹⁴ *Snyder Tp. v. Bovaird*, 122 Pa. St. 442; s. c. 15 Atl. 910.

⁴¹⁶ *Avery v. Township Board*, 73 Mich. 622; s. c. 41 N. W. 818.

⁴¹⁷ *Brown v. Town of Jacobs*, 77 Wis. 27; s. c. 45 N. W. 679.

⁴¹⁸ *Alexander v. Oneida Co.*, 76 Wis. 56; s. c. 45 N. W. 21. The Wisconsin statute provides that no action shall be brought upon a county order until thirty days after a demand for payment.

⁴¹⁹ *Marvin v. Town of Jacobs*, 77 Wis. 31; s. c. 45 N. W. 679.

a township order as the allowance of a part of an account for services rendered for the reasonable value of which the township is liable will not preclude the creditor from suing for the balance of his services, if he does not accept the order in full payment.⁴²⁰ Where a town order is presented by the payee to the treasurer of the town and paid, it ceases to be a valid contract and can not be again negotiated in payment of other debts owing by the town.⁴²¹ It has been held that immediately upon the passage of an act creating a new county there came into existence the usual county offices in such county, and that the filling of such offices by the appointment of the county commissioners by the governor, and the other county officers by such commissioners under the authority given in the act, was the filling of *de jure* offices, and made all the officers who qualified and acted under such appointment at least *de facto* officers, and therefore warrants issued by the board of county commissioners so appointed were *prima facie* valid and binding upon the county.⁴²² A fund set apart under the Alabama code making the claims of jurors and for certain other expenses preferred claims against the county, and requiring the county treasurer to set apart a sufficient fund for their payment, can be used for the payment of the current claims of those classes only, and jurors' certificates for services previously rendered are not entitled to payment out of it.⁴²³

§ 953. School board orders.—A declaration in a suit against the directors of a new school district on orders issued by the directors of a school district which has since been attached to it with no allegation of an apportionment, under the Illinois statute, of the funds, property and liabilities of the former district has been held fatally defective.⁴²⁴ Where a town has adopted the township system of school government and constitutes but one school district, it is not necessary, in an action against the district on orders for school purposes drawn by it on the town treasurer and made payable "out of any money in the school fund not otherwise appropriated," to allege in the complaint that there are moneys in the town treasurer's hands, as the statute requires each school district to provide annually by taxation for an amount sufficient to support its schools during the

⁴²⁰ *Wilkinson v. Long Rapids Tp.*, 74 Mich. 63; s. c. 41 N. W. 861. The decision of a township board, unlike that of the board of supervisors, is not final and conclusive upon the claimant or upon the courts.

⁴²¹ *Mitchell v. Inhabitants &c.*, 81 Maine 482; s. c. 17 Atl. 546.

⁴²² *Merchants' Nat'l Bk v. McKinney*, 2 S. Dak. 106; s. c. 48 N. W. 841.

⁴²³ *Allen v. Watts*, 88 Ala. 497; s. c. 7 So. 190.

⁴²⁴ *Moll v. School Directors*, 23

ensuing year.⁴²⁵ A warrant issued to a teacher who does not hold a legal certificate of qualification is void under the Dakota statute; and the fact that the school township received the benefit of the teacher's services does not subject the township to liability under the warrant on a quantum meruit.⁴²⁶ Such warrants not being negotiable so as to cut off defenses, an assignee can not recover thereon as being a bona fide purchaser.⁴²⁷ An order for the payment of school funds drawn with the concurrence of two only of three trustees of a district, one of whom was interested in it, has been held to be void.⁴²⁸

§ 954. School warrants.—School warrants issued by a school board under the provisions of the Dakota statute in payment of necessary appendages for a schoolhouse during the time a school is taught are prima facie valid claims against a school district; and, in the absence of evidence to the contrary, it will be presumed that they were lawfully issued, and duly presented and allowed at a regular meeting of the district, if such presentation and allowance was necessary.⁴²⁹ A warrant issued by a school district, though in the hands of a bona fide purchaser, creates no greater liability than the demand it represents, and it is subject to the same defenses.⁴³⁰ Though the Mississippi statute "to provide for the payment of the outstanding public school certificates" declared that such teachers' certificates as were not presented pursuant to its provisions should be barred of all benefit under that act, this, it was held, did not relieve the county from the obligation to pay valid certificates which were not presented under the act because they had been mislaid.⁴³¹ Orders on the treasurer of a school district directing him to pay certain judgments issued

⁴²⁵ *Brown v. Town Board &c.*, 77 Wis. 27; s. c. 45 N. W. 678. The order being made payable "out of any moneys in the school fund not otherwise appropriated" is an order on the general school fund in the town treasurer's hands, and not an order on a special fund; and hence the rule that it must be averred that there are moneys in the special fund sufficient to meet orders thereon does not apply.

⁴²⁶ *Goose River Bank v. Willow Lake School Tp.*, 1 N. Dak. 26; s. c. 44 N. W. 1002. The statute referred to provides that no teacher shall be employed to teach who does not hold a lawful certificate of qualification. Every warrant issued to a teacher

who holds no such certificate is without consideration and void.

⁴²⁷ *Goose River Bank v. Willow Lake School Tp.*, 1 N. Dak. 26; s. c. 44 N. W. 1002.

⁴²⁸ *Shakespear v. Smith*, 77 Cal. 638; s. c. 20 Pac. 294. And such an order not being a negotiable investment in the sense of the law merchant, a third person can acquire no greater rights under it than the original holder had.

⁴²⁹ *Edinburg Am. Land &c. Co. v. City of Mitchell*, 1 S. Dak. 593; s. c. 48 N. W. 131.

⁴³⁰ *Capital Bank v. School Dist.*, 1 N. Dak. 479; s. c. 48 N. W. 363.

⁴³¹ *Douglas v. Downing* (Miss.), 9 So. 297.

under the provision of the code of Iowa, that "when a judgment has been obtained against a school district the board of directors shall pay off and satisfy the same from the proper fund by an order on the treasurer," are not evidences of debt independent of the judgments on which they are based, and payment can not be enforced without reference to the ownership of the judgments.⁴³²

⁴³² *Richards v. Independent School Dist.*, 46 Fed. 460, sustaining a demurrer to a petition on these orders by an assignee, in which it was not averred that the judgments had been paid or canceled, on the ground that it failed to state a cause of action.

CHAPTER XXIII.

BONDS AND COUPONS.

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§ 955. **Implied power to issue bonds.**—We have seen that the implied power of municipal corporations to borrow money to carry on their ordinary operations is a point upon which the American cases are not harmonious.¹ There is also an irreconcilable conflict among the authorities as to the power to issue bonds or other commercial paper having the privileges and exemptions accorded to that class of commercial securities.² It is admitted that the power to borrow money, whether express or implied, or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness by the corporation to the lender or other creditor, and that such evidences may be in the form of notes, warrants, and perhaps most generally in that of a bond.³ But there is a marked legal distinction between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale in open market a bond, as a commercial security, with immunity in the hands of a bona fide holder for value from equitable defenses.⁴ The power to issue evidences of indebtedness for money

¹ § 827, ante.

² It is settled in England that no corporation, whether municipal or private, has the incidental right to make commercial paper: *Queen v. Town Council &c.*, 4 Q. B. 891, 906; *Bateman v. Mid-Wales R. Co.*, L. R. 1 C. P. 499; *Broughton v. Manchester Water-Works*, 3 Barn. & Ald. 1; *Bramah v. Roberts*, 3 Bing. N. C. 963; *Peruvian &c. R. Co. v. Thames &c. Ins. Co.*, L. R. 2 Ch. 617.

³ *Merrill v. Monticello*, 138 U. S. 673, 687; s. c. 11 S. Ct. 441; *Mayor &c. v. Ray*, 19 Wall. 468; *Sheffield v. Andress*, 56 Ind. 157; *Board v. Day*, 19 Ind. 450; *Miller v. Board*, 66 Ind. 162; *Hardy v. Merriwether*, 14 Ind. 203; *Mills v. Gleason*, 11 Wis. 470; *State v. Common Council &c.*, 7 Wis. 688; *President &c. v. Mayor &c.*, 7 Ohio 354; *Commonwealth v. Select &c. Council*, 34 Pa. St. 496; *Moss v. Harpeth Academy*, 7 Heisk. (Tenn.) 283.

⁴ *Merrill v. Monticello*, 138 U. S. 673, 678; s. c. 11 S. Ct. 441. The fundamental difference is illustrated by Justice Bradley in delivering the opinion of the supreme court of the

United States in *Police Jury v. Britton*, 15 Wall. 566, 571, as follows:—

“That a municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable considerations that may arise or exist between the parties, and to any modification, abatement or rescission in whole or in part that may be just and proper in consequence of irregularities, or disregard, or betrayal of the public interests. Such contracts are very different from those which are in controversy in this case [bonds issued for the purpose of funding a previous indebtedness]. The bonds and coupons on which a recovery is now sought are commercial instruments payable at a future day and transferable from

borrowed is one thing, and the power to make them of such character as to cut off equitable defenses is quite another.⁵ The power of a public quasi-corporation to issue bonds must be expressly conferred or clearly implied. Mere political bodies, constituted as counties are, for the purposes of local police and administration, have no power to make and utter commercial paper of any kind unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given which can not be fairly exercised without it. The power to issue paper obligations with the attributes of ordinary commercial paper as to matters of defense is foreign to the purposes for which the corporation is created and is never to be conceded in the absence of express legislation, or necessary, or at least very strong, implication.⁶ Where the public policy of a state, so far as the matter of the power of its municipal corporations is concerned, is clearly shown by its constitution, or its statutes, or the settled decisions of the state courts, United States courts are bound thereby.⁷ As above stated, the power of a municipal corporation to borrow money or incur indebtedness carries with it the power to issue the usual evidences of indebtedness by the corporation to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants, and perhaps most generally in the form of bonds. But, as stated above, it must be observed that there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale in open market a bond, as commercial security, with immunity in the hands of a bona fide holder for value from equitable defenses. The inherent nature of a municipal corporation is such that a different rule applies in regard to the making of commercial paper from that which exists in regard to private corporations. Where a corporation is

hand to hand. . . . The power to issue such paper has been the means in several cases which have recently been brought to our notice, of imposing upon counties and other local jurisdictions burdens of a most fraudulent and iniquitous character, and of which they would have been summarily relieved had not the obligations been such as to protect them from question in the hands of bona fide holders. . . . It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justice and

validity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements."

⁵ *Brenham v. German-American Bank*, 144 U. S. 173; s. c. 12 S. Ct. 559, and cases cited; overruling *Mitchell v. Burlington*, 4 Wall. 270, and *Rogers v. Burlington*, 3 Wall. 654.

⁶ *Claiborne Co. v. Brooks*, 111 U. S. 400; s. c. 4 S. Ct. 489; *Police Jury v. Britton*, 15 Wall. 566.

⁷ *Claiborne Co. v. Brooks*, *supra*.

created for business purposes all persons may justly presume such bodies, when issuing their paper, are acting within the scope of their power, but not so with municipalities. Being created for governmental purposes, they are auxiliary to the government in carrying into effect some special governmental policy, or to aid in preserving order and promoting the well-being of the locality over which their authority extends; and the borrowing of money, the purchase of property on time, and the giving of commercial paper are not inherent, or even powers usually conferred, and unless endowed with such power in their charters, they have no power to make and place on the market such paper, and persons dealing with them must see that the power exists.⁸ Power to negotiate loans in anticipation of revenue does not authorize the issuing of bonds in payment of such loans.⁹ The power of public quasi-corporations to issue bonds must be expressly conferred upon them by law or be clearly implied. As a rule this class of public corporations are created for the purposes of government and are in fact political bodies with functions limited and prescribed.¹⁰ Power to borrow money and issue bonds impliedly includes power to employ a person to procure purchasers.¹¹

§ 956. The doctrine of the supreme court of the United States.—

It has been held by the supreme court of the United States and has become the settled doctrine of that court, in opposition, however, to a considerable number of cases in the state courts,¹² that there is no power to make and utter commercial paper of any kind, unless such power is expressly conferred by law, or is clearly implied from some other power expressly given which can not be fairly exercised

⁸ *Merrill v. Monticello*, 138 U. S. 673; s. c. 11 S. Ct. 441; *Police Jury v. Britton*, 15 Wall. 566; *Mayor v. Ray*, 19 Wall. 468; *Hill v. Memphis*, 134 U. S. 198; s. c. 10 S. Ct. 562; *Hewitt v. Board &c.*, 94 Ill. 528; *Board &c. v. Farwell*, 25 Ill. 181; *Clarke v. Board &c.*, 27 Ill. 305; *Marshall County v. Cook*, 38 Ill. 44; *Wiley v. Silliman*, 62 Ill. 170; *Harding v. Rockford &c. R. Co.*, 65 Ill. 90; *McWhorter v. People*, 65 Ill. 290; *Goodnow v. Board &c.*, 11 Minn. 31; *Board of Education v. Blodgett*, 155 Ill. 441; s. c. 40 N. E. 1025; 31 L. R. A. 70; *Rathbone v. Board &c.*, 73 Fed. 395.

⁹ *German Ins. Co. v. City of Manning*, 95 Fed. 597.

¹⁰ *Young v. Clarendon Tp.*, 132 U. S. 340; s. c. 10 S. Ct. 107; *Hill v. Memphis*, 134 U. S. 198; s. c. 10 S. Ct. 562; *Claiborne Co. v. Brooks*, 111 U. S. 400; s. c. 4 S. Ct. 489.

¹¹ *Armstrong v. Village of Ft. Edward*, 159 N. Y. 315; s. c. 53 N. E. 1116.

¹² *Williamsport v. Commonwealth*, 84 Pa. St. 487; *Bank v. Mayor &c.*, 7 Ohio 354; *Mills v. Gleason*, 11 Wis. 470; *State v. Common Council*, 7 Wis. 688; *Clark v. City of Janesville*, 10 Wis. 119, 136; *Clark v. School Dist.*, 3 R. I. 199; *State v. Babcock*, 22 Neb. 614; s. c. 35 N. W. 941; *State v. Babcock*, 25 Neb. 278; s. c. 41 N. W. 155.

without it;¹³ and Judge Dillon pronounces the contention unsound and dangerous "that a public or municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and as *incidental* thereto the power to issue commercial securities, that is, paper, which cuts off defenses when it is in the hands of a bona fide holder for value acquired before it is due."¹⁴

§ 957. **The same subject continued—Brenham v. German-American Bank.**—The charter of the city of Brenham, Texas, provided that "the city council shall have the power and authority to borrow, for general purposes, not exceeding \$15,000 on the credit of said city;" also, that the "bonds of the corporation of the city of Brenham shall not be subject to tax under this act." Under the authority conferred, the city council passed an ordinance entitled "An ordinance to provide for the issue and sale of \$15,000 in coupon bonds of the city to borrow money for general purposes." Bonds negotiable in form, and to the full amount authorized by the ordinance, were issued, and the coupons held by the plaintiff, the German-American Bank, were from the bonds so issued. The principal contention on the part of the defendant was that it had no authority to issue the bonds, and that they were void for all purposes and in the hands of all persons. The plaintiff recovered judgment in the United States circuit court,¹⁵ but upon a writ of error the supreme court held that the bonds were absolutely void.¹⁶

¹³ Claiborne Co. v. Brooks, 111 U. S. 400, 406; s. c. 4 S. Ct. 489; Hill v. Memphis, 134 U. S. 198; s. c. 10 S. Ct. 562. See also, Kelley v. Milan, 127 U. S. 139; s. c. 8 S. Ct. 1101; Young v. Clarendon Tp., 132 U. S. 340, 347; s. c. 10 S. Ct. 107; Bangor Sav. Bank v. City of Stillwater, 46 Fed. 899.

¹⁴ Dillon Munic. Corp., §§ 507, 507a; Town of Hackettstown v. Swackhamer, 37 N. J. L. 191; Newgass v. City of New Orleans, 42 La. An. 163; s. c. 7 So. 565; Beaman v. Board &c., 42 Miss. 237; Parsons v. Inhabitants &c., 70 Maine 262; Gause v. City of Clarksville, 5 Dill. 165, where Judge Dillon examines the cases and discusses the question in all its bearings, holding, however, that the authority may be inferred from the grant of special and extraordinary powers.

¹⁵ German-American Bank v. City of Brenham, 35 Fed. 185.

¹⁶ Brenham v. German-American Bank, 144 U. S. 173; s. c. 12 S. Ct. 559. The United States supreme court will adopt the settled decisions of the highest court of a state which have determined the extent and character of the powers which its political and municipal organizations shall possess: Claiborne Co. v. Brooks, 111 U. S. 400; s. c. 4 S. Ct. 489; Howard v. Francis Co., 50 Fed. 44. See also, Comanche Co. v. Lewis, 133 U. S. 198, 207; s. c. 10 S. Ct. 286. It was urged by the plaintiff in Brenham v. German-American Bank, *supra*, that the supreme court of Texas had recognized the validity of this very issue of bonds in Dwyer v. Hackworth, 57 Tex. 245; but in that case the court only decided that it could not enjoin

§ 958. Same continued—State decisions.—There is an utter lack of harmony in the decisions of the state courts upon the subject of

the collection of taxes to pay interest on the bonds without making the holders of the bonds parties to the suit. "There was, therefore, no adjudication in that case as to the validity of the bonds," and the supreme court proceeded to determine the case in hand upon general principles and the precedents in its own court. The opinion of the court in *Brenham v. German-American Bank*, supra, was delivered by Justice Blatchford, who said:—"That in exercising its power to borrow not exceeding \$15,000 on its credit for general purposes the city could give to the lender, as a voucher for the repayment of the money, evidence of indebtedness in the shape of non-negotiable paper is quite clear; but that does not cover the right to issue negotiable paper or bonds unimpeachable in the hands of a bona fide holder. . . . The confining of the power in the present case to the borrowing of money for general purposes on the credit of the city limits it to the power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the grant of the power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and not to plunge the municipal corporation into a debt on which interest must be paid at the rate of ten per centum per annum, semi-annually for at least ten years. It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and under the well settled rule that any doubt as to the existence of such power ought to be determined against its

existence it ought not to be held to exist in the present case. . . . We can not regard the provision in the charter of the city that bonds of the corporation of the city 'shall not be subject to the tax under this act' as recognizing the validity of the bonds in question. Whatever that provision may mean, it can not include bonds unlawfully issued." Justices Brown, Harlan and Brewer dissented from the conclusion of the majority of the court, the grounds of dissent being stated by Justice Brewer. He reviews the cases cited in the majority opinion and concludes from a minute examination that in none of those decided since *Rogers v. Burlington*, 3 Wall. 654, was there any question as to negotiable securities being issued under an express power to borrow money; and that some of them concede that such a power carries with it the authority to give a negotiable paper for money borrowed. The argument ab inconvenienti is also directed against the views of the majority:—"There are perhaps few municipal corporations anywhere that have not, under some circumstances and within prescribed limits as to amount, express authority to borrow money for legitimate corporate purposes. While this authority may be abused, it is often vital to the public interests that it be exercised. But if it may not be exercised by giving negotiable notes or bonds as evidence of the indebtedness so created—which is the mode usually adopted in such cases,—the power to borrow, however urgent the necessity, will be of little practical value. Those who have money to lend will not lend it upon mere vouchers or certificates of indebtedness. The aggregate amount of negotiable notes and bonds exe-

the power of municipalities to issue bonds which are in the nature of commercial paper passing by delivery and as to which all equitable defenses are barred as against a bona fide holder. This lack of harmony has largely grown out of a failure to distinguish the difference between the law applicable to a strictly private or trading corporation and a municipal corporation, growing out of the fundamental difference as to the functions of these corporations. The implied power of a trading corporation to issue negotiable bonds, in the absence of statutory or constitutional limitations, may be admitted. It is incidental to the purposes of its creation and necessary for its existence. But with reference to a municipal corporation it can not be said that the issuance of bonds of the character under consideration is a necessity growing out of the purposes of its creation. The object for which its bonds may be issued must of necessity have relation to the performance of municipal duties. It can not issue bonds in aid of a railroad without express authority, such act not being a municipal function. Much confusion also has arisen from not distinguishing the difference between a simple evidence of indebtedness given for money borrowed and a general issuance of negotiable bonds, to be placed upon the market and sold as commercial paper freed of all equitable defenses. It may be convenient, or even essential to the regulation and sale of municipal securities, that they have the attributes of ordinary commercial paper, and all defenses of an equitable nature be barred as between the maker and bona fide holder, and if so, let it be done by the proper law-making power rather than by a judicial extension of the law of implied powers of municipal corporations. Any one familiar with the enormous municipal indebtedness existing in many cities operating as a mortgage upon the resources of the people, promoting as it does unwise and lavish expenditures, must admit the danger of amplifying the law of implied powers in this regard. The United States supreme court, as seen above, has placed its seal of disapproval upon this subject. Nearly all leading text-writers have done the same. Many state courts have declared the public policy as against either acknowledging the existence of this implied power or further extending it. The decided trend and weight of authority, as well as reason and the safety of municipalities, are

cuted by municipal corporations for legitimate purposes, under express power to borrow money simply, and now outstanding in every part of the country, must be enormous. A declaration by this court that such

notes and bonds are void because of the absence of express legislative authority to execute negotiable instruments for the money borrowed will, we fear, produce incalculable mischief."

against the implied power of cities, towns and villages to issue negotiable bonds with the attributes of commercial paper.¹⁷

§ 959. Agency in issuing.—Where selectmen borrow money on the credit of the town, but without authority, and execute notes in their own names as selectmen, the payee takes the notes with notice of agency and takes the risk of the authority to execute them.¹⁸ Bonds issued by *de facto* officers are valid.¹⁹

§ 960. The corporation must have a legal existence.—When the attempted organization of a municipality is void, such a body may plead the invalidity of its organization in defense to a suit brought on its bonds, since it has no power to issue them.²⁰ But although the

¹⁷ The court, in *City of Williamsport v. Commonwealth*, 84 Pa. St. 487, holds that the power to borrow money gives, by implication, the power to issue negotiable securities. It is based upon the following citations: *Bank of Chillicothe v. Mayor &c.*, 7 Ohio 354; *Sturtevant v. City of Alton*, 3 McLean 393; *Mullarky v. Town of Cedar Falls*, 19 Iowa 21; *City of Galena v. Corwith*, 48 Ill. 423; *Ketchum v. City of Buffalo*, 14 N. Y. 356; *Kelley v. Mayor &c.*, 4 Hill (N. Y.) 263; *Clarke v. School District*, 3 R. I. 199; *First Municipality &c. v. McDonough*, 2 Rob. (La.) 244; *Clark v. City of Des Moines*, 19 Iowa 199; *Adams v. Memphis &c. R. Co.*, 2 Coldw. (Tenn.) 645; *Commonwealth &c. v. Councils of Pittsburgh*, 5 Wright (Pa.) 278, 284. In the case of *City of Galena v. Corwith*, *supra*, the bond was in payment of an actual existing indebtedness, and the decision has since been overruled in *Hardin Co. v. McFarlan*, 82 Ill. 138; *Commissioners &c. v. Newell*, 80 Ill. 587; *Hewitt v. Board of Education*, 94 Ill. 528; *Binell v. City of Kankakee*, 64 Ill. 249. In *People v. Johnson*, 100 Ill. 537, the court says: "We regard the rule well settled, by considerations of public policy as well as by a decided preponderance

of authority, that warrants or orders drawn by one municipal officer upon another in the disbursement of funds of the municipality and payment of its indebtedness are not to be regarded as negotiable or commercial paper cutting off equities against the corporation. As we have already seen the official agents of these municipalities have no implied power to execute such paper, and to clothe these warrants or orders with the qualities and attributes of commercial securities would be to give them a character foreign to the object and purposes of their creation."

¹⁸ *Smith v. Epping*, 69 N. H. 558; s. c. 45 Atl. 415. Cf. *The Floyd Acceptances*, 7 Wall. 666; *Marsh v. Fulton County*, 10 Wall. 676; *Louisville v. Bank of Louisville*, 174 U. S. 439; s. c. 19 S. Ct. 753.

¹⁹ *City of Lampasas v. Talcott*, 97 Fed. 457.

²⁰ *Ruohs v. Town of Athens*, 91 Tenn. 20; s. c. 18 S. W. 400. See also, the important case of *Norton v. Shelby Co.*, 118 U. S. 425; s. c. 6 S. Ct. 1121. But in the case first cited the court said:—"Such a rule would not, of course, apply to irregularly organized corporations, or those which obtained such validity by special grant of the state, or compli-

original organization of a county was confessedly fraudulent, yet where the county had a de facto organization, and the records of such organization appeared regular and valid upon their face, and the governor recognized and proclaimed the organization, and its validity was subsequently recognized by the legislature of the state, it was held that the bonds in regular form issued while that organization was in existence were valid obligations in the hands of bona fide purchasers for value before maturity.²¹

§ 961. No right of action on void bonds.—When a municipal corporation sells bonds which are void and receives the money, it may be compelled to restore it in an action for money had and received. So when it is authorized to purchase property for any purpose, or to contract for the erection of public buildings or for any other public work, and it enters into such authorized contract, but pays for the property acquired or work done in negotiable securities, which it has no express or implied power to issue, it may be compelled to pay for that which it has received in a suit brought for that purpose. But suit must be brought on the implied promise which the law raises to pay the value of that which the municipality has received, but has in fact not paid for, because the securities issued in pretended payment were void; and if negotiable paper is uttered without authority of law a suit can not be maintained *thereon* for any purpose.²²

§ 962. Constitutional limitations—Public purpose.—As the payment of municipal bonds must ultimately be accomplished by taxation, a valid bond issued for a purpose for which the legislature could not constitutionally authorize the levy of a tax would be a legal solecism. Taxation is a mode of raising money for some public serv-

ance with general laws, as to be merely voidable organizations, and such as the state by direct proceeding could alone dissolve; but where the constitution or the statute provides that acts done or omissions occurring in efforts to organize a municipal corporation shall render the attempt to organize and the charter invalid and of no force whatever, it is not left to the court to disregard this statutory or constitutional prohibition at the instance of a creditor deceived by the appearance of an organization. First, is there a legal corporation; and sec-

ond, has it power to issue the bonds proposed to be sold? He must at his peril determine both questions for himself."

²¹ *Harper County Com'rs v. Rose*, 140 U. S. 71; s. c. 11 S. Ct. 710.

²² *Dodge v. City of Memphis*, 51 Fed. 165; *Mayor v. Ray*, 19 Wall. 408; *Hitchcock v. Galveston*, 96 U. S. 341; *Little Rock v. National Bank*, 98 U. S. 308; *Wall v. Monroe Co.*, 103 U. S. 74, 78; *Hill v. Memphis*, 134 U. S. 198; s. c. 10 S. Ct. 562; *Merrill v. Monticello*, 138 U. S. 673; s. c. 11 S. Ct. 441.

ice or some object which concerns the public welfare. "The legislature has no constitutional right to create a public debt, or to levy a tax, or to authorize any municipal corporation to do so in order to raise money for a mere private purpose."²³ Whether the purpose in a given instance is public or private is a judicial question, and the determination of the legislature is not conclusive.²⁴ No case attempts to enumerate the objects which the legislature may constitutionally promote at the public expense. The supreme court of New Hampshire declared that the rule to be followed can not be found in any abstract principle of law, but is essentially a conclusion of fact and public policy.²⁵ The legislature of Massachusetts authorized the city of Boston to issue bonds for a large amount, and to lend the proceeds under certain conditions to the owners of land, the buildings upon which were burned in the great fire of 1872, the object being to insure the speedy rebuilding of the district swept by the conflagration. It was held that the act was not within the constitutional power of the legislature, the incidental advantage to the public by the promotion of private interests not being sufficient to justify their aid by taxation.²⁶

²³ *Black, C. J., in Sharpless v. Mayor &c.*, 21 Pa. St. 147; s. c. 59 Am. D. 759; *Hilbish v. Catherman*, 64 Pa. St. 154, 159; *Parkersburg v. Brown*, 106 U. S. 487; s. c. 1 S. Ct. 442; *State v. Wapello County*, 13 Iowa 405; *Loan Ass'n v. Topeka*, 20 Wall. 655; *Hackett v. Ottawa*, 99 U. S. 86; *State v. Osawkee Township*, 14 Kan. 418; s. c. 19 Am. R. 99.

²⁴ *In re Townsend*, 39 N. Y. 171. "If the purpose designated by the legislature lies so near the border line as that it may be doubtful on which side it is domiciled, the court may not set their judgment against that of the lawmaker." *Folger, J., in Weismer v. Village of Douglas*, 64 N. Y. 91; s. c. 21 Am. R. 586.

²⁵ *Perry v. Keene*, 56 N. H. 514. See also, *State v. Tappan*, 29 Wis. 664; *English v. People*, 96 Ill. 566. "In deciding whether in the given case the object for which the taxes are assessed falls on the one side or the other of this line [between private and public use], they must be governed mainly by the course and

usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation." *Justice Miller in Loan Ass'n v. Topeka*, 20 Wall. 655, 665.

²⁶ *Lowell v. City of Boston*, 111 Mass. 454; s. c. 15 Am. R. 39. The same rule was applied to the same state of facts in *Feldman v. City Council &c.*, 23 S. C. 57. See also, *State v. Osawkee Township*, 14 Kan. 418; s. c. 19 Am. R. 99; *McConnell v. Hamm*, 16 Kan. 228; *Weismer v. Village of Douglas*, 64 N. Y. 91; *Allen v. Inhabitants &c.*, 60 Maine 124; *Brewer Brick Co. v. Inhabitants &c.*,

§ 963. **Aid to manufacturing enterprises.**—The validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy the tax for that purpose, and it is inferred that when the legislature of the state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference. It is generally held that the legislature has no right to authorize municipalities to levy taxes to be used in aid of manufacturing enterprises conducted by individuals, or private corporations, for purposes of gain, and therefore a law conferring power to issue bonds for such a purpose is of no validity, and the obligations are utterly void.²⁷

62 Maine 62; s. c. 16 Am. R. 395; Commercial Nat. Bank v. City of Iola, 2 Dill. 353; Bissell v. City of Kankakee, 64 Ill. 249; Coates v. Campbell, 37 Minn. 498; s. c. 35 N. W. 366. For illustrations of public purposes, see Wilkinson v. Cheatham, 43 Ga. 258; Curtis v. Whipple, 24 Wis. 350; Weeks v. City of Milwaukee, 10 Wis. 242; Jenkins v. Inhabitants &c., 103 Mass. 94; Tyler v. Beecher, 44 Vt. 648.

²⁷ "If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally the promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town." Per Justice Miller, in *Loan Ass'n v. Topeka*, 20 Wall. 655, 665; holding also that payment of interest in such cases by the city works no estoppel. For other cases in point, see *Parkersburg v. Brown*, 106 U. S. 487; s. c.

1 S. Ct. 442; 2 Am. & Eng. Corp. Cas. 263; *Blair v. Cuming Co.*, 111 U. S. 363; s. c. 4 S. Ct. 449; *Cole v. La Grange*, 113 U. S. 1; s. c. 5 S. Ct. 416; 7 Am. & Eng. Corp. Cas. 379; *Ohio Valley Iron Works v. Town of Moundsville*, 11 W. Va. 1; *McConnell v. Hamm*, 16 Kan. 228; *People v. Parks*, 58 Cal. 624; *Brodhead v. City of Milwaukee*, 19 Wis. 624; *Osborne v. Adams Co.*, 106 U. S. 181; s. c. 1 S. Ct. 168; 2 Am. & Eng. Corp. Cas. 284; *In re Eureka Basin & Co.*, 96 N. Y. 42. In *Hackett v. Ottawa*, 99 U. S. 86, and *Ottawa v. National Bank*, 105 U. S. 342, the bonds were declared valid because they appeared on their faces to have been issued for legitimate and authorized purposes. See *Ottawa v. Carey*, 108 U. S. 110; s. c. 2 S. Ct. 361. Where the constitution prohibits taxation except for corporate purposes, the issue of negotiable bonds, to be expended by a private corporation in improving water-power within the municipal limits, is unauthorized: *Mather v. City of Ottawa*, 114 Ill. 659; s. c. 3 N. E. 216. Or to aid a private corporation carrying on a rolling-mill: *Cole v. La Grange*, 113 U. S. 1; s. c. 5 S. Ct. 416. Bonds issued for the purpose of supplying the corporation or its citizens with gas or water are for a legiti-

§ 964. **Internal improvements.**—The statutes of some of the states authorize cities and counties to issue bonds in aid of any work of “internal improvement.” A toll bridge,²⁸ water-works owned by a city,²⁹ and water-power for a public grist-mill,³⁰ have been held to be within the scope of the statute.³¹ Where a city has authority to donate money for a public improvement it will be presumed that the city acted under such authority of the statute, and on a petition of the taxpayers.³²

§ 965. **Municipal aid to railroads—Express legislative authority essential.**—By an unbroken current of decisions, both in federal and state courts, it is settled law that a municipality has no implied power to contract debts for the purpose of aiding a railway company or subscribing to its stock.³³ And even where there is authority to aid

mate public purpose, whether the source of supply is wholly within or wholly without the corporate limits: *Fellows v. Walker*, 39 Fed. 651 (natural gas).

²⁸ *County Com'rs v. Chandler*, 96 U. S. 205. And a bridge in a highway contiguous to a city: *State v. Babcock*, 23 Neb. 179; s. c. 36 N. W. 474. See also, *State v. Keith Co.*, 16 Neb. 508; s. c. 20 N. W. 856; distinguishing *De Clerq v. Hager*, 12 Neb. 185; s. c. 10 N. W. 697. Under power to aid, a county may itself construct a bridge: *Union Pac. R. Co. v. Commissioners &c.*, 4 Neb. 450. Public roads: *Wilcox v. Deer Lodge Co.*, 2 Mont. 574.

²⁹ *State v. Babcock*, 19 Neb. 230; s. c. 27 N. W. 98.

³⁰ *Blair v. Cumming Co.*, 111 U. S. 363; s. c. 4 S. Ct. 449; *Traver v. Merrick Co.*, 14 Neb. 327; s. c. 15 N. W. 690. Contra as to steam grist-mills: *Osborne v. Adams Co.*, 106 U. S. 181; s. c. 1 S. Ct. 168. Cf. *Getchell v. Benton*, 30 Neb. 870; s. c. 47 N. W. 468; *Burlington Tp. v. Beasley*, 94 U. S. 310.

³¹ But authority to “aid in the construction of any railroad or other work of internal improvement” does not include public buildings: *Board &c. v. McNamar*, 10 Neb. 276; s. c.

4 N. W. 991; *Lewis v. Board &c.*, 2 McCrary 464; *Union Pac. R. Co. v. Lincoln Co.*, 3 Dill. 300. See also, *Rozier v. St. Francois Co.*, 34 Mo. 395; *Guernsey v. Burlington Tp.*, 4 Dillon 372; *Lewis v. Board &c.*, 5 Fed. 269; *Freemont Bldg. Ass'n v. Sherwin*, 6 Neb. 48.

³² *Schneck v. City of Jeffersonville*, 152 Ind. 204; s. c. 52 N. E. 212.

³³ *Young v. Clarendon Tp.*, 132 U. S. 340; s. c. 10 S. Ct. 107; *Kelley v. Milan*, 127 U. S. 139; s. c. 8 S. Ct. 1101; *Norton v. Dyersburg*, 127 U. S. 160; s. c. 8 S. Ct. 1111; *Concord v. Robinson*, 121 U. S. 165; s. c. 7 S. Ct. 937; *Daviess Co. v. Dickinson*, 117 U. S. 657; s. c. 6 S. Ct. 897; *Claiborne Co. v. Brooks*, 111 U. S. 400; s. c. 4 S. Ct. 489; *Lewis v. City of Shreveport*, 108 U. S. 282; s. c. 2 S. Ct. 634; *Weightman v. Clark*, 103 U. S. 256; *Wells v. Supervisors*, 102 U. S. 625; *Town of South Ottawa v. Perkins*, 94 U. S. 260; *Town of Coloma v. Eaves*, 92 U. S. 484; *St. Joseph Tp. v. Rogers*, 16 Wall. 644; *Kenicott v. Wayne Co.*, 16 Wall. 453; *Pendleton Co. v. Amy*, 13 Wall. 297; *Police Jury v. Britton*, 15 Wall. 566; *Marsh v. Fulton Co.*, 10 Wall. 676; *Thomson v. Lee Co.*, 3 Wall. 327; *Kelley v. Town of Milan*, 21 Fed. 842; *Katzenberger v. City of*

a railroad and incur a debt in extending such aid, it is also settled that the power does not carry with it any authority to execute negotiable bonds, except subject to the restrictions and conditions of the enabling act.³⁴

§ 966. **Railway aid bonds—Legislature may authorize.**—The law is now firmly established, except in Iowa, Michigan and Wisconsin, that in the absence of constitutional restraint the legislature may authorize a municipal corporation to subscribe to stock in a railway company, or to aid it by a donation, and to issue negotiable bonds in fulfillment of those purposes. "The public has an interest in such a road when it belongs to a corporation—as clearly as they would have if it was free or as if the tolls were payable to the state, because travel and transportation are cheapened by it to a degree far exceeding all the tolls and charges of every kind; and this advantage the public has over and above those of rapidity, comfort, convenience, increase of travel, opening of markets and other means of rewarding labor and

Aberdeen, 16 Fed. 745; Commercial Bank v. City of Iola, 2 Dill. 353; Orleans &c. R. Co. v. Dunn, 51 Ala. 128; English v. Chicot Co., 26 Ala. 454; French v. Teschemaker, 24 Cal. 518; McCoy v. Briant, 53 Cal. 247; City of Bridgeport v. Housatonic R. Co., 15 Conn. 475; Jones v. Mayor &c., 25 Ga. 610; Gaddis v. Richland Co., 92 Ill. 119; Pitzman v. Village of Freeburg, 92 Ill. 111; Barnes v. Town of Lacon, 84 Ill. 461; Lafayette &c. R. Co. v. Geiger, 34 Ind. 185; City of Aurora v. West, 22 Ind. 88, 503; Delaware Co. v. McClintock, 51 Ind. 325; Williamson v. City of Keokuk, 44 Iowa 88; Jeffries v. Lawrence, 42 Iowa 498; City of Atchison v. Butcher, 3 Kan. 104; Burnes v. Mayor &c., 2 Kan. 454; Clay v. Nicholas Co., 4 Bush (Ky.) 154; City &c. v. Alexander, 23 Mo. 483; Hawkins v. Carroll Co., 50 Miss. 735; Reine-man v. Covington &c. R. Co., 7 Neb. 310; Starin v. Town of Genoa, 23 N. Y. 439; People v. Mitchell, 35 N. Y. 551; Gould v. Sterling, 23 N. Y. 439; Town of Duanesburg v. Jenkins, 40 Barb. (N. Y.) 574; Pennsylvania R.

Co. v. City of Philadelphia, 47 Pa. St. 189; Nichol v. Mayor &c., 9 Humph. (Tenn.) 252; Cook v. Manufacturing Co., 1 Sneed (Tenn.) 698; Lamoille Valley R. Co. v. Town of Fairfield, 51 Vt. 257; Fisk v. City of Kenosha, 26 Wis. 23. Power to borrow money to contribute to works of internal improvement will sustain a guaranty of railroad bonds: City of Savannah v. Kelly, 108 U. S. 184; s. c. 2 S. Ct. 468.

³⁴ Young v. Clarendon Tp., 132 U. S. 340; s. c. 10 S. Ct. 107; Hill v. Memphis, 134 U. S. 198; s. c. 10 S. Ct. 562; Wells v. Supervisors, 102 U. S. 625; Ottawa v. Carey, 108 U. S. 110; s. c. 2 S. Ct. 361; Mayor &c. v. Gilmore, 21 Fed. 870; Taxpayers of Milan v. Tennessee &c. R. Co., 11 Lea (Tenn.) 330; Campbell Co. v. Knoxville &c. R. Co., 6 Coldw. (Tenn.) 598; Ogden v. Daviess Co., 102 U. S. 634; Daviess Co. v. Dickinson, 117 U. S. 657; s. c. 6 S. Ct. 897. See also, Aspinwall v. Commissioners &c., 22 How. 364; People v. Coon, 25 Cal. 635; City of Lafayette v. Cox, 5 Ind. 38.

promoting wealth.”³⁵ An act incorporating a railroad company may grant authority to towns to vote bonds in aid of the railroad without

³⁵ Chief Justice Black in *Sharpless v. Mayor &c.*, 21 Pa. St. 147, 169; s. c. 59 Am. D. 759, the leading case on this subject; *Railroad Co. v. Otoe Co.*, 16 Wall. 667; *Olcott v. Supervisors*, 16 Wall. 678; *St. Joseph Tp. v. Rogers*, 16 Wall. 644; *Pine Grove Tp. v. Talcott*, 19 Wall. 666; *Mitchell v. Burlington*, 4 Wall. 270; *Bell v. Mobile &c. R. Co.*, 4 Wall. 598 (railroad in another state); *Rogers v. Burlington*, 3 Wall. 654; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Loan Ass'n v. Topeka*, 20 Wall. 655; *Gibbons v. Mobile &c. R. Co.*, 36 Ala. 410; *Stein v. Mayor &c.*, 24 Ala. 591; *Ex parte Selma &c. R. Co.*, 45 Ala. 696; *City of Opdike v. Daniel*, 59 Ala. 211; *Robinson v. Bidwell*, 22 Cal. 379; *Stockton &c. R. Co. v. Common Council &c.*, 41 Cal. 147; *Douglas v. Town of Chatham*, 41 Conn. 211; *Society &c. v. City of New London*, 29 Conn. 174; *City of Bridgeport v. Housatonic &c. R. Co.*, 15 Conn. 475; *Powers v. Inferior Court*, 23 Ga. 65; *Cotton v. County Com'rs*, 6 Fla. 610; *Leavenworth Com'rs v. Miller*, 7 Kan. 479, where the question is thoroughly discussed; *Butler v. Dunham*, 27 Ill. 473; *Quincy &c. R. Co. v. Morris*, 84 Ill. 410; *Robertson v. City of Rockford*, 21 Ill. 451; *Shaw v. Dennis*, 5 Gilm. (Ill.) 405; *Petty v. Myers*, 49 Ind. 1; *City of Mt. Vernon v. Hovey*, 52 Ind. 563; *John v. Cincinnati R. Co.*, 35 Ind. 539; *Slack v. Maysville &c. R. Co.*, 13 B. Mon. (Ky.) 1, 26; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Courtney v. Louisville*, 12 Bush (Ky.) 419; *Talbot v. Dent*, 9 B. Mon. (Ky.) 526; *State v. County Court*, 44 Mo. 504; *City v. Alexander*, 23 Mo. 483; *St. Joseph &c. R. Co. v. Linn Co. Court*, 39 Mo. 485; *Police Jury v. McDonough*, 8 La. An. 341; *Augusta Bank v. City of Augusta*, 49 Maine 507; *Hallenbeck v. Hahn*, 2 Neb. 377; *Perry v. Keene*, 56 N. H. 514; *Cincinnati &c. R. Co. v. Commissioners &c.*, 1 Ohio St. 77; *Loomis v. Spencer*, 1 Ohio St. 153; *Griffith v. Commissioners &c.*, 20 Ohio 609; *Cass v. Dillon*, 2 Ohio St. 607; *Walker v. City of Cincinnati*, 21 Ohio St. 14; *State v. Trustees &c.*, 14 Ohio St. 569; *Hopple v. Trustees &c.*, 13 Ohio St. 311; *Bank of Rome v. Village of Rome*, 18 N. Y. 38; *Clarke v. City of Rochester*, 24 Barb. (N. Y.) 446; *People v. Mitchell*, 35 N. Y. 551; *In re Townsend*, 39 N. Y. 171; *Commonwealth v. Council &c.*, 41 Pa. St. 278; *Commonwealth v. McWilliams*, 11 Pa. St. 61; *Commonwealth v. Perkins*, 43 Pa. St. 400; *Hill v. Commissioners &c.*, 67 N. C. 367; *Louisville &c. R. Co. v. County Court*, 1 Sneed (Tenn.) 637; *City of San Antonio v. Jones*, 28 Tex. 19; *City of San Antonio v. Lane*, 32 Tex. 405; *Harcourt v. Good*, 39 Tex. 455; *Goddin v. Crump*, 8 Leigh (Va.) 120; *Langhorne v. Robinson*, 20 Gratt. (Va.) 661; *State v. Mayor &c.*, 10 Rich. (S. C.) 491. May authorize donations: *Chicago &c. R. Co. v. Smith*, 62 Ill. 268 (see also, *Chicago &c. R. Co. v. Pinckney*, 74 Ill. 277); *Davidson v. County Com'rs*, 18 Minn. 482; *Whiting v. Sheboygan &c. R. Co.*, 25 Wis. 167 (holds a subscription valid but not a gift); *Phillips v. Town of Albany*, 28 Wis. 340. In Iowa, acts authorizing subscriptions are held unconstitutional: *Hanson v. Vernon*, 27 Iowa 28; *State v. Wapello Co.*, 13 Iowa 388. Cf. *Stewart v. Board &c.*, 30 Iowa 1. And in Michigan: *People v. Township Board &c.*, 20 Mich. 452; s. c. 4 Am. R. 400 (opinion by Judge Cooley); overruled in *Pine Grove Tp. v. Talcott*, 19 Wall. 666, and adhered to in

in terms amending the charter of the towns, where no charter authority exists.³⁶ Railroad aid bonds are not invalidated by a change of the route where the road was actually built through the city as contemplated in the subscription.³⁷

§ 967. The same subject continued—Negotiable bonds.—It is well settled that the power to subscribe for stock in a railway corporation does not of itself include the power to issue negotiable bonds in payment of it. All grants of power in such cases are to be construed strictly and not to be extended beyond the terms of the law. Whilst a municipal corporation authorized to subscribe for stock or to incur any other obligation may give written evidence of such subscription or obligation, it is not thereby empowered to issue negotiable paper for the amount of the indebtedness incurred by the subscription or obligation. Such paper in the hands of innocent parties for value can not be enforced without reference to any defense on the part of the corporation, whether existing at the time or arising subsequently.³⁸

§ 968. Conditions precedent.—Where the constitution or the legislature prescribes certain conditions precedent to the granting of aid to a railway, it is necessary, except where the question of power arises between the municipality and an innocent holder for value of its bonds, that there should be a compliance with all substantial or material requirements.³⁹ It is not uncommon for the courts to grant

People v. State Treasurer, 23 Mich. 499; *People v. State Treasurer*, 24 Mich. 468; *Thomas v. City of Port Huron*, 27 Mich. 320.

³⁶ *Glenn v. Wray*, 126 N. C. 730; s. c. 36 S. E. 167. Cf. *Board &c. v. Payne*, 123 N. C. 435; s. c. 31 S. E. 711; *Jones v. Commissioners*, 107 N. C. 248; s. c. 12 S. E. 69; *Wood v. Town of Oxford*, 97 N. C. 227; s. c. 2 S. E. 653; *Union Bank &c. v. Commissioners &c.*, 119 N. C. 214; s. c. 25 S. E. 966.

³⁷ *Mayor &c. v. Denison*, 69 Fed. 58.

³⁸ *Hill v. Memphis*, 134 U. S. 198; s. c. 10 S. Ct. 562. See also, *Claiborne Co. v. Brooks*, 111 U. S. 400, 476; s. c. 4 S. Ct. 489; *Kelley v. Milan*, 127 U. S. 139; s. c. 8 S. Ct. 1101; *Ogden v. Daviess Co.*, 102 U. S.

634; *Marsh v. Fulton Co.*, 10 Wall. 676; *Wells v. Supervisors*, 102 U. S. 625; *Mayor &c. v. Gilmore*, 21 Fed. 870; *Green v. Town of Dyersburg*, 2 Flip. 477; *Concord v. Robinson*, 121 U. S. 165; s. c. 7 S. Ct. 937; *Ottawa v. Carey*, 108 U. S. 110, 123; s. c. 2 S. Ct. 361; *Campbell Co. v. Knoxville &c. R. Co.*, 6 Coldw. (Tenn.) 598. Where a town, in pursuance of statutory authority, subscribes for stock in a railway company, but without such authority issues negotiable bonds in payment thereof, such bonds are absolutely void, and no suit can be maintained on them on the theory that they are valid as non-negotiable instruments; *Dodge v. City of Memphis*, 51 Fed. 165.

³⁹ *Portland &c. R. Co. v. Inhabitants &c.*, 58 Maine 23; *People v.*

an injunction in favor of a taxpayer restraining the issue of bonds under proceedings alleged to be valid, but which in fact constitute a material departure from the terms of the statute;⁴⁰ or if the bonds have been actually issued they may for the same reason be declared void in the hands of one who holds them with knowledge or under circumstances which deprive him of the privileges of a bona fide holder for value.⁴¹

§ 969. Bonds—Constitutional requirements.—The validity of bonds is frequently affected by a non-compliance with constitutional requirements. Thus where the constitution provides that no law shall be passed to impose any tax upon the people, or to allow counties, cities or towns to do so, unless the yeas and nays on the second and third reading of the bill shall have been entered in the journal, the validity of the indebtedness depends upon the journal showing a compliance with this requirement.^{41a} All proceedings to issue bonds to fund

Board &c., 63 Ill. 374; *Force v. Town of Batavia*, 61 Ill. 99; *Wiley v. Town of Brimfield*, 59 Ill. 306; *People v. Cass Co.*, 77 Ill. 438; *Williams v. Town of Roberts*, 88 Ill. 11; *Lippincott v. Town of Pana*, 92 Ill. 24; *Gaddis v. Richland Co.*, 92 Ill. 119; *Gould v. Sterling*, 23 N. Y. 439; *Armstrong Co. v. Brinton*, 47 Pa. St. 367; *People v. Board &c.*, 92 Ill. 441, 444.

⁴⁰ *McClure v. Oxford Tp.*, 94 U. S. 429; *Chambers Co. v. Clews*, 21 Wall. 317; *Cairo &c. R. Co. v. Sparta*, 77 Ill. 505; *Union Pac. R. Co. v. Lincoln Co.*, 3 Dill. 300; *Union Pac. R. Co. v. Merrick Co.*, 3 Dill. 359; *Packard v. Board &c.*, 2 Colo. 338; *State v. Montgomery*, 74 Ala. 226. A township subscribed to the capital stock of a railroad under the provisions of the session laws of Kansas of 1887, ch. 183, § 1, on the condition, inter alia, that a depot should be built at a certain place. By mistake, this place, as set out in the petitions for and notices of election, was different from that intended, and from that where the depot was, in fact, built. When this mistake was discovered it was attempted to hold another election in

which the true route of the road and place for the depot should be set out, relying on the provisions of the last clause of the same section, that a second election should be held "for the same purpose" as the first, under certain circumstances. In the preliminaries for the second election a different amount for the subscription and a different route and time of completion of the road were specified. It was held that the election was not for the same purpose as the first, and the subscription was invalid: *Kansas City &c. R. Co. v. Rich Tp.*, 45 Kan. 275; s. c. 25 Pac. 595. See also, *Cook v. City of Beatrice*, 32 Neb. 80; s. c. 48 N. W. 828; *State v. Babcock*, 21 Neb. 599; s. c. 33 N. W. 247.

⁴¹ *Chester &c. R. Co. v. Commissioners*, 72 N. C. 486; *Belo v. Commissioners*, 76 N. C. 489. See also, *Louisville &c. R. Co. v. Davidson Co. Court*, 1 Sneed (Tenn.) 637; *Winston v. Tennessee &c. R. Co.*, 1 Baxt. (Tenn.) 60.

^{41a} *Union Bank &c. v. Commissioners &c.*, 119 N. C. 214; s. c. 25 S. E. 966; 34 L. R. A. 487. In this case there is a valuable collection of cases, ninety-three in number, from

existing indebtedness are illegal where the ordinance is not sufficient.⁴² A purchaser in the open market of bonds which have been issued for the construction of a bridge will be entitled to presume that the location of the bridge has been approved by the proper authorities.⁴³ Where in a funding act the commissioners were required to determine the amount of county debt preparatory to issuing refunding bonds and enter the same of record, which was done, it is authentic information a purchaser may rely on as to the validity of the bonds so far as indebtedness is concerned.⁴⁴ The preliminary requirements necessary to the valid issuance of bonds vary with each municipality, and no uniform requirements can be established.⁴⁵

§ 970. The same subject continued—Assent of taxpayers.—The power to issue bonds may be conferred upon certain officials as representatives of the corporation;⁴⁶ but more generally the authority is made to depend upon the assent of a certain proportion of the voters or taxpayers signified by a petition to the proper officers or manifested at a general or special election.⁴⁷ These provisions are deemed to be mandatory, and the use of the word “may” instead of “shall” does not render compliance with them optional.⁴⁸ Where the bonds are to be

thirty-three states, upon the doctrine announced in the text, a few of which are *Town of South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Supervisors &c.*, 105 U. S. 667; *People v. Allen*, 42 N. Y. 378; *Hollingsworth v. Thompson*, 45 La. An. 222; s. c. 12 So. 1; *State v. Mead*, 71 Mo. 266; *Hunt v. State*, 22 Tex. App. 396; s. c. 3 S. W. 233.

⁴² *Coffin v. Richards* (Idaho), 59 Pac. 562.

⁴³ *City of South St. Paul v. Lamprecht*, 88 Fed. 449; *E. H. Rollins & Sons v. Board &c.*, 80 Fed. 692.

⁴⁴ *Commissioners v. Snuggs*, 121 N. C. 394; s. c. 28 S. E. 539; *Mayor v. Commissioners &c.*, 122 N. C. 5; s. c. 29 S. E. 343; *Rodman v. Town of Washington*, 122 N. C. 39; s. c. 30 S. E. 118; *City of Charlotte v. Shepard*, 122 N. C. 602; s. c. 29 S. E. 842; *Commissioners v. Call*, 123 N. C. 308; s. c. 31 S. E. 481; *McGuire v. Williams*, 123 N. C. 349; s. c. 31 S. E. 627; *Smathers v. Commissioners*, 125 N. C. 480; s. c. 34 S. E. 554.

⁴⁵ *State v. Common Council*, 96 Wis. 73; s. c. 71 N. W. 86; *Cleveland v. City Council &c.*, 54 S. C. 83; s. c. 31 S. E. 871; *Knight v. Town of West Union*, 45 W. Va. 194; s. c. 32 S. E. 163.

⁴⁶ *McCallie v. Mayor &c.*, 3 Head (Tenn.) 317. See also, *Hawkins v. Board &c.*, 50 Miss. 735; *State v. School Dist.*, 10 Neb. 544; *Smith v. Clark Co.*, 54 Mo. 58; *State v. Green Co.*, 54 Mo. 540.

⁴⁷ A popular vote has no efficacy without legislative sanction: *Hayes v. Holly Springs*, 114 U. S. 120; s. c. 5 S. Ct. 785; *Allen v. Louisiana*, 103 U. S. 80. The power to submit the question to vote is not exhausted by a single submission: *Society for Savings v. City of New London*, 29 Conn. 174. *Contra*, *People v. Supervisors*, 88 Ill. 469.

⁴⁸ *Missouri River &c. R. Co. v. Commissioners &c.*, 12 Kan. 230; *Lewis v. Commissioners &c.*, 12 Kan. 186; *Steines v. Franklin Co.*, 48 Mo. 167; *Leavenworth &c. R. Co. v.*

issued upon a petition or assent signed by a certain number of voters or taxpayers,⁴⁹ a sufficient petition goes to the jurisdiction, and if enough signers withdraw their names before it has been acted upon, so that an insufficient number remains, there is no power to act in the premises;⁵⁰ and the authorities themselves may rescind a resolution before the rights of other parties have attached.⁵¹

§ 971. **The same subject continued—Election.**—Where the power to issue bonds depends upon the result of an election provided for by law, the election must be held in compliance with all material statutory requirements.⁵² It must be ordered by the proper officers⁵³ upon a sufficient petition,⁵⁴ and posted in the manner prescribed by

County Court, 42 Mo. 171; Portland &c. R. Co. v. Inhabitants &c., 65 Maine 63.

⁴⁹ Consent of "inhabitants" in the statute means legal voters: Walnut v. Wade, 103 U. S. 683.

⁵⁰ Noble v. City of Vincennes, 42 Ind. 125. In proceedings for injunction by taxpayers, signatures attached on Sunday were held to be void: De Forth v. Wisconsin &c. R. Co., 52 Wis. 320; s. c. 9 N. W. 17; 5 Am. & Eng. R. Cas. 28. Where the consent of taxpayers of a certain class is required, the petition must show that its signers belong to that class: Rich v. Mentz Tp., 134 U. S. 632; s. c. 10 S. Ct. 610. But the withdrawal must be made before and not after the hearing on the petition: Town of Springfield v. Teutonia Sav. Bank, 84 N. Y. 403; People v. Wagner, 7 Lans. (N. Y.) 467; People v. Allen, 52 N. Y. 538; People v. Deyou, 2 T. & C. (N. Y.) 142; People v. Sawyer, 52 N. Y. 296; People v. Hatch, 1 T. & C. (N. Y.) 113; People v. Henshaw, 61 Barb. (N. Y.) 409. Cf. First Nat'l Bank v. Town of Dorset, 16 Blatchf. 62; Matter of Taxpayers of Green, 38 How. Pr. (N. Y.) 515. Several petitions may be circulated at once and presented at different times: People v. Hughitt, 5 Lans. (N. Y.) 89; First Nat'l Bank v. Town of Concord, 50 Vt. 257. See also, on sufficiency of petition, cases cited in 22 Am. & Eng. Corp. Cas.

54, n.; Jussen v. Board &c., 95 Ind. 567.

⁵¹ In re Road Case, 17 Pa. St. 71; Red v. City Council &c., 25 Ga. 386; Bigelow v. Hillman, 37 Maine 52; State v. Hoyt, 2 Or. 246; City of New Orleans v. Wardens &c., 11 La. An. 244. See also, §§ 309, 389, ante, vol. 1. A subscription conditional upon the subscription of another town can not be rescinded after the latter has subscribed: Redd v. Supervisors &c., 31 Gratt. (Va.) 695.

⁵² A subscription without such election is void: Leavenworth &c. R. Co. v. County Court, 42 Mo. 171. The municipality may, if it chooses, submit the question to vote when it is not compelled to do so by statute: Mason v. City of Shawneetown, 77 Ill. 533.

⁵³ Jacksonville &c. R. Co. v. Vir-den, 104 Ill. 339. Cf. Sauerhering v. Iron Bridge &c. R. Co., 25 Wis. 447; Marshall County v. Cook, 38 Ill. 44.

⁵⁴ The petition must not be conditional: Craig v. Town of Andes, 93 N. Y. 405. Contra, Bittinger v. Bell, 65 Ind. 445. But such a defect may be cured by the legislature: People v. Clark, 53 Barb. (N. Y.) 171. "The undersigned, representing a majority of the taxpayers, petition," etc., is a sufficient statement that the signers are a majority: Town of Solon v. Williamsburg Sav. Bank, 35 Hun (N. Y.) 1. See

law,⁵⁵ and the requisite notice given.⁵⁶ The notice should specify with reasonable certainty the subject-matter to be acted upon.⁵⁷ Where the validity of bonds depends on the vote of two-thirds of the qualified voters voting affirmatively it means two-thirds of the voters actually voting, and not two-thirds of the qualified voters of the city.⁵⁸ And where the statute makes the issue of bonds for refunding purposes dependent upon a vote of the people it means a majority of the votes cast at a general election, and not a majority of the votes cast for the proposition.⁵⁹ Where a popular vote is required in order to issue

further as to requisites of petition, *Kansas City &c. R. Co. v. Rich Township*, 45 Kan. 275; s. c. 25 Pac. 595; *People v. Spencer*, 55 N. Y. 1; *People v. Supervisors &c.*, 88 Ill. 202; *People v. Cline*, 63 Ill. 394; *Town of Wellsborough v. New York &c. R. Co.*, 76 N. Y. 182; *People v. Barrett*, 18 Hun (N. Y.) 206; *Slack v. Blackburn*, 64 Iowa 373; *People v. Hurlbert*, 46 N. Y. 110; *State v. Blackstone*, 63 Wis. 362; s. c. 24 N. W. 72; *People v. Knowles*, 47 N. Y. 415; *Matter of Taxpayers &c.*, 43 How. Pr. (N. Y.) 263; *Orchard v. School Dist.*, 14 Neb. 378. False representations to induce citizens to sign: *Wullenwaber v. Dunigan*, 33 Neb. 447; s. c. 50 N. W. 428.

⁵⁵ §§ 364, 366, ante, vol. 1. Where the statute required thirty days' notice, the issue of bonds was restrained for failure to give the notice, although a majority voted in favor of the subscription: *Harding v. Rockford &c. R. Co.*, 65 Ill. 90.

⁵⁶ *George v. Oxford Township*, 16 Kan. 72. Notice signed by the clerk by order of the board sufficient: *Lawson v. Milwaukee &c. R. Co.*, 30 Wis. 597. See § 365, ante, vol. 1; *Luzader v. Sargeant*, 4 Wash. St. 299; s. c. 30 Pac. 142. Act of Illinois, March 6, 1867, granting a charter to the Cairo & Vincennes Railroad Company, provides that counties through which the railroad shall pass may take stock and issue bonds in payment to the company, provided a majority of the legal voters of the county shall vote for

the same at an election to be held under the order and direction of the county court. Act of Illinois, November 6, 1849, provides that such elections shall be called on thirty days' notice. It was held that the act granting the charter did not authorize an election except on the notice required by statute, and where bonds have been issued and the authority of the county to issue them is questioned, it devolves on the holder of the bonds to prove that notice of the election under which they were issued was duly given: *Post v. Pulaski Co.*, 47 Fed. 282. Where an election is required in order to authorize refunding bonds and no notice is prescribed, a notice which refers to the act and gives the voters the necessary information in order to determine the question submitted is sufficient: *Brown v. Ingalls Tp.*, 81 Fed. 485.

⁵⁷ *Bowen v. Mayor &c.*, 79 Ga. 709; s. c. 4 S. E. 159; *Belfast &c. R. Co. v. Inhabitants &c.*, 60 Me. 568; *Chicago &c. R. Co. v. Pinckney*, 74 Ill. 277 (see § 362, ante, vol. 1); *National Bank v. Town of Grenada*, 41 Fed. 87. The name of the road should be stated: *State v. Roggen*, 22 Neb. 118; s. c. 34 N. W. 108. *Contra*, *Marshall v. Silliman*, 61 Ill. 218.

⁵⁸ *Cronly v. City of Tucson* (Ariz.), s. c. 56 Pac. 876.

⁵⁹ *Bryan v. City of Lincoln*, 50 Neb. 620; s. c. 70 N. W. 252; 35 L. R. A. 752.

bonds in aid or to incur indebtedness they are restricted to the purpose stated in the submission, and rest on the special tax authorized by the vote.⁶⁰ Where the constitution provides for incurring an indebtedness based on the submission to a popular vote the validity of the bonds depends upon a strict compliance with the constitutional requirements, that is, the debt must be contracted after the vote, the bonds must be predicated on the tax and the debt not exceed the limit specified.⁶¹ Bonds issued in compliance with the statute are unaffected by a subsequent statute requiring a submission to popular vote, although they have not been sold when the statute goes into effect.⁶² Bonds issued pursuant to a vote at an election called for the purpose, but canvassed by an unauthorized board, are illegal.⁶³

§ 972. Conduct of election continued.—To authorize a subscription to stock and an issue of bonds the election must be regularly held and conducted. A vote taken at a stated town meeting when the statute required it to be taken at a special meeting was held to be void.⁶⁴ And an entry by county commissioners that a subscription was voted by a certain majority does not preclude proof to the contrary in a proceeding instituted for the purpose of contesting the validity of the election, even where contracts have been made in pursuance of the vote.⁶⁵ Where the statute requires the assent of the majority of "legal voters," "qualified voters," "electors," "qualified electors," etc., as the case may be, the question whether those of the class designated who actually voted, as distinguished from those who are entitled to vote, are intended, has been often litigated. The weight of authority is that only those who attend and vote are to be considered; but in some instances it has been held that the legislative intent to the contrary clearly appeared.⁶⁶

⁶⁰ *Callaghan v. Town of Alexandria*, 52 La. An. 1013; s. c. 27 So. 540.

⁶¹ *Callaghan v. Town of Alexandria*, 52 La. An. 1013; s. c. 27 So. 540. Where the constitution authorizes certain cities to create debts for sanitary purposes on a vote of the taxpayers it does not prohibit the legislature from authorizing the issuance of bonds for other purposes without popular vote: *Moller v. City of Galveston*, 23 Tex. Civ. App. 693; s. c. 57 S. W. 1116.

⁶² *Moller v. City of Galveston*, 23 Tex. Civ. App. 693; s. c. 57 S. W. 1116.

⁶³ *Brown v. Ingalls Tp.*, 81 Fed. 485.

⁶⁴ *Town of Pana v. Lippincott*, 2 Ill. App. 466.

⁶⁵ *Goforth v. Rutherford & Co.*, 96 N. C. 535; s. c. 2 S. E. 361. Contra, *Trimmier v. Bomar*, 20 S. C. 354.

⁶⁶ See 15 Am. & Eng. Encyc. of Law 1279; § 398, ante, vol. 1; *Smith v. Proctor*, 130 N. Y. 319; s. c. 29 N. E. 312; *Metcalf v. City of Seattle*, 1 Wash. 297; s. c. 25 Pac. 1010; *State v. Snodgrass*, 1 Wash. 305; s. c. 25 Pac. 1014. The Georgia constitution provides that no bonded indebtedness for the establishment of certain public improvements shall be incurred by any municipal corporation without the assent of two-

§ 973. **Conditional subscriptions.**—The authority to subscribe to railroad stock involves the authority to make the subscription conditional.⁶⁸ A condition may be that the bonds shall not be sold below par.⁶⁹ It is a common condition precedent that the railroad shall be constructed within a certain time,⁷⁰ or over a certain route, or that its termini shall be established at certain points. These conditions are strictly construed.⁷¹ A holder of bonds who took them

thirds of the qualified voters thereof at an election for that purpose. It was held that a provision of the legislature (Code Ga., § 508), that in estimating whether or not two-thirds of the voters have voted in favor of such an indebtedness the judges of election shall base their calculation on the votes cast at the last previous election, is constitutional. Where it appeared under this provision that more than two-thirds as many votes as were cast at the last previous election and more than two-thirds of the votes cast at the election upon the question were in favor of bonding a municipal corporation, the bonds were properly authorized: *Bell v. Mayor &c.*, 79 Ga. 152; s. c. 3 S. E. 612; *Boyt v. Dougherty Co.*, 79 Ga. 211; s. c. 3 S. E. 613.

⁶⁸ *Jacks v. City of Helena*, 41 Ark. 213; *People v. Hutton*, 18 Hun (N. Y.) 116; *Falconer v. Buffalo &c. R. Co.*, 69 N. Y. 491; *Packard v. Board &c.*, 2 Colo. 338; *Townsend v. Lamb*, 14 Neb. 324; s. c. 15 N. W. 727; *California &c. R. Co. v. Board &c.*, 18 Cal. 671; *Coe v. Caledonia &c. R. Co.*, 27 Minn. 197; s. c. 6 N. W. 621; *Rich v. Town of Mentz*, 19 Fed. 725; *Hodgman v. Chicago &c. R. Co.*, 20 Minn. 48; *Cowdrey v. Town of Canada*, 16 Fed. 532; *Portland &c. R. Co. v. Inhabitants &c.*, 58 Maine 23; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526; s. c. 9 S. Ct. 159; *People v. Dutcher*, 56 Ill. 144; *Cooper v. Sullivan Co.*, 65 Mo. 542; *People v. Holden*, 91 Ill. 446; *Alley v. Board &c.*, 76 Ill. 101; *Commonwealth v.*

Springfield &c. Co., 10 Bush (Ky.) 254.

⁶⁹ *Town Council &c. v. Elliott*, 5 Ohio St. 113; *Commonwealth v. Commissioners &c.*, 32 Pa. St. 218; *Omaha Nat'l Bank v. City of Omaha*, 15 Neb. 333; s. c. 18 N. W. 63.

⁷⁰ *Cooper v. Sullivan Co.*, 65 Mo. 542. Receipt of benefits by the municipality may preclude it from availing itself of a breach of the condition: *Kansas City &c. R. Co. v. Alderman*, 47 Mo. 349.

⁷¹ Constructing a road within two thousand feet of a mill does not fulfil a condition to construct it within twelve hundred feet: *Virginia &c. R. Co. v. County Com'rs &c.*, 6 Nev. 68; *City of Aurora v. West*, 22 Ind. 88; *Supervisors &c. v. Wisconsin R. &c. Co.*, 121 Mass. 460; *Parker v. Smith*, 3 Ill. App. 356; *Stockton &c. R. Co. v. City of Stockton*, 51 Cal. 328. Cf. *Commissioners &c. v. Thayer*, 94 U. S. 631. Many of the persons who signed a petition for the calling of an election to vote for the issue of bonds by the township in aid of a railroad, as authorized by the laws of Nebraska, were induced thereto by representations on behalf of the road that it would locate a depot on section 16. After it was voted that the bonds should be issued, the depot was located on section 17. It was held that the aggrieved petitioners were entitled to have the issue of the bonds enjoined on account of the false representations: *Wullenwaber v. Dunigan*, 30 Neb. 877; s. c. 47 N. W. 420. A city voted to issue bonds in aid of a rail-

knowing that conditions had not been complied with by the railroad company in whose favor they were issued is not a bona fide holder, and the fact of non-compliance with the conditions may be set up by the municipality in his suit against it.⁷²

§ 974. **The same subject continued.**—A township subscribed certain warrants in aid of a railroad which were to be issued when the company should have built and put in operation, “with cars running thereon by lease or otherwise, its said railroad from the city of A.,” at or near the depot of the F. R. Co., to the city of M. The railroad company built its road from M. to within one hundred and eleven feet of the city limits of A., at which point it intersected the road of the F. R. Co., and, by running its cars over the F. R. Co.’s road to its depot from this intersection, it continuously operated the road from M. to A. This was held to be a substantial compliance with the conditions of the subscription, and mandamus to compel the issue of the warrants was allowed.⁷³ A condition in the vote of bonds that the railroad company should establish and maintain a division terminus at a point situated between two named cities was satisfied where the terminus was established at a point on the line of the road between the two cities a few rods off from a direct line between them.⁷⁴

road, provided the terminus, general offices and headquarters should be there located. It was held that the location of the operating headquarters of the road must be there established before the city would be compelled by mandamus to issue the bonds: *State v. City of Minneapolis*, 32 Minn. 501; s. c. 21 N. W. 722. See also, *Portland & C. R. Co. v. Inhabitants & C.*, 58 Maine 23; *Atchison & C. R. Co. v. Board & C.*, 25 Kan. 261; *Purdy v. Lansing*, 128 U. S. 557; s. c. 9 S. Ct. 172; *People v. Morgan*, 55 N. Y. 587.

⁷² *Mobile Sav. Bank v. Board & C.*, 24 Fed. 110.

⁷³ *Chicago & C. R. Co. v. Makepeace*, 44 Kan. 676; s. c. 24 Pac. 1104.

⁷⁴ *Chicago & C. R. Co. v. Board & C.*, 49 Kan. 399; s. c. 30 Pac. 456. See also, *Hodgman v. Chicago & C. R. Co.*, 20 Minn. 48; s. c. 15 Am. & Eng. Encyc. of Law, 1284 et seq. A popular vote authorized the issue of bonds to a certain amount for each

mile of the road constructed. The proposition voted on specified the termini of the proposed road, and bonds were issued within the limit, but the road was not built between the termini but only for a part of the distance. It was held by a divided court that the bonds were valid: *Nevada Bank v. Steinmitz*, 64 Cal. 301; s. c. 30 Pac. 970. As to waiver or modification of conditions by the municipality, see *State v. Daviess Co. Court*, 64 Mo. 30; *State v. City Council*, 74 Ala. 226; *Board & C. v. Walbridge*, 38 Wis. 179; *People v. Town of Waynesville*, 88 Ill. 469; *Richeson v. People*, 115 Ill. 450; s. c. 5 N. E. 121; *Coleman v. Board & C.*, 50 Cal. 493; *Town of Eagle v. Kohn*, 84 Ill. 292; *Randolph Co. v. Post*, 93 U. S. 502; *Converse v. City of Fort Scott*, 92 U. S. 503; *Barnard v. Campbell*, 55 N. Y. 456; *Chiniquy v. People*, 78 Ill. 570; *Melvin v. Lisenby*, 72 Ill. 63.

§ 975. **Ratification.**—Bonds which are invalid because of irregularities attending their issue may be ratified by the municipality if it originally possessed the power to issue them.⁷⁵ But where legislative authority was wanting in the first instance, they can not be made binding by mere municipal ratification, because there is no more power to ratify than there was to create originally.⁷⁶ In such a case, however, it is competent for the legislature to validate the bonds by a statute passed subsequent to the issue.⁷⁷ Municipal bonds not originally authorized but subsequently ratified by the legislature will be held valid in the federal courts on the well-settled doctrine of the United States supreme court as to the power of a state legislature, in the absence of any constitutional provision to the contrary, to ratify acts of a municipal corporation which it might originally have authorized, notwithstanding decisions of the state supreme court adverse to such doctrine, rendered after the issue of the bonds and the passage of the

⁷⁵ *Supervisors v. Schenck*, 5 Wall. 772; *Barrett v. Schuyler Co. Court*, 44 Mo. 197; *Borough of Freeport v. Marks*, 59 Pa. St. 253; 1 *Dillon Munic. Corp.* (4th ed.), § 463; *Campbell v. City of Kenosha*, 5 Wall. 194. For ratification by levy of tax and payment of interest, see *Burr v. Chariton Co.*, 2 *McCrary* 603; *Mills v. Gleason*, 11 Wis. 470; *Brown v. Bon Homme Co.*, 1 S. Dak. 216; s. c. 46 N. W. 173. That mere silence will not create a ratification, see *Otis v. Stockton*, 76 *Maine* 506.

⁷⁶ *Katzenberger v. Aberdeen*, 121 U. S. 172; s. c. 7 S. Ct. 947; *Town of Pana v. Lippincott*, 2 Ill. App. 466; *Town of Atchison v. Butcher*, 3 Kan. 104; *Howe v. Keeler*, 27 Conn. 538; *Bleu v. Bean River & C. R. Co.*, 20 Cal. 602; *People v. Flagg*, 17 N. Y. 584; *Doon Township v. Cummins*, 142 U. S. 366; s. c. 12 S. Ct. 220, 223.

⁷⁷ *Grenada Co. v. Brogden*, 112 U. S. 261; s. c. 5 S. Ct. 125; *Deyo v. Otoe Co.*, 37 Fed. 246; *Bolles v. Brimfield*, 120 U. S. 759; s. c. 7 S. Ct. 736; *Otoe Co. v. Baldwin*, 111 U. S. 1; *Elmwood Tp. v. Marcy*, 92 U. S. 289; *Quincy v. Cooke*, 107 U. S. 549; s. c. 2 S. Ct. 614; *Read v. Platts-mouth*, 107 U. S. 568; s. c. 2 S. Ct.

208; *Jonesboro v. Cairo & C. R. Co.*, 110 U. S. 192; s. c. 4 S. Ct. 67; *Jasper County v. Ballou*, 103 U. S. 745; *Shaw v. Norfolk R. Co.*, 5 *Gray (Mass.)* 162; *Black v. Cohen*, 52 Ga. 621; *Winn v. City Council &c.*, 21 Ga. 275; *Bass v. Mayor &c.*, 30 Ga. 845; *Frederick v. City Council &c.*, 5 Ga. 561; *Wilson v. Hardesty*, 1 Md. Ch. 66; *Knapp v. Grant*, 27 Wis. 147; *Kimball v. Town of Rosendale*, 42 Wis. 407; *Copes v. Mayor &c.*, 10 *Rich. L. (S. C.)* 491; *New Orleans v. Poutz*, 14 La. An. 856; *Town of Duanesburgh v. Jenkins*, 57 N. Y. 177; *First Municipality &c. v. Orleans Theater Co.*, 2 *Rob. (La.)* 209; *Bradley v. Franklin Co.*, 65 Mo. 638; *Lewis v. City of Shreveport*, 3 *Woods (C. C.)* 205; *Williams v. Roberts*, 88 Ill. 11; *Gardner v. Haney*, 86 Ind. 17; *Satterlee v. Matthewson*, 2 *Peters* 380; *Comer v. Folsom*, 13 *Minn.* 219; *Kunkle v. Town of Franklin*, 13 *Minn.* 127; *City of Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Wilkinson v. Leland*, 2 *Peters* 627; *Atchison & C. R. Co. v. Commissioners*, 17 Kan. 29; *First Nat'l Bank v. Yankton Co.*, 101 U. S. 129; *President & C. v. Frick*, 34 Ill. 405.

curative act.⁷⁸ A municipal act may be confirmed or legalized by subsequent legislation where there is no constitutional barrier to such legislation, and where the illegal act would have been legal under legal sanction.⁷⁹ Unless vested rights have intervened the legislature may legalize bonds issued for an unauthorized purpose.⁸⁰ Bonds issued before the adoption of a constitution, and which would be void thereunder, may be legalized by a curative act.⁸¹ Bonds issued in a territory which are void for want of authority may be validated by an act of congress where there was nothing to prevent congress from authorizing the issue when made.⁸² Ratification can only be effective when the party ratifying possesses the power to perform the act ratified.⁸³ In other words, a ratification can have no greater effect than a previous authority, and debts which neither the corporation nor its officers had power to authorize or create can not be ratified or validated by either of them by the payment of interest or otherwise.⁸⁴ Where the ordinance authorizing the issuance of bonds is invalid the legislature has power to ratify and validate the bonds.⁸⁵ Bonds may be ratified by both the municipality and legislature.⁸⁶ Bonds which are issued by a town without any power under the constitution and statutes can not be rendered valid by a consent judgment for a smaller amount.⁸⁷ Bonds issued under an unconstitutional law can not be ratified.⁸⁸ The payment of an installment of interest on bonds in aid of a railroad which the town had no statutory or constitutional authority to issue does not render them valid.⁸⁹

⁷⁸ *Dows v. City of Elmwood*, 34 Fed. 114; following *Bolles v. Brimfield*, 120 U. S. 759; s. c. 7 S. Ct. 736.

⁷⁹ *Erschine v. Steele County*, 87 Fed. 630.

⁸⁰ *Schneck v. City of Jeffersonville*, 152 Ind. 204; s. c. 52 N. E. 212.

⁸¹ *Schneck v. City of Jeffersonville*, 152 Ind. 204; s. c. 52 N. E. 212.

⁸² *Utter v. Franklin*, 172 U. S. 416; s. c. 19 S. Ct. 183.

⁸³ *Marsh v. Fulton Co.*, 10 Wall. 676, 684; *Norton v. Shelby Co.*, 118 U. S. 425; s. c. 6 S. Ct. 1121.

⁸⁴ *Doon Tp. v. Cummins*, 142 U. S. 366, 376; s. c. 12 S. Ct. 220.

⁸⁵ *Lehman v. City of San Diego*, 73 Fed. 105.

⁸⁶ *Mayor &c. v. Dennison*, 69 Fed. 58; s. c. 16 C. C. A. 125.

⁸⁷ *Board &c. v. Union Bank &c.*, 96 Fed. 293. Cf. *Kelley v. Milan*, 127

U. S. 139; s. c. 8 S. Ct. 1101; *Doon Tp. v. Cummins*, 142 U. S. 366; s. c. 12 S. Ct. 220.

⁸⁸ *Norton v. Shelby Co.*, 118 U. S. 425; s. c. 6 S. Ct. 1121.

⁸⁹ *Union Bank &c. v. Commissioners &c.*, 119 N. C. 214; s. c. 25 S. E. 966; 34 L. R. A. 487; *Glenn v. Wray*, 126 N. C. 730; s. c. 36 S. E. 167. Cf. *Tyler v. Capeheart*, 125 N. C. 64; s. c. 34 S. E. 108; *Williams v. Clouse*, 91 N. C. 322; *Union Bank &c. v. Commissioners &c.*, 119 N. C. 214; s. c. 25 S. E. 966; *Wagon Co. v. Byrd*, 119 N. C. 460; s. c. 26 S. E. 144; *Union Bank &c. v. Board &c.*, 116 N. C. 339; s. c. 21 S. E. 410 (but see *Claybrook v. Board &c.*, 117 N. C. 456; s. c. 23 S. E. 360); *Commissioners v. Zimmerman*, 101 Ky. 432; s. c. 41 S. W. 428.

§ 976. **The same subject continued.**—But curative acts will not be extended by a latitudinarian construction so as to cover cases that are not clearly within the legislative intent.⁹⁰ Thus, an act legalizing all subscriptions not made in violation of the constitution of the state was held not to validate bonds issued in pursuance of a vote but without legislative authority.⁹¹ And the statute is not operative if at the time it is enacted the legislature has no power under the constitution to authorize the issue of the bonds,⁹² or to enable the corporation to issue them in the manner attempted.⁹³

§ 977. **Effect of consolidation of companies on authority to subscribe.**—It was held by the supreme court of the United States in *Marsh v. Fulton County*,⁹⁴ that where the people of a county voted in favor of a subscription for stock in a railroad an act of the legislature passed before the subscription was actually made, making fundamental changes in the organization of the company, and dividing it substantially into three companies, worked in law a revocation of the authority of the county officers to make the subscription. But there was in that case nothing in the general law of the state, and nothing in the charter, which authorized the company to change its organization. In *Nugent v. The Supervisors of Putnam County*,⁹⁵ the principle was asserted that a contract for subscription is precluded or discharged by a subsequent alteration of the organization or purposes of the company, only when such alteration is both fundamental and not provided for or contemplated by either the charter itself or the general laws of the state.⁹⁶ In *Harshman v. Bates County*,⁹⁷ before the authority to subscribe conferred by vote upon the county court had been executed by it, the company consolidated

⁹⁰ *Dillon Munic. Corp.* (2d ed.), § 544; *Hayes v. Holly Springs*, 114 U. S. 120; s. c. 5 S. Ct. 785.

⁹¹ *Hayes v. Holly Springs*, 114 U. S. 120; s. c. 5 S. Ct. 785.

⁹² *Sykes v. Mayor &c.*, 55 Miss. 115; *Hardenburgh v. Van Keuren*, 4 Abb. N. C. (N. Y.) 43; *Single v. Marathon Co.*, 38 Wis. 364.

⁹³ *Katzenberger v. Aberdeen*, 121 U. S. 172; s. c. 7 S. Ct. 947.

⁹⁴ 10 Wall. 676.

⁹⁵ 19 Wall. 241.

⁹⁶ See also, *Sparrow v. Evansville &c. R. Co.*, 7 Ind. 369; *Bish v. Johnson*, 21 Ind. 299; *Hanna v. Cincin-*

nati &c. R. Co., 20 Ind. 30; *Bishop v. Brainerd*, 28 Conn. 289; *Schenectady &c. Co. v. Thatcher*, 11 N. Y. 102; *Buffalo &c. R. Co. v. Dudley*, 14 N. Y. 336; *Meadow Dam Co. v. Gray*, 30 Maine 547; *Agricultural Branch R. Co. v. Winchester*, 13 Allen (Mass.) 29, 32; *Noyes v. Spaulding*, 27 Vt. 420; *Pacific R. Co. v. Renshaw*, 18 Mo. 210; *Fry v. Lexington &c. R. Co.*, 2 Met. (Ky.) 314; *Illinois River R. Co. v. Beers*, 27 Ill. 185, 189; *Terre Haute &c. R. Co. v. Earp*, 21 Ill. 291.

⁹⁷ 92 U. S. 569.

with another under a general law, and it was held that the power of the county court was thereby extinguished.⁹⁸ In *Scotland County v. Thomas*,⁹⁹ the county court, under direct legislative authority to subscribe to the stock of a certain company, subscribed to a company subsequently formed by consolidation (authorized by the act), and the subscription was sustained.¹⁰⁰ The doctrine declared in *Nugent v. Supervisors &c.* has been frequently affirmed¹⁰¹ and the rigid rule laid down in *Harshman v. Bates County* very much weakened, if not denied.¹⁰³

§ 978. Effect of constitutional prohibitions.—Constitutional provisions prohibiting the legislature from authorizing loans or subscriptions for stock are prospective, not retroactive; they act as a limitation on future legislation only, and do not operate to repeal enabling acts or grants of power in charters then existing. Although put into execution by making the subscription or issuing the bonds after the adoption of the constitution the power remains valid.¹⁰⁴

⁹⁸ The decision was based upon the principles governing the law of principal and agent, but Judge Dillon points out that it is reconcilable with *Nugent v. Supervisors &c.*, 19 Wall. 241, on the ground that in the latter case the consolidation was effected after, whereas in the former it was before, the subscription: 1 Dillon Munic. Corp. (4th ed.), § 541.
⁹⁹ 94 U. S. 682.

¹⁰⁰ *Harshman v. Bates Co.*, 92 U. S. 569, was distinguished on the ground that there the county court was the mere agent of the township (by a vote of the electors), while in this case the county court acted as the representative authority of the county itself (no vote of the electors being required by the act).

¹⁰¹ *New Buffalo v. Iron Co.*, 105 U. S. 73; *Town of East Lincoln v. Davenport*, 94 U. S. 801; *Wilson v. Salamanca*, 99 U. S. 499, 504; *Empire v. Darlington*, 101 U. S. 87; *Menasha v. Hazard*, 102 U. S. 81; *Harter v. Kernochan*, 103 U. S. 562; *Tipton Co. v. Locomotive Works*, 103 U. S. 523.

¹⁰³ *Livingston Co. v. Portsmouth Bank*, 128 U. S. 102; s. c. 9 S. Ct. 18.

¹⁰⁴ *Scotland Co. v. Hill*, 132 U. S. 107; s. c. 10 S. Ct. 26; *Callaway Co. v. Foster*, 93 U. S. 567; *Henry Co. v. Nicolay*, 95 U. S. 619; *Schuyler Co. v. Thomas*, 98 U. S. 169; *Cass Co. v. Gillett*, 100 U. S. 585; *Ralls Co. v. Douglass*, 105 U. S. 728; *Louisiana v. Taylor*, 105 U. S. 454; *Supervisors &c. v. Galbraith*, 99 U. S. 214; *Macon Co. v. Shores*, 97 U. S. 272; *Randolph Co. v. Post*, 93 U. S. 502; *Ray Co. v. Vansycle*, 96 U. S. 675; *Fairfield v. Gallatin Co.*, 100 U. S. 47; *Moultrie Co. v. Fairfield*, 105 U. S. 370; *Red Rock v. Henry*, 106 U. S. 596; s. c. 1 S. Ct. 434; *Louisville v. Savings Bank*, 104 U. S. 469; *Thompson v. Kelly*, 2 Ohio St. 647; *State v. Mayor &c.*, 14 Ohio St. 472; *Cass v. Dillon*, 2 Ohio St. 607. This doctrine was announced by the supreme court of Missouri in *State v. Macon County Court*, 41 Mo. 453; *Kansas City &c. R. Co. v. Alderman*, 47 Mo. 349; *Smith v. Clark Co.*, 54 Mo. 58, 70; and *State v. Sullivan County Court*, 51 Mo. 522; but a con-

§ 979. **The same subject continued.**—But there is a distinction between the operation of a constitutional limitation upon the power of the legislature and of a constitutional inhibition upon the municipality itself. In the latter case past legislative action is annulled.¹⁰⁵ And if the inhibition be qualified by conditions, it is nevertheless deemed to be self-executing and operating directly upon the municipality, and not in itself enabling the latter to proceed in accordance with the prescribed limitation, and further legislation is necessary before the municipality can act.¹⁰⁶

trary rule was afterwards adopted in *State v. Garrouette*, 67 Mo. 445; *State v. Dallas County Court*, 72 Mo. 329; but the supreme court of the United States, having followed the original ruling of the state court in cases arising in Missouri, declined (in *Ralls Co. v. Douglass*, *supra*, and *Scotland Co. v. Hill*, *supra*) to reconsider its former decisions to the prejudice of bona fide holders of bonds issued prior to the change of decisions in the state courts.

¹⁰⁵ A provision in the new constitution keeping in force all laws not inconsistent therewith does not perpetuate any previous law, enabling a municipality to do that which it is subsequently forbidden to do by the constitution: *Norton v. Board &c.*, 129 U. S. 479, 490; s. c. 9 S. Ct. 322.

¹⁰⁶ *Norton v. Board &c.*, 129 U. S. 479; s. c. 9 S. Ct. 322. Thus, a provision in the Indiana constitution forbidding subscriptions unless the stock were paid for when subscribed applied to a subscription subsequently made under authority of a prior act containing no limitation: *Aspinwall v. Board &c.*, 22 How. 364. See also, *Wadsworth v. Taxpayers*, 102 U. S. 534; *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 625 (constitution of Illinois); *Falconer v. Buffalo &c. R. Co.*, 69 N. Y. 491; *Buffalo &c. R. Co. v. Falconer*, 103 U. S. 821 (constitution of New York); *Jarrold v. Moberly*, 103 U. S. 580; *Kelley v. Milan*, 127 U. S.

139; s. c. 8 S. Ct. 1101; *Mayor &c. v. Gilmore*, 21 Fed. 870; *Taxpayers v. Tennessee Cent. R. Co.*, 11 Lea (Tenn.) 329. But the constitutional prohibition can not affect a contract of subscription already completed: *Cass Co. v. Gillett*, 100 U. S. 585; *Gunn v. Barry*, 15 Wall. 610, 623; *United States v. Jefferson Co.*, 1 McCrary 356. Or a donation previously contracted: *Fairfield v. Gallatin Co.*, 100 U. S. 47; overruling *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 625; *Chicago &c. R. Co. v. Pinckney*, 74 Ill. 277. But the donation must have been made at a valid election: *Lippincott v. Town of Pana*, 92 Ill. 24. The contract to subscribe will be protected though the bonds are not issued until afterwards: *Clay Co. v. Society of Savings*, 104 U. S. 579; s. c. 5 Am. & Eng. R. Cas. 170; *People v. Hamill*, 134 Ill. 666; s. c. 17 N. E. 799; 29 N. E. 280; 22 Am. & Eng. Corp. Cas. 39; *Town of Middleport v. Aetna L. Ins. Co.*, 82 Ill. 562; *Moultrie Co. v. Fairfield*, 105 U. S. 370. As to when the contract is deemed to be complete, see *Falconer v. Buffalo &c. R. Co.*, 69 N. Y. 491; *Jeffries v. Lawrence*, 42 Iowa 498; *Nugent v. Supervisors*, 19 Wall. 241; *Western Saving Fund Society v. City of Philadelphia*, 31 Pa. St. 175; *City of Sacramento v. Kirk*, 7 Cal. 419; *City of Logansport v. Blakemore*, 17 Ind. 318; *Shelby County Court v. Cumberland &c. R. Co.*, 8 Bush (Ky.) 209; *Chicago &c. R. Co. v. Commissioners &c.*, 38 Kan.

§ 980. **Recitals in municipal bonds.**—(a) *General*: There have been in the last few years many adjudications as to the effect of recitals in municipal bonds. That there should be lack of harmony in the decisions is not strange when it is considered that most of the cases involve the doctrine of estoppel, which, as a rule, is founded upon the equities of each particular case, rather than general principles of universal application. Any one carefully discerning the trend of judicial decisions in this as in many other subjects will observe a tendency in two directions. One is in the direction of placing municipal bonds upon the same plane as commercial securities generally, barring all equitable defenses that might arise between the maker and the first holder, where such bonds have passed into the hands of a bona fide holder for value. The other tendency has been in the direction of protection of the public in the matter of public expenditures against the reckless acts of municipal agents. (b) *Estoppel—Doctrine of by recitals*: The doctrine of estoppel as applied in the matter of municipal bonds arises in two ways: (1) where the municipality has received the benefit of the proceeds of bonds it is not permitted to take advantage of irregularities in the issuance without placing the holder of the bonds in statu quo; (2) where there is vested in certain municipal authorities power to issue bonds upon the performance of certain conditions precedent, usually prescribed by statute, and power granted to such authorities to determine whether such conditions have been complied with, and they so determine and embody their decision in recitals, or other certificate, their action is final and binding on the municipality. The fundamental principles of equity and fair dealing are equally binding and applicable to municipal corporations as to individuals. They are not permitted by their representations to induce others to part with their money and then turn around and say the representations were untrue.¹⁰⁷ (c) *When estoppel does not arise*: Where the governing body of a town are authorized to borrow a sum of money, and thereafter, without authority, borrow other sums, the town is not estopped to deny its liability for the unauthorized act.¹⁰⁸ No agreement of officials or payment of interest can estop a municipality from raising the question of the legality or constitutionality of the statute under which

597; s. c. 16 Pac. 828; Board of Com'rs v. State, 115 Ind. 64; s. c. 4 N. E. 589; 17 N. E. 855. A vote without a subscription or agreement is not a complete obligation: Land Grant &c. R. Co. v. Board &c., 6 Kan. 256; Bound v. Wisconsin &c. R. Co.,

45 Wis. 543; Aspinwall v. Commissioners, 22 How. 364.

¹⁰⁷ As to the basis of estoppel and the principles by which it is governed, see § 1670 et seq., post.

¹⁰⁸ Smith v. Epping, 69 N. H. 558; s. c. 45 Atl. 415.

the bonds are issued.¹⁰⁹ Where municipal bonds are issued under a constitutional or statutory requirement which prescribes the public record furnishing the test of compliance a purchaser of such bonds is charged with notice of its contents, but is not required to look beyond such record. If the record shows a compliance with the constitutional requirement it will be presumed the officers faithfully discharged their duty in the issuance of the bonds.¹¹⁰ Where certificates are signed by city officers certifying what steps had been taken as preliminaries to the issuing of bonds and also as to the city's financial condition, and such certificates are not within the power of the officers to make, the city is not estopped thereby to assert the invalidity of the bonds.¹¹¹ Payment of interest for a short time does not work an estoppel,¹¹² but a municipality having paid interest on its bond for several years is estopped to set up their irregularity in issue as against bona fide holders for value, or their assignees.¹¹³ The city may estop itself from contesting the validity of coupons by issuing new bonds in lieu of the bonds from which the coupons were detached.¹¹⁴ Certificates that bonds were issued by virtue of a statute in satisfaction of judgments rendered in court against the county will bind the county as to the existence of judgments.¹¹⁵ The issuance of bonds under stat-

¹⁰⁹ Board &c. v. Union Bank, 96 Fed. 293. Cf. Marsh v. Fulton Co., 10 Wall. 676; Town of South Ottawa v. Perkins, 94 U. S. 260; Doon Tp. v. Cummins, 142 U. S. 366; s. c. 12 S. Ct. 220; Daviess Co. v. Dickinson, 117 U. S. 657; s. c. 6 S. Ct. 897; Lewis v. City of Shreveport, 108 U. S. 282; s. c. 2 S. Ct. 634; East Oakland Tp. v. Skinner, 94 U. S. 255; Lake Co. v. Graham, 130 U. S. 674; s. c. 9 S. Ct. 654; Chaffee Co. v. Potter, 142 U. S. 355; s. c. 12 S. Ct. 216; Dixon Co. v. Field, 111 U. S. 83; s. c. 4 S. Ct. 315; Sutliff v. Lake Co. Com'rs, 147 U. S. 230; s. c. 13 S. Ct. 318; Commissioners &c. v. E. H. Rollins & Sons, 173 U. S. 255; s. c. 19 S. Ct. 390; Marcy v. Oswego Tp., 92 U. S. 637; Humboldt Tp. v. Long, 92 U. S. 642.

¹¹⁰ Board &c. v. Sutliff, 97 Fed. 270. Cf. Dudley v. Board &c., 49 U. S. App. 336; s. c. 80 Fed. 672; Marcy v. Oswego Tp., 92 U. S. 637; Humboldt Tp. v. Long, 92 U. S. 642; Sherman Co. v. Simons, 109 U. S. 735; s. c. 3 S. Ct. 502; Dallas Co. v. McKenzie,

110 U. S. 686; s. c. 4 S. Ct. 184; Wilson v. Salamanca Tp., 99 U. S. 499; Chaffee Co. v. Potter, 142 U. S. 355; s. c. 12 S. Ct. 216; Commissioners &c. v. E. H. Rollins & Sons, 173 U. S. 255; s. c. 19 S. Ct. 390.

¹¹¹ National Life Ins. Co. &c. v. Mead, 13 S. D. 37; s. c. 82 N. W. 78. Cf. Meyer v. School Dist., 4 S. D. 420; s. c. 57 N. W. 68.

¹¹² Brown v. Ingalls Tp., 81 Fed. 485. But see, as to long payment, Town of Lexington v. Union Nat. Bank, 75 Miss. 1; s. c. 22 So. 291.

¹¹³ Dudley v. Board &c., 80 Fed. 672. Cf. Supervisors v. Schenck, 5 Wall. 772; Clay Co. v. Society &c., 104 U. S. 579; Anderson Co. Com'rs v. Beal, 113 U. S. 227; s. c. 5 S. Ct. 433; Moulton v. City of Evansville, 25 Fed. 382; McKee v. Vernon County, 3 Dill. 210; Portsmouth Sav. Bank v. Springfield, 4 Fed. 276.

¹¹⁴ City of Coolidge v. General Hospital Soc. &c., 9 Kan. App. 891 (mem.); s. c. 58 Pac. 562.

¹¹⁵ Geer v. Board &c., 97 Fed. 435.

utory authority to fund outstanding indebtedness and the sale thereof to an innocent purchaser for full value estops the municipality from asserting a defense that the officers used the proceeds in the payment of invalid warrants.¹¹⁶ (d) *Recitals binding only where power to issue exists*: It is an essential to the validity of bonds that the municipality has power to issue them, and no bona fides can dispense with it, and no recital can excuse it. If the constitution or statute peremptorily prohibits a municipal body from loaning its credit to or subscribing for stock in a railroad company a subscription or loan would give no right against the county, although the bond should recite that there was such authority, and the purchaser should pay full value in the belief of the truth of the recital. It is true that if the power to issue exists in the municipality the bona fide holder is protected against mere irregularities in the manner of execution, but if there is a want of power no legal liability can be created. So where bonds are put on the market and the law requires that in order to be valid they must be certified to by the auditor of state, the certification is part of the execution, and they are invalid without.¹¹⁷ The same rule applies where the standard of validity is imposed by the constitution. Thus when the constitution imposes upon a municipality a limitation on the power to incur a debt it is not within the power of the legislature to dispense with that limitation either directly or indirectly; and in such case a certificate that all the provisions and requirements of the statute have been fully complied with does not operate as an estoppel.¹¹⁸ And so recitals which are mere matters of law can not estop the municipality, for the reason that all parties are equally bound to know the law, and besides it would be an assumption of power lodged elsewhere.¹¹⁹ A purchase of bonds purporting to be issued pursuant to a charter does not estop the municipality from showing the invalidity of the bonds, since the recital is a conclusion of law.¹²⁰ An estoppel does not arise except upon matters of fact which corporate officers have authority by

¹¹⁶ *Lyon County v. Keene &c. Bank*, 97 Fed. 159; s. c. 100 Fed. 337. As to estoppel generally, see *Commissioners &c. v. Call*, 123 N. C. 308; s. c. 31 S. E. 481; *Waite v. City of Santa Cruz*, 89 Fed. 619; *Cleveland v. City Council &c.*, 54 S. C. 83; s. c. 31 S. E. 871; *Board &c. v. National Life Ins. Co.*, 90 Fed. 228; *Cronin v. Patrick Co.*, 89 Fed. 79.

¹¹⁷ *Anthony v. Jasper Co.*, 101 U.

S. 693; *Daviess Co. v. Huidekoper*, 98 U. S. 98.

¹¹⁸ *Lake Co. v. Graham*, 130 U. S. 674; s. c. 9 S. Ct. 654.

¹¹⁹ *Lake Co. v. Graham*, 130 U. S. 674; s. c. 9 S. Ct. 654; *Dixon Co. v. Field*, 111 U. S. 83, 92; s. c. 4 S. Ct. 315.

¹²⁰ *Town of Klamath Falls v. Sachs*, 35 Or. 325; s. c. 57 Pac. 329.

law to determine and to certify.¹²¹ Nor does the doctrine of estoppel apply where the facts necessary to the existence of the power to issue are to be determined not officially by the officers charged with the execution of the power but by reference to some express and definite record of a public character. In such case the authority to act depends upon the actual objective existence of the requisite fact, as shown by the record, and not upon the ascertainment and determination by any one, and where this is true the recitals do not estop the municipal body.¹²² (e) *Bona fide purchaser*: The doctrine of estoppel based upon recitals in municipal bonds applies only where the bonds have passed into the hands of a bona fide holder for value before maturity without notice. Municipal bonds are generally in the nature of negotiable securities and are invested with the attributes of commercial paper derived from the law merchant. By universal commercial usage and consent they have the qualities of commercial paper, the principal of which is the shield afforded from the effects of prior equities between the original parties.¹²³ If bonds are issued without recitals, but in violation of law or authority there exists no reason why they should not be open to the defense, in a suit, even by one without actual notice, that they were issued in violation of precedent conditions.¹²⁴ (f) *Decision of city officials binding, when*: Where it may be gathered from the legislative enactment that certain officers of the municipality are invested with the power to decide whether the conditions precedent have been complied with, and by their recital they represent that such conditions have been performed, and the bonds are in the hands of a bona fide holder, the recital is conclusive of the facts and binding on the municipality, for the reason that in such case the recital is itself a decision of the fact by the

¹²¹ *Dixon Co. v. Field*, 111 U. S. 83; s. c. 4 S. Ct. 315.

¹²² *Dixon Co. v. Field*, 111 U. S. 83, 92; s. c. 4 S. Ct. 315; *Lake Co. v. Graham*, 130 U. S. 674; s. c. 9 S. Ct. 654.

¹²³ *City of Lexington v. Butler*, 14 Wall. 282; *Moran v. Miami Co.*, 2 Black 722; *Mercer Co. v. Hacket*, 1 Wall. 83; *Ackley School District v. Hall*, 113 U. S. 135; s. c. 5 S. Ct. 371; *New Providence Tp. v. Halsey*, 117 U. S. 336; s. c. 6 S. Ct. 764; *Ottawa v. First Nat. Bank*, 103 U. S. 770; *Cromwell v. Sac Co.*, 96 U. S. 51; *Block v. Commissioners*, 99 U.

S. 686; *Macon Co. v. Shores*, 97 U. S. 272; *Marsh v. Fulton Co.*, 10 Wall. 676; *Buchanan v. Litchfield*, 102 U. S. 278; *Merchants' &c. Bank v. Bergen Co.*, 115 U. S. 384; s. c. 6 S. Ct. 88; *Daviess Co. v. Dickinson*, 117 U. S. 657; s. c. 6 S. Ct. 897; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526; s. c. 9 S. Ct. 159; *Carroll Co. v. Smith*, 111 U. S. 556; s. c. 4 S. Ct. 539.

¹²⁴ *Chambers Co. v. Clews*, 21 Wall. 317; *Citizens' Sav. &c. Ass'n v. Perry Co.*, 156 U. S. 692, 701; s. c. 15 S. Ct. 547; *Barnett v. Denison*, 145 U. S. 135; s. c. 12 S. Ct. 819.

appointed tribunal.¹²⁵ On the other hand, where officers authorized to issue bonds upon certain conditions are not the appointed tribunal

¹²⁵ *Town of Coloma v. Eaves*, 92 U. S. 484; citing *Bissell v. Jeffersonville*, 24 How. 287; *Van Hastrup v. Madison City*, 1 Wall. 291; *Mercer Co. v. Hackett*, 1 Wall. 83; *St. Joseph Tp. v. Rogers*, 16 Wall. 644; and distinguishing *Marsh v. Fulton Co.*, 10 Wall. 676. See also, for other cases illustrating this doctrine, *Oregon v. Jennings*, 119 U. S. 74; s. c. 7 S. Ct. 124; *Anderson Co. Com'rs v. Beal*, 113 U. S. 227; s. c. 5 S. Ct. 433; *Dixon Co. v. Field*, 111 U. S. 83; s. c. 4 S. Ct. 315; *Northern Bank of Toledo v. Porter Tp. Trustees*, 110 U. S. 608; s. c. 4 S. Ct. 254; *Ottawa v. National Bank*, 105 U. S. 342; *Lincoln v. Iron Co.*, 103 U. S. 412; *Buchanan v. Litchfield*, 102 U. S. 278; *Menasha v. Hazard*, 102 U. S. 81; *Foote v. Pike Co.*, 101 U. S. 688, n.; *Anthony v. Jasper Co.*, 101 U. S. 693; *Roberts v. Bolles*, 101 U. S. 119; *Douglass v. Pike Co.*, 101 U. S. 677; *Pompton v. Cooper Union*, 101 U. S. 196; *Darlington v. Jackson Co.*, 101 U. S. 688, n.; *Lyons v. Munson*, 99 U. S. 684; *Hackett v. Ottawa*, 99 U. S. 86; *Town of Weyauwega v. Ayling*, 99 U. S. 112; *Wilson v. Salamanca*, 99 U. S. 499; *Supervisors &c. v. Galbraith*, 99 U. S. 214; *Nauvoo v. Ritter*, 97 U. S. 389; *Macon Co. v. Shores*, 97 U. S. 272; *Warren Co. v. Marcy*, 97 U. S. 96; *Daviess Co. v. Huidekoper*, 98 U. S. 98; *Schuyler Co. v. Thomas*, 98 U. S. 169; *San Antonio v. Barnes*, 96 U. S. 316, n.; *San Antonio v. Mehaffy*, 96 U. S. 312, n.; *Cass Co. v. Johnston*, 95 U. S. 360; *Scotland Co. v. Thomas*, 94 U. S. 682; *Commissioners &c. v. January*, 94 U. S. 202; *Leavenworth Co. v. Barnes*, 94 U. S. 70; *Commissioners v. Bolles*, 94 U. S. 104; *Commissioners v. Thayer*, 94 U. S. 631; *Town of East Lincoln v. Davenport*, 94 U. S. 801; *Callaway Co. v. Foster*, 93 U. S. 567; *Randolph Co. v. Post*, 93 U. S. 502; *Humboldt Tp. v. Long*, 92 U. S. 642; *Town of Venice v. Murdock*, 92 U. S. 494; *Elmwood Tp. v. Marcy*, 92 U. S. 289; *Moultrie Co. v. Rockingham &c. Sav. Bank*, 92 U. S. 631; *Marcy v. Oswego Tp.*, 92 U. S. 637; *Pendleton Co. v. Amy*, 13 Wall. 297; *Kennicott v. Supervisors &c.*, 16 Wall. 452; *Lynde v. County*, 16 Wall. 6; *Grand Chute v. Winegar*, 15 Wall. 355; *City of Lexington v. Butler*, 14 Wall. 282; *Supervisors v. Schenck*, 5 Wall. 772; *Cincinnati v. Morgan*, 3 Wall. 275; *Rogers v. Burlington*, 3 Wall. 654; *Meyer v. City of Muscatine*, 1 Wall. 384; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Moran v. Miami Co.*, 2 Black 722; *Woods v. Lawrence Co.*, 1 Black 386; *Mygatt v. City of Green Bay*, 1 Biss. (C. C.) 292; *Nicolay v. St. Clair Co.*, 3 Dill. (C. C.) 163; *Huidekoper v. Buchanan Co.*, 3 Dill. 175; *Phelps v. Lewiston*, 15 Blatchf. 131; *Third Nat'l Bank &c. v. Town of Seneca Falls*, 15 Fed. 783; *Hopper v. Town of Covington*, 8 Fed. 777; *Cary v. City of Ottawa*, 8 Fed. 199; *Carrier v. Town of Shawangunk*, 10 Fed. 220; *Irwin v. Town of Ontario*, 3 Fed. 49; *Board &c. v. Shields*, 62 Mo. 247; *Catron v. La Fayette Co.*, 106 Mo. 659; s. c. 17 S. W. 577; *Smith v. Clark Co.*, 54 Mo. 58; *Steines v. Franklin Co.*, 48 Mo. 167; *State v. Saline County Court*, 48 Mo. 390; *Carpenter v. Inhabitants &c.*, 51 Mo. 483; *Wilkinson v. City of Peru*, 61 Ind. 1; *Shorter v. Mayor &c.*, 52 Ga. 621; *Lane v. Inhabitants &c.*, 72 Maine 354; *Anderson Co. v. Houston &c. R. Co.*, 52 Tex. 228; *Bargate v. Shortridge*, 5 H. L. Cas. 297; *In re Imperial Land Co.*, L. R. 11 Eq. 478; *Webb v. Herne Bay Com'rs*, L. R. 5 Q. B. 642.

to decide the fact which constitutes the condition their recital will not be taken as a substitute for proof. In such case it is necessary to establish the power in the officers to issue the bond and also that they had power to make the recitals and to make the recitals conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject.¹²⁶ Where bonds are issued by a municipal corporation under a special and limited authority imposing restrictions and conditions, but authorizing officials of the municipality to execute and issue such bonds when the conditions precedent imposed have been complied with, and it can be fairly and reasonably gathered from the act that the officials so authorized to execute the bonds were also empowered to ascertain and determine that the requisite facts and circumstances did exist, or all conditions precedent had been complied with, and this determination or decision has been embodied in the recitals, a purchaser without other notice, and for value, would have a right to rely upon the truth of the representations appearing in the bond and need make no further inquiry.¹²⁷ This principle does not apply as between the municipality and a railroad company, to whom they are issued, nor to a purchaser who is not a bona fide holder for value.¹²⁸ Where the statute authorizes the issuance of bonds and vests the power in a board upon conditions precedent having been complied with but does not specify the manner, the board may direct that the bonds shall be executed and signed by appropriate officers, in which case the recitals are to be given the same effect as though made by the board.¹²⁹ Where the statute contains no reference to the record of indebtedness and does not require a record to be kept but provides for a recital that they are issued under and by authority of the

¹²⁶ *Dixon Co. v. Field*, 111 U. S. 83, 94; s. c. 4 S. Ct. 315. Cf. *Marcy v. Oswego Tp.*, 92 U. S. 637; *Commissioners &c. v. Bolles*, 94 U. S. 104; *Commissioners &c. v. Clark*, 94 U. S. 278; *Warren County v. Marcy*, 97 U. S. 96; *Pana v. Bowler*, 107 U. S. 529; s. c. 2 S. Ct. 704.

¹²⁷ *Mercer Co. v. Provident Life &c. Co.*, 72 Fed. 623; *Town of Coloma v. Eaves*, 92 U. S. 484; *Dixon Co. v. Field*, 111 U. S. 83; s. c. 4 S. Ct. 315; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526; s. c. 9 S. Ct. 159; *Citizens' Sav. &c. Ass'n v. Perry Co.*,

156 U. S. 692, 701; s. c. 15 S. Ct. 547.

¹²⁸ *Chambers Co. v. Clews*, 21 Wall. 317.

¹²⁹ *Rondot v. Rogers Tp.*, 99 Fed. 202. Cf. *Town of Coloma v. Eaves*, 92 U. S. 484; *Ashley v. Board*, 16 U. S. App. 656; *Risley v. Village of Howell*, 64 Fed. 453; *City of Cadillac v. Woonsocket Inst. &c.*, 16 U. S. App. 545; s. c. 7 C. C. A. 574; 58 Fed. 935; *Supervisors v. Schenck*, 5 Wall. 772; *State v. Trustees &c.*, 14 Ohio St. 569; *State v. Van Horne*, 7 Ohio St. 327; *State v. Trustees &c.*, 8 Ohio St. 394.

statute, it confers power upon the officers charged with the duty of incurring indebtedness of reciting that the indebtedness is such as to authorize their issue under the statute and the recital is conclusive.¹³⁰ (g) *Constitutional requirements complied with:* Where there are constitutional limitations upon the power to issue bonds, and the recital is to the effect that the constitutional requirements have been complied with, it has been held that the recital works an estoppel upon the municipality, in some cases, while in others it does not. If the recital may be construed as a certificate of the facts, which would make the issue legal, estoppel applies. It will be observed that in this class of cases the commissioners were not to determine the constitutionality of the issue of bonds, but whether the facts existed which permitted the issue under the limitations of the constitution. But estoppel does apply in some cases where there are recitals in regard to constitutional limitations. Thus where the constitutional limitation relates to the amount of municipal indebtedness and the recital expressly states that the limit has not been passed and there is nothing on the face of the bonds that shows it has, the purchaser need look no further.¹³¹ This would not be true if the bond disclosed on its face that the limit had been exceeded.¹³² Nor would it be true in a case where the constitution forbids the issuance of bonds where the aggregate indebtedness exceeds six dollars on each thousand of assessed valuation, and the statute requires the commissioners in submitting the vote to the electors to enter of record an order specifying the object of the debt and also to publish and enter of record semi-annual statements exhibiting in detail the debts, expenditures and receipts, in which case a purchaser for value is chargeable with the duty of examining the record notwithstanding the certificate, and there is no estoppel.¹³³ As to the effect of recitals in reference to compliance with constitutional requirements and for a full review of the decisions of the United States supreme court, see the cases cited in the foot-note.¹³⁴ (h) *Of compliance with popu-*

¹³⁰ *Brattleboro Sav. Bank v. Board &c.*, 98 Fed. 524.

¹³¹ *Gunnison Co. &c. v. E. H. Rollins & Sons*, 173 U. S. 255, 270; s. c. 19 S. Ct. 390; *Town of Coloma v. Eaves*, 92 U. S. 484; *Town of Venice v. Murdock*, 92 U. S. 494; *Marcy v. Township of Oswego*, 92 U. S. 637; *Wilson v. Salamanca*, 99 U. S. 499; *Buchanan v. Litchfield*, 102 U. S. 278; *Northern Bank v. Porter Tp. Trustees*, 110 U. S. 608; s. c. 4 S. Ct.

254; *Chaffee Co. v. Potter*, 142 U. S. 355; s. c. 12 S. Ct. 216.

¹³² *Lake Co. v. Graham*, 130 U. S. 674, 680; s. c. 9 S. Ct. 654; *Dixon Co. v. Field*, 111 U. S. 83, 92; s. c. 4 S. Ct. 315.

¹³³ *Sutliff v. Lake Co.*, 147 U. S. 230, 235; s. c. 13 S. Ct. 318.

¹³⁴ *Gunnison Co. v. E. H. Rollins & Sons*, 173 U. S. 255, 263; s. c. 19 S. Ct. 390; *Chaffee Co. v. Potter*, 142 U. S. 355, 363; s. c. 12 S. Ct. 216.

lar vote: In many states the constitution or statute requires as a condition precedent to the incurring of any considerable amount of indebtedness the submission of the question to a popular vote. In this class of cases the rule may be stated that the statute, and an election held thereunder, are not to be technically construed and mere irregularities in the calling or holding of an election ought not to invalidate the bonds and particularly so where the municipality has by its acts treated the election, and the bond issue based thereon, as valid. Usually under statutes of this character some designated court, board of commissioners, or other body, is authorized and empowered to pass upon the preliminary requirements, and if it finds they have been complied with the bonds are issued by the proper officers. The action of the court, or other body, is quasi-judicial, and usually binding on the municipality.¹³⁵ Where the statute designates the county court as the proper authority to determine that the conditions exist which authorize the making the subscription, to be followed by the issuing of the bonds by the county court, under its seal, with the recitals contained in the bonds, and the other facts, the municipality is estopped from urging as against a bona fide holder the existence of any mere irregularity in the making of the subscription or the issuing of the bonds. Under such circumstances it must be presumed that the subscription to stock was made by the county court in behalf of the township and the county is estopped from asserting the contrary.¹³⁶ Bonds issued in the exercise of a power constitutionally conferred must be binding on the municipality, although there were some irregularities in the form of notice of election, want of precise words on the ballots, and others of a like character.¹³⁷ Where bonds issued by a township under the authority of a statute contain a recital that they are issued under provisions of the statute, in accordance with a vote of the electors, to refund and retire certain binding, subsisting, legal obligations outstanding, and the bonds are held and the proceeds used in paying prior obligations bearing a higher rate of interest, the township is estopped from showing that the recitals are false, and the debts refunded were illegal.¹³⁸ Negotiable bonds containing a

¹³⁵ *Andes v. Ely*, 158 U. S. 312; s. Burr v. City of Carbondale, 76 Ill. c. 15 S. Ct. 954; *Calhoun v. Millard*, 455.

121 N. Y. 69; s. c. 24 N. E. 27; *Bernards Tp. v. Morrison*, 133 U. S. 523; s. c. 10 S. Ct. 333.

¹³⁶ *Livingston Co. v. First Nat'l Bank &c.*, 128 U. S. 102; s. c. 9 S. Ct. 18.

¹³⁷ *Roberts v. Bolles*, 101 U. S. 119;

¹³⁸ *Wesson v. Town of Mt. Vernon*, 98 Fed. 804. Cf. *Hackett v. Ottawa*, 99 U. S. 86; *Orleans v. Platt*, 99 U. S. 676; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Town of Coloma v. Eaves*, 92 U. S. 484; *Buchanan v. Litchfield*, 102 U. S. 278; *Ore-*

recital that they are in conformity with the statute and were authorized by a vote of the qualified electors, the proceeds having been received and returned, and interest paid thereon, estop the municipality from questioning the regularity of the election or defects in the preliminary proceedings as against a bona fide holder.¹³⁹ When municipal officers make a subscription and issue county bonds in payment it may fairly be presumed that the conditions which the law attaches to the exercise have been fairly fulfilled. If the right to issue is made dependent upon the result of a popular vote the officers of the county, as a rule, must first determine whether the vote has been taken as directed by law, and what the vote was.¹⁴⁰ It has been held that where a charter authorized a subscription of thirty-five thousand dollars and the notice under which the vote was taken was a mere call for a special town meeting, signed by only twelve voters, and which did not seek to follow the charter provisions, the bonds are void.¹⁴¹ If an election is required to authorize the issue of bonds and the result of that election is by law to be ascertained and declared by any judge, officer or tribunal, and that judge, officer or tribunal, on behalf of the corporation, executes or issues the bonds, with a recital that the election has been held, it will be sufficient evidence of the facts to all bona fide holders of such bonds.¹⁴² Irregularities in an election may be cured by an act of the legislature.¹⁴³ Where a statute declares that bonds shall not be invalidated by mistakes in giving the notice and issuing the bonds, an election irregularly called and held does not invalidate the issue.¹⁴⁴ Where an election was called pursuant to a statute which required a submission of the question to the "inhabitants of the town and affirmed by them," it means a majority of the legal voters.¹⁴⁵ The levy of taxes and payment of interest for eleven years

gon v. Jennings, 119 U. S. 74; s. c. 7 S. Ct. 124; *Chaffee Co. v. Potter*, 142 U. S. 355; s. c. 12 S. Ct. 216; *National L. Ins. Co. v. Board &c.*, 62 Fed. 778; *City of Huron v. Second Ward &c. Bank*, 86 Fed. 272; *City of Evansville v. Dennett*, 161 U. S. 434; s. c. 16 S. Ct. 613; *Board &c. v. National L. Ins. Co.*, 90 Fed. 228; *Risley v. Village of Howell*, 64 Fed. 453; *Sherman Co. v. Simons*, 109 U. S. 735; s. c. 3 S. Ct. 502; *Waite v. City of Santa Cruz*, 89 Fed. 619; *Gunnison Co. v. E. H. Rollins & Sons*, 173 U. S. 255; s. c. 19 S. Ct. 390; 80 Fed. 692.

¹³⁹ *Rondot v. Rogers Tp.*, 99 Fed. 202.

¹⁴⁰ *Pendleton Co. v. Amy*, 13 Wall. 297.

¹⁴¹ *Elmwood Township v. Marcy*, 92 U. S. 289; *Marshall v. Silliman*, 61 Ill. 218; *Wiley v. Silliman*, 62 Ill. 170.

¹⁴² *Kennicott v. Supervisors*, 83 U. S. 452; *St. Joseph Tp. v. Rogers*, 83 U. S. 644, 665.

¹⁴³ *St. Joseph Tp. v. Rogers*, 83 U. S. 644, 665.

¹⁴⁴ *Roberts v. Bolles*, 101 U. S. 119.

¹⁴⁵ *Walnut Tp. v. Wade*, 103 U. S. 683.

cures any irregularity in the issuance of bonds.¹⁴⁶ Where bonds recite on their face that an election was held the irregularity of the election is not a defense as to a bona fide holder.¹⁴⁷ Recitals that bonds were issued under the provisions of and in conformity to a statute pursuant to a vote of the electors, cures a defect in the notice.¹⁴⁸ The city is estopped to deny recitals as against a bona fide purchaser.¹⁴⁹ But a municipality is not estopped to deny that a vote and subscription were in pursuance of a statute when in fact such statute was not applicable.¹⁵⁰ (i) *Of compliance with statute:* Bonds issued by an irrigation district under statutory power containing a recital that they were issued under and in full compliance with the statute, work an estoppel as against the city in favor of bona fide purchasers.¹⁵¹ Officers who are empowered to issue bonds upon the fulfillment of conditions and assert by way of recital that they are issued "in pursuance of" or "in conformity with" or "by virtue of" the statute, estop the municipality from contradicting the recitals as to precedent conditions.¹⁵² A municipality having issued its bonds containing recitals of conformity with the statute and conditions precedent is estopped from denying its obligations when such bonds are in the hand of a bona fide holder, for value, before maturity. It can not show the recitals are false and the bonds issued for an illegal and unauthorized purpose.¹⁵³ In the absence of a statute authorizing officers to determine whether an issue of bonds would exceed the constitutional limit, and there is no recital that they are within the limit, and the bonds in connection with the assessment roll show the limit to have been exceeded, a general recital that all requirements of the law have been complied with will not estop the city from showing the illegality of the bonds by reason of their exceeding the limit of indebtedness.¹⁵⁴ Where the statute provides that no bonds shall

¹⁴⁶ Clay Co. v. Society of Savings, 104 U. S. 579.

¹⁴⁷ Livingston Co. v. First Nat'l Bank, 128 U. S. 102; s. c. 9 S. Ct. 18; Pana v. Bowler, 107 U. S. 529; s. c. 2 S. Ct. 704. Contra, Lippincott v. Town of Pana, 92 Ill. 24.

¹⁴⁸ Anderson Co. Com'rs v. Beal, 113 U. S. 227; s. c. 5 S. Ct. 433; Town of Coloma v. Eaves, 92 U. S. 484; Dixon Co. v. Field, 111 U. S. 83; s. c. 4 S. Ct. 315.

¹⁴⁹ Ashman v. Pulaski Co., 73 Fed. 927; Mayor &c. v. Dennison, 69 Fed. 58; Wesson v. Saline Co., 73 Fed. 917.

¹⁵⁰ Rathbone v. Board &c., 73 Fed. 395.

¹⁵¹ Miller v. Perris Irr. Dist., 99 Fed. 143. Cf. Mercer Co. v. Hackett, 1 Wall. 83; Town of Coloma v. Eaves, 92 U. S. 484; Commissioners v. Bolles, 94 U. S. 104; Commissioners v. January, 94 U. S. 202; San Antonio v. Mehaffy, 96 U. S. 312.

¹⁵² Gratton Tp. v. Chilton, 97 Fed. 145.

¹⁵³ Village of Kent v. Dana, 100 Fed. 56; s. c. 40 C. C. A. 281.

¹⁵⁴ Geer v. School Dist. &c., 97 Fed. 732.

be issued creating an indebtedness exceeding a specified per cent. of the assessed valuation and also requires that a book shall be kept which will at all times show the amount of indebtedness, and the assessment roll of the preceding year is a public record accessible to all, a recital that the indebtedness incurred did not exceed the debt limit, does not estop the city from showing that the bonds did create an indebtedness exceeding the limit. This is based on the fact that a purchaser is bound to take notice of the existing indebtedness and the assessed valuation.¹⁵⁵ Recitals in bonds that they have been issued "in pursuance of," or "in conformity with," or "by virtue of," or "by authority of," the statute import full compliance with the statute and preclude inquiry as to whether the precedent conditions have been performed before the bonds were issued, where they are in the hands of a bona fide purchaser for value.¹⁵⁶ Where bonds recite that all the provisions of the act authorizing their issue have been complied with, and also the purpose for which they are issued, the county is estopped to deny these recitals as against a bona fide purchaser.¹⁵⁷ The indorsement on a bond that it is registered is part of the bond, and, taken in connection with the recital that it is issued pursuant to a statute which requires registration, estops the municipality from denying registration.¹⁵⁸ The recital that the bond is issued in pursuance of the statute referred to is conclusive against the municipality only as to matters of fact, but does not estop it from denying the power of its officers to issue the bond under the statute.¹⁵⁹ (j) *Rule in United States supreme court*: The rules established by the United States supreme court in the matter of recitals where the rights of a bona fide purchaser are involved may be stated as follows: (1) Where neither the constitution nor the statute prescribes a rule or test by which persons contracting with municipal corporations can ascertain the extent of their existing indebtedness and the recital states that the issue is within the constitutional limit, the municipality is estopped from denying the truth of the representations.¹⁶⁰ (2) Where

¹⁵⁵ *National Life Ins. Co. v. Mead*, 13 S. D. 342; s. c. 83 N. W. 335.

¹⁵⁶ *School Dist. v. Stone*, 106 U. S. 183, 187; s. c. 1 S. Ct. 84; *Town of Coloma v. Eaves*, 92 U. S. 484; *Commissioners v. Bolles*, 94 U. S. 104; *Mercer Co. v. Hackett*, 1 Wall. 83; *Anderson Co. Com'rs v. Beal*, 113 U. S. 227; s. c. 5 S. Ct. 433; *Cairo v. Zane*, 149 U. S. 122; s. c. 13 S. Ct. 803; *Moulton v. City of Evansville*, 25 Fed. 382.

¹⁵⁷ *German Ins. Co. v. City of Manning*, 78 Fed. 900; *Second Ward Sav. Bank v. City of Huron*, 80 Fed. 660.

¹⁵⁸ *D'Esterre v. City of Brooklyn &c.*, 90 Fed. 586.

¹⁵⁹ *D'Esterre v. City of Brooklyn &c.*, 90 Fed. 586.

¹⁶⁰ *Buchanan v. Litchfield*, 102 U. S. 278, 290, 292.

the legislature has given to a municipality, or to its officers, authority to issue bonds, but only on some precedent condition, such as a popular vote, and it is to be gathered from the legislative enactment that the officers are invested with power to decide whether the condition precedent has been complied with, their recital that it has been is conclusive of the fact, and binding on the municipality.¹⁶¹

(3) Where the bonds recite that they are issued in accordance with the constitution, or where the ordinance states, in any form, that the proposed indebtedness is within the constitutional limit, or where the statute restricts the exercise of the authority to those municipal corporations whose indebtedness, at the time, does not exceed the constitutional limit, the city can not, as against an innocent holder, dispute the fair inference to be drawn from the recitals, as to the extent of the indebtedness.¹⁶²

(4) Recitals do not determine legislative authority in the municipality to issue the bonds, but such authority being conceded, or being apparent, the municipality may be estopped by recitals to show irregularities in the exercise of that power.¹⁶³

(5) Where the authority to issue is to be determined upon the existence of a condition of facts to be ascertained and determined by some person or tribunal other than the officers charged with the duty of issuing the bonds, a recital contrary to the finding would be without legal effect and would work no estoppel.¹⁶⁴

(6) Where the fact, or facts, necessary to the existence of authority to issue are, by law, to be ascertained from some express and definite record of a public character, and not officially to be determined by those charged with the issue of the bonds, the recitals will not bind the municipality, and all persons claiming under the exercise of such a power are required to prove the fact or facts affirmatively.¹⁶⁵

(7) Where there are constitutional restrictions in regard to the extent of indebtedness the municipality may incur a purchaser is charged with knowledge of the fact, there being no recitals as to the constitutional requirements. In such case the standard of validity is created by the constitution.¹⁶⁶

(8) Where there are constitutional restrictions in regard to the validity of the issue it is not within the power of the legisla-

¹⁶¹ *Town of Coloma v. Eaves*, 92 U. S. 484; *Northern Bank &c. v. Porter Tp. Trustees*, 110 U. S. 608, 616, 619; s. c. 4 S. Ct. 254.

¹⁶² *Orleans v. Platt*, 99 U. S. 676.

¹⁶³ *Northern Bank &c. v. Porter Tp. Trustees*, 110 U. S. 608, 616, 619; s. c. 4 S. Ct. 254.

¹⁶⁴ *Dixon Co. v. Field*, 111 U. S. 83, 92-94; s. c. 4 S. Ct. 315.

¹⁶⁵ *Dixon Co. v. Field*, *supra*.

¹⁶⁶ *Lake Co. v. Graham*, 130 U. S. 674, 680, 683; s. c. 9 S. Ct. 654; *Carroll Co. v. Smith*, 111 U. S. 556; s. c. 4 S. Ct. 539; *Sutliff v. Lake Co. Com'rs*, 147 U. S. 230, 235, 237; s. c. 13 S. Ct. 318.

ture to dispense with them directly or indirectly by the creation of a ministerial commission whose finding shall be taken in lieu of the facts.¹⁶⁷ (9) In regard to legislative exactions, the legislature being the source of the exactions, it may create a board authorized and empowered to determine whether the conditions have been complied with, and its findings are conclusive where a bona fide purchaser is concerned.¹⁶⁸ (10) Where the defense interposed is that the issue is in violation of the constitution, but there is nothing on the face of the bonds showing the total number issued of each series, and the total amount in all, and there is an express recital that the limitation has not been passed, and the bonds themselves do not show that it has, the purchaser is not required to look further, if the commissioners issuing the bonds are to determine whether they are issued in conformity with the constitution and statute.¹⁶⁹ In such case the recital in the bond that the constitutional limitation had not been exceeded, when taken in connection with the fact that the bonds themselves do not show such recital to be untrue, estops the county from saying that it is untrue.¹⁷⁰ (11) In general a municipal corporation is estopped where it is recited in the bonds that they are not in excess of the constitutional or statutory limit, and the statute, as construed by the court, leaves it to the officers issuing the bonds to determine whether the facts exist which constitute the statutory or constitutional precedent, and do not make those facts a matter of public record.¹⁷¹ (k) *The rule in New York*: The doctrine of the court of appeals of New York in respect to the conclusiveness of recitals by the officers concerned in issuing bonds is directly opposed to that of the federal courts. "There can be no bona fide holders of bonds," said Danforth, J.,¹⁷² "within the meaning of the law applica-

¹⁶⁷ Lake Co. v. Graham, 130 U. S. 674; s. c. 9 S. Ct. 654.

¹⁶⁸ Sherman Co. v. Simons, 109 U. S. 735; s. c. 3 S. Ct. 502; Oregon v. Jennings, 119 U. S. 74; s. c. 7 S. Ct. 124.

¹⁶⁹ Chaffee Co. v. Potter, 142 U. S. 355, 363, 364, 366; s. c. 12 S. Ct. 216; citing Town of Coloma v. Eaves, 92 U. S. 484; Town of Venice v. Murdock, 92 U. S. 494; Marcy v. Oswego Township, 92 U. S. 637; Wilson v. Salamanca, 99 U. S. 499.

¹⁷⁰ Buchanan v. Litchfield, 102 U. S. 278; Northern Bank &c. v. Porter Tp. Trustees, 110 U. S. 608; s. c. 4 S. Ct. 254; distinguishing Dixon Co.

v. Field, 111 U. S. 83; s. c. 4 S. Ct. 315; Lake Co. v. Graham, 130 U. S. 674; s. c. 9 S. Ct. 654; and Sutliff v. Lake Co. Com'rs, 147 U. S. 230; s. c. 13 S. Ct. 318.

¹⁷¹ Gunnison Co. Com'rs v. E. H. Rollins & Sons, 173 U. S. 255; s. c. 19 S. Ct. 390; Marcy v. Oswego Township, 92 U. S. 637; Humboldt Tp. v. Long, 92 U. S. 642; Dixon Co. v. Field, 111 U. S. 83; s. c. 4 S. Ct. 315; Lake Co. v. Graham, 130 U. S. 674, 682; s. c. 9 S. Ct. 654; Chaffee Co. v. Potter, 142 U. S. 355, 363; s. c. 12 S. Ct. 216.

¹⁷² Cagwin v. Town of Hancock, 84 N. Y. 532.

ble to negotiable paper, which have been issued without authority. A town has no general authority to issue such bonds. It can issue them only by special authority conferred by some statute. Unless issued in the way pointed out by statute they can not bind the town." Accordingly it was held that where the statute providing for the issue of bonds required the consent in writing of a majority of the taxpayers, owning more than one-half of the taxable property of the town, and providing that the fact that such majority had been obtained should be proved by affidavit in writing of one of certain specified town officers, and declaring that the affidavit or a certified copy thereof should be evidence of the facts therein contained, the affidavit was not conclusive, but only prima facie evidence of the facts stated, and might be disputed in a suit by a bona fide holder.¹⁷³ (1) *Effect of recital*: A recital in negotiable bonds that all conditions have been complied with, is conclusive as to the regularity of all proceedings antecedent to their issuance when the bonds are in the hands of a bona fide holder.¹⁷⁴ A recital that the bonds are issued in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof, imports not only compliance with the act of the legislature but that the ordinances of the city council were in conformity with the statute.¹⁷⁵ A recital that bonds were issued by a

¹⁷³ *Cagwin v. Town of Hancock*, 84 N. Y. 532, on the ground that the consent of the taxpayers was a fundamental condition precedent to the power to issue bonds, and that it was the manifest intention of the legislature that they should not be issued without such consent. See also, *Starin v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, 23 N. Y. 439, 456; *Dodge v. Platt County*, 82 N. Y. 218; *Town of Venice v. Woodruff*, 62 N. Y. 462; *Town of Duanesburgh v. Jenkins*, 57 N. Y. 177; *People v. Smith*, 45 N. Y. 772; *People v. Mead*, 24 N. Y. 114; *Williams v. Duanesburgh*, 66 N. Y. 129; *Ontario v. Hill*, 99 N. Y. 324; *Mercer County v. Pittsburgh &c. R. Co.*, 27 Pa. St. 389; *City of Aurora v. West*, 22 Ind. 88; *City and County of St. Louis v. Alexander*, 23 Mo. 483; *State v. Saline County*, 45 Mo. 242. The reasons given in the New York cases were carefully considered in

Town of Venice v. Murdock, 92 U. S. 494 (on error to the circuit court for the northern district of New York), and pronounced unsound. It was argued that the New York decisions were judicial constructions of a statute of that state, and therefore furnished a rule by which the federal court should be guided. But the supreme court did not accept this view, holding that they asserted only general propositions concerning the validity of commercial paper, and applied as well to the execution of powers or authorities granted by private persons as to the issue of bonds under the statute.

¹⁷⁴ *Pickens Tp. v. Post*, 99 Fed. 659. Cf. *Town of Coloma v. Eaves*, 92 U. S. 484; *City of Evansville v. Dennett*, 161 U. S. 434; s. c. 16 S. Ct. 613.

¹⁷⁵ *City of Evansville v. Dennett*, 161 U. S. 434; s. c. 16 S. Ct. 613.

county board in accordance with the provisions of a statute authorizing counties to refund their indebtedness is a representation that the debt refunded was just and valid, and as to an innocent purchaser, who relies upon the representation, the county is estopped from denying it.¹⁷⁶ A municipality can not make a false certificate in its bonds, or a false record that they were issued in accordance with law and for a lawful purpose, and then defeat a recovery by an innocent purchaser who has bought relying on the certificate or record.¹⁷⁷ Where bonds are issued for improvements within the power of the town to make, recitals that all acts required as conditions precedent have been performed estop the town, as against a bona fide holder, from asserting that the improvement was not completed or the contract not complied with.¹⁷⁸ When a municipality is authorized to issue bonds containing recitals of matters of fact, showing that they were issued in accordance with law and for a purpose authorized by the law, the municipality is estopped, as against a bona fide holder, from disputing the truth of the recitals.¹⁷⁹ (m) *Purchaser may rely on, when:* Where negotiable bonds do not of themselves exceed the limit of indebtedness, and they recite that they are refunding bonds for outstanding indebtedness, and recite the statute authorizing them, there is nothing on their face to charge a purchaser with notice that their issue will exceed the limit of indebtedness, and a purchaser, in good faith, for full value, may rely on the recitals and enforce the bonds at least to the extent to which the county might contract an indebtedness legally at the time of issue.¹⁸⁰ The recital in bonds that they were issued in pursuance of a lawful and proper resolution, and of honest and just action on the part of the county under the statute, relieves an innocent purchaser of all inquiry, notice and knowledge of the actual action and record, and estops the county from denying that proper action was taken and that a lawful resolu-

¹⁷⁶ Board &c. v. Ætna L. Ins. Co., 90 Fed. 222.

¹⁷⁷ Board &c. v. National Life Ins. Co., 90 Fed. 228; West Plains Tp. v. Sage, 69 Fed. 943; City of Huron v. Second Ward Sav. Bank, 86 Fed. 272; s. c. 30 C. C. A. 38.

¹⁷⁸ Town of Klamath Falls v. Sachs, 35 Or. 325; s. c. 57 Pac. 329.

¹⁷⁹ Waite v. City of Santa Cruz, 89 Fed. 619, 635; Commissioners v. Aspinwall, 21 How. 539; Chilton v. Town of Gratton, 82 Fed. 873; Sherman Co. v. Simons, 109 U. S. 735; s.

c. 3 S. Ct. 502; Town of Coloma v. Eaves, 92 U. S. 484; Bernards Tp. v. Morrison, 133 U. S. 523; s. c. 10 S. Ct. 333; Chaffee Co. v. Potter, 142 U. S. 355; s. c. 12 S. Ct. 216; Provident Life &c. Co. v. Mercer Co., 170 U. S. 593; s. c. 18 S. Ct. 788; West Plains Tp. v. Sage, 69 Fed. 943; s. c. 16 C. C. A. 552; Resley v. Village of Howell, 64 Fed. 453; s. c. 12 C. C. A. 218.

¹⁸⁰ Lyon Co. v. Keene &c. Bank, 100 Fed. 337; Board &c. v. Ætna Life Ins. Co., 90 Fed. 222.

tion was passed.¹⁸¹ Where a bond recites that it is issued under a statutory provision, and an ordinance in conformity therewith, printed on the back of the bond, and the statute and ordinance authorize the bonds, the purchaser is not chargeable with notice of the disposition of the bonds by the city, which might render them void in the hands of one with notice.¹⁸² (n) *Must be clear and unambiguous*: A recital must be explicit as to the fact upon which the purchaser relies. A recital as to one fact in a series of prerequisites is not to be extended to others, although, in many cases, a general recital of compliance with a statute is construed as a compliance with all the essential facts that constitute a complete performance of conditions precedent. Where the holder of bonds relies upon recitals for protection the recitals should at least be clear and unambiguous in order to estop a municipal corporation from showing that they were issued in violation or without authority of law.¹⁸³

§ 981. Negotiability of bonds.—The negotiability of municipal bonds is not materially different from that of other commercial paper, but when spoken of as negotiable instruments the element usually in the mind relates to the rights of a bona fide holder for value in that he takes and holds them free of equitable defenses, rather than the mode of transfer or assignability. As in the case of promissory notes, however, they must be for a sum certain and payable at a time certain. They can not be made for so many pounds or so many dollars.¹⁸⁴ As to the maturity of municipal bonds payable to bearer, it has been held that they are governed by the law merchant, as inland bills of exchange, and therefore must be presented for payment at the place designated, or where payable.¹⁸⁵ The fact that they contain recitals does not destroy their negotiability,¹⁸⁶ nor does the fact that the payee is not inserted render them non-negotiable, for in such case they are intended to be payable to the holder or bearer.¹⁸⁷ The

¹⁸¹ *Wesson v. Saline Co.*, 73 Fed. 917; s. c. 20 C. C. A. 227; *Rathbone v. Board &c.*, 83 Fed. 125; s. c. 27 C. C. A. 477; *City of South St. Paul v. Lamprecht Bros. Co.*, 88 Fed. 449; s. c. 31 C. C. A. 585.

¹⁸² *City of Uvalde v. Spier*, 91 Fed. 594.

¹⁸³ *School Dist. v. Stone*, 106 U. S. 183, 187; s. c. 1 S. Ct. 84.

¹⁸⁴ *Parsons v. Jackson*, 99 U. S. 434; 1 *Daniel on Neg. Inst.*, § 53.

¹⁸⁵ *Gardner v. Haney*, 86 Ind. 17;

City of Bloomington v. Smith, 123 Ind. 41; s. c. 23 N. E. 972.

¹⁸⁶ *Humboldt Tp. v. Long*, 92 U. S. 642.

¹⁸⁷ *White v. Vermont &c. R. Co.*, 21 How. 575; *Craig v. City of Vicksburg*, 31 Miss. 216. Being under seal does not destroy the negotiability as at common law; *Manhattan Sav. Inst. v. New York &c. Bank*, 59 N. Y. S. 51; s. c. 42 App. Div. (N. Y.) 147.

general rule is that municipal bonds, by universal commercial usage and consent, have all the qualities of commercial paper. "It seems to be the well-settled doctrine that state, county, city, and other bonds and public securities of this character, are negotiable by delivery only, without indorsement, in the same manner as bank bills, especially when they are payable to bearer."¹⁸⁸ "It is the well-settled doctrine that bonds of this character are to be treated as commercial paper."¹⁸⁹ The character of municipal bonds is as well established as that of a bill of exchange or promissory note, and it is no more necessary to say "negotiable bonds" than to say "negotiable notes" or "negotiable bills." In fact in but few of the acts authorizing the issue of such bonds is it declared that they shall be negotiable. When the power to issue them is given, the officers authorized, unless restricted by positive enactment, may make them payable to order or to bearer, and such is the uniform practice.¹⁹⁰ The grant of power to issue bonds is to be interpreted to give power to issue municipal bonds in the usual form of such securities and the usual form is negotiable.¹⁹¹ It is probable that the power to issue negotiable bonds is not to be implied from the limited power to borrow money or incur indebtedness.¹⁹³ Registration of bonds does not destroy their negotiability when voluntarily transferred by the owner.¹⁹⁴ A statutory requirement that certain bonds shall be registered does not of itself make them non-negotiable.¹⁹⁵

§ 982. Signature to bonds.—If the legislative act is silent as to the officers who shall issue the bonds they should be executed by the municipal officers.¹⁹⁶ Where the name of the proper officer was writ-

¹⁸⁸ *Gelpcke v. City of Dubuque*, 1 Wall. 175, 206; *Johnson v. Stark County*, 24 Ill. 75; *Board &c. v. Hubbard*, 45 Ill. 139.

¹⁸⁹ *Town of Eagle v. Kohn*, 84 Ill. 292.

¹⁹⁰ *Howard v. Kiowa Co.*, 73 Fed. 406; *Ashley v. Board &c.*, 8 C. C. A. 455; s. c. 60 Fed. 55; *City of Cadillac v. Woonsocket Inst.*, 7 C. C. A. 574; s. c. 58 Fed. 935; *West Plains Tp. v. Sage*, 16 C. C. A. 553; s. c. 69 Fed. 943.

¹⁹¹ *West Plains Tp. v. Sage*, 16 C. C. A. 553; s. c. 69 Fed. 943.

¹⁹³ *Merrill v. Monticello*, 138 U. S. 673; s. c. 11 S. Ct. 441; *Hill v. Memphis*, 134 U. S. 198; s. c. 10 S. Ct.

562; *Brenham v. German American Bank*, 144 U. S. 173; 12 S. Ct. 559.

¹⁹⁴ *D'Esterre v. City of Brooklyn*, 90 Fed. 586.

¹⁹⁵ *Manhattan Sav. Institution v. New York &c. Bank*, 59 N. Y. S. 51; s. c. 42 App. Div. (N. Y.) 147. The bonds held not negotiable, in *Scolians v. Rollins*, 173 Mass. 275; s. c. 53 N. E. 863.

¹⁹⁶ *Lane v. Inhabitants &c.*, 72 Maine 354; *Middleton v. Mullica Tp.*, 112 U. S. 433; s. c. 5 S. Ct. 198. Proper officers of a town are the supervisor and clerk: *Walnut v. Wade*, 103 U. S. 683; *Town of Windsor v. Hallett*, 97 Ill. 204. See also, *Kankakee Co. v. Etna L. Ins. Co.*,

ten by another person at his request and afterward treated by him as his own, by participating in the negotiation and sale of bonds, they were valid in the hands of a bona fide holder.¹⁹⁷ The fact that the clerk's name attached to bonds is lithographed thereon does not render them invalid.¹⁹⁸

§ 983. *Sealing*.—Where a statute gave authority to borrow money, etc., and to execute bonds therefor, and provided that the bonds should be under the hands and seals of the commissioners, the direction was declared to be “a matter of form rather than of substance,” “merely a directory requirement,” and “not an essential part of the transaction.”¹⁹⁹

106 U. S. 668; s. c. 2 S. Ct. 80; *Coler v. Board &c.*, 6 New Mex. 88; s. c. 27 Pac. 619.

¹⁹⁷ *School Dist. v. First Nat'l Bank*, 19 Neb. 89; s. c. 26 N. W. 912. See also, on the same point, *Montgomery v. St. Marys Township*, 43 Fed. 362. A public board acts by a majority of its members: *Blair v. Cumming Co.*, 111 U. S. 363; s. c. 4 S. Ct. 449; *Curtis v. Butler Co.*, 24 How. 435; *Burleigh v. Town of Rochester*, 5 Fed. 667; *First Nat'l Bank v. Town of Arlington*, 16 Blatchf. 57; *Commissioners &c. v. Clark*, 94 U. S. 278; *Bissell v. Spring Valley Tp.*, 110 U. S. 162; s. c. 3 S. Ct. 555. If the statute requires the mayor's signature, the council can not authorize any other person to sign them: *Coler v. Cleburne*, 131 U. S. 162; s. c. 9 S. Ct. 720. A Washington statute requiring city bonds to be signed by the mayor of the city was sufficiently complied with by the signature of the person occupying the office at the date of their negotiation and delivery, though he was elected after the day of their date: *Yesler v. City of Seattle*, 1 Wash. St. 308; s. c. 25 Pac. 1014. That a lithograph fac-simile signature may suffice, see *Pennington v. Baehr*, 48 Cal. 565; *McKee v. Vernon Co.*, 3 Dill. 210.

¹⁹⁸ *Town of Lexington v. Union Nat'l Bank*, 75 Miss. 1; s. c. 22 So. 291.

¹⁹⁹ *Draper v. Town of Springport*, 104 U. S. 501, evidently overruling *Avery v. Town of Springport*, 14 Blatchf. 272, although the latter case is not referred to. See also, *San Antonio v. Mehaffy*, 96 U. S. 312; *Ring v. Johnson Co.*, 6 Iowa 265; *Connecticut &c. Ins. Co. v. Cleveland &c. R. Co.*, 41 Barb. (N. Y.) 9; *Town of Solon v. Williamsburg Sav. Bank*, 114 N. Y. 122; s. c. 21 N. E. 168. As to sufficiency of seal, see *Stockton v. Powell*, 29 Fla. 1; s. c. 10 So. 688; *Kelly v. McCormick*, 28 N. Y. 318; *Board of Education v. Fonda*, 77 N. Y. 350; *United States v. Linn*, 15 Peters 290. Where commissioners intended to issue bonds in behalf of a town pursuant to statute and stated on the face of the bonds that they had done so, and that they had thereto set their hands and seals, and the town received full consideration for the bonds, and the purchasers bought them in the open market, in good faith and for value, and in ignorance of the want of seals, it was held that a court of equity having jurisdiction of the cause and of the parties would prevent the formal defect of the want of seals from being set up to defeat an action at law upon the bonds: *Bernards Tp. v. Stebbins*, 109 U. S. 341; s. c. 3 S. Ct. 252; citing *Smith v. Aston*, *Freem. Ch.* 308; *Cockerell v. Cholomeley*, 1 Russ. & Myl. 418,

§ 984. **Date—Antedating.**—The true date of the issuance of a bond is the date when it actually passes out of the custody and control of the corporation pursuant to contract, and not necessarily the day of the date which it bears.²⁰⁰ A registration law was enacted subsequently to a vote for the issue of bonds, but went into effect before the bonds were actually issued. The bonds bore date of the day of the vote, but were signed by one whose authority did not exist until after the registration act was passed, and they were not registered in compliance with that statute. They were decided to be invalid in the hands of a bona fide holder.²⁰¹ The same result was reached where the bonds were not signed by an officer who was in office when they were signed, but by a person who was in office on the antedated day on which they bore date.²⁰² But a purchaser ignorant of the fact that the bonds were invalid on account of such a defect may recover the money actually received by the corporation.²⁰³

§ 985. **To whom payable.**—An act authorizing a subscription in aid of a railroad provided that the bonds should be made payable to the company “and their successor and assigns,” but they were drawn payable to the company or bearer. It was insisted that the divergence from the prescribed formula was a fatal defect. But the court held that the requirement was only directory, and moreover

429; *Town of Rutland v. Paige*, 24 Vt. 181; *Wiser v. Blachly*, 1 Johns. Ch. (N. Y.) 607; *Breen v. Morris & Co.*, 1 Beas. (N. J.) 165; *Druiff v. Parker*, L. R. 5 Eq. 131. And that the failure to observe the omission of the seals was not such negligence as to be fatal; citing *Wadsworth v. Wendell*, 5 Johns. Ch. (N. Y.) 224; *Inhabitants & Co. v. Haughton*, 7 Conn. 543; *Harris v. Pepperell*, L. R. 5 Eq. 1; *Elliott v. Sackett*, 108 U. S. 132; s. c. 2 S. Ct. 375. In *Draper v. Town of Springport*, 104 U. S. 501, Justice Bradley said: — “Whether the deviation from the directions of the statute, in the form of the obligations, may not have the effect of notice to the holder, sufficient to allow the other defenses to be set up, is a question which it is unnecessary at this time to decide. It may admit of much consideration.”

²⁰⁰ *School Dist. v. First Nat'l Bank*, 19 Neb. 89; s. c. 26 N. W. 912.

²⁰¹ *Anthony v. Jasper County*, 101 U. S. 693 (clearly distinguishing *Town of Weyauwega v. Ayling*, 99 U. S. 112, where a town was held estopped from proving that the bonds were actually signed by a former clerk after he went out of office, because the clerk in office adopted that signature as his own when he united with the chairman of the board in delivering the bonds); *Coler v. Cleburne*, 131 U. S. 162; s. c. 9 S. Ct. 720.

²⁰² *Town of Weyauwega v. Ayling*, 99 U. S. 112. Bonds may be antedated if so provided by the ordinance: *Moller v. City of Galveston*, 23 Tex. Civ. App. 693; s. c. 57 S. W. 1116.

²⁰³ *Louisiana v. Wood*, 102 U. S. 294. It is not necessary that the bonds be dated on the day of the ordinance providing for their issue: *Flagg v. Mayor & Co.*, 33 Mo. 440.

that the irregularity being committed by the servants of the municipality the latter was estopped to take advantage of it.²⁰⁴

§ 986. Place of payment.—It has been repeatedly decided by the United States courts that the power of a municipal corporation to make any contract does not depend upon the place of performance but upon its scope and object; and that no legal principle is violated if its bonds are made payable at a distant place instead of the treasury of the corporation;²⁰⁵ but a contrary rule is thoroughly established in Illinois.²⁰⁶

§ 987. Time of maturity.—Bonds may be made payable in a shorter time than that provided for by statute. In declaring that such bonds were not ultra vires the supreme court of New Jersey said: "If the contract was in opposition to express legislation, to public policy or to any general principle of law, then such contract must fail; but its want of coincidence with mere naked formalities or statutory directions not intended to be of the essence of the thing

²⁰⁴ *Supervisors v. Galbraith*, 99 U. S. 214; *Indianapolis R. Co. v. Horst*, 93 U. S. 291; *Rock Creek Township v. Strong*, 96 U. S. 271; *Bargate v. Shortridge*, 5 H. L. Cas. 297. A bond payable to bearer is transferable by delivery like a bank note: *Commonwealth v. Commissioners &c.*, 37 Pa. St. 237. Coupon bonds are negotiable though not made payable to any particular person: *Smith v. Clark County*, 54 Mo. 58; *McCoy v. Washington Co.*, 3 Phila. (Pa.) 290.

²⁰⁵ *Meyer v. City of Muscatine*, 1 Wall. 384; *Lynde v. County*, 16 Wall. 6; *Thomson v. Lee Co.*, 3 Wall. 327; *City of Lexington v. Butler*, 14 Wall. 282; *Supervisors &c. v. Galbraith*, 99 U. S. 214; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Mygatt v. City of Green Bay*, 1 Biss. 292.

²⁰⁶ *People v. Tazewell County*, 22 Ill. 147, where the court said:—"States, counties and corporations, created for public convenience only, are not required to seek their creditors to discharge their indebtedness, but when payment is desired the demand shall be made at their treasury. That is the only place

at which payment can be legally insisted upon, and it is the only place where the treasurer can legally have the public funds with which he is intrusted. To authorize the auditor to draw his warrants on the treasurer, payable in a sister state or in a foreign country, necessarily imposes an obligation on the treasurer to provide funds at that place to meet them, and his duties requiring him at the treasury would require the employment of agents, the transmission of the funds at a risk of loss and at a considerable expense in charges, insurance and discounts, which are not incident to its payment at the treasury." The rule applies to cities, counties and public corporations generally, and in the absence of legislative enactment "they have no power to make their indebtedness payable at any other place than at their treasury." - - - Demand on such bonds should be made at the treasury: *City of Pekin v. Reynolds*, 31 Ill. 529. See also, *Prettyman v. Supervisors &c.*, 19 Ill. 406; *Johnson v. Stark County*, 24 Ill. 75.

authorized will not have such effect. The circumstance that the bonds were required to be payable in twenty years rather than in five or within any other designated period could not be a matter of substance or anything but an immaterial incident to the act authorized."²⁰⁷

§ 988. **Delivery.**—The act of delivery is essential to the existence of any deed, bond or note. Although drawn and signed, so long as it is undelivered it is a nullity; "not only does it take effect only *by* delivery but also *on* delivery."²⁰⁸ Where a town had ample authority for issuing its bonds to a railroad company as a donation or subscription, and the bonds were executed in proper form and made payable to the proper company, but were delivered to the secretary of a new company, and there was nothing pertaining to them or that could have been ascertained from the record indicating their delivery to one not entitled to receive them, they were held to be enforceable in the hands of an innocent purchaser.²⁰⁹ Where the statute requires bonds to be delivered to a railroad company in payment of a subscription they can not be sold in advance and the money paid into the treasury to be paid out to the company.²¹⁰ Bonds issued two years after passage of the ordinance authorizing them are valid and bind-

²⁰⁷ *Singer Mfg. Co. v. City of Elizabeth*, 42 N. J. L. 249, 257. See also, *Rock Creek Tp. v. Strong*, 96 U. S. 271; *Mott v. United States Trust Co.*, 19 Barb. (N. Y.) 568; *Northwestern &c. Ins. Co. v. Overholt*, 4 Dill. 287; *De Voss v. City of Richmond*, 18 Gratt. (Va.) 338. Contra, *Potter v. Town of Greenwich*, 26 Hun (N. Y.) 326. See also, *Davis v. Yuba Co.*, 75 Cal. 452; s. c. 13 Pac. 874; 17 Pac. 533; *Woodruff v. Okolona*, 57 Miss. 806; *Cairo &c. R. Co. v. City of Sparta*, 77 Ill. 505. Power to issue bonds to mature fifteen years from the date of the statute is lawfully exercised by issuing bonds four years after date of the act to mature in eleven years: *Gilchrist v. Little Rock*, 1 Dill. 261. Cf. *Green v. Dyersburg*, 2 Flip. 477; *Brownell v. Town of Greenwich*, 114 N. Y. 518; s. c. 22 N. E. 24. Bonds payable "in twenty-five years after date," with a stipulation that "this bond will be redeemed, if desired, twelve years

after date," means that they are to run for twenty-five years and can not be redeemed until then without the consent of the holder: *Allentown School Dist. v. Derr*, 115 Pa. St. 439; s. c. 9 Atl. 55. The time for which the bonds are to run may be estimated from a future date if the latter be reasonable: *Daws v. Town of Elmwood*, 34 Fed. 114; *Commissioners &c. v. Clark*, 94 U. S. 278.

²⁰⁸ *Young v. Clarendon Township*, 132 U. S. 340, 353; s. c. 10 S. Ct. 107; citing *Bayley v. Taber*, 5 Mass. 286; *Marvin v. McCullum*, 20 Johns (N. Y.) 288; *Ward v. Churn*, 18 Gratt. (Va.) 801; *Lovejoy v. Whipple*, 18 Vt. 379.

²⁰⁹ *Town of Prairie v. Lloyd*, 97 Ill. 179. A conditional delivery would bind the company but not the creditors of the company having no knowledge of the conditions: *Thomas v. Morgan Co.*, 39 Ill. 496.

²¹⁰ *Neale v. County Court*, 43 W. Va. 90; s. c. 27 S. E. 370.

ing.²¹¹ Failure to state on the face of bonds the class to which they belong is not a legal defense to an action thereon, when they represent a valid indebtedness,²¹² nor is it a defense that an illegal contract was made for the payment of a commission on the sale, such commission never having been paid, where the bonds are held by an assignee without notice.²¹³

§ 989. **Quality of municipal bonds as commercial paper.**—Municipal bonds payable to bearer are uniformly placed on the same footing as other negotiable paper. They are transferable by delivery, and when issued by and under competent authority pass into the hands of a bona fide purchaser for value before maturity freed from any infirmity in their origin.²¹⁴ “Whatever fraud the officers authorized to issue them may have committed in disposing of them, or however entire may have been the failure of the consideration promised by parties receiving them, these circumstances will not affect the title of subsequent bona fide purchasers for value before maturity or the liability of the municipalities.”²¹⁵

²¹¹ *Moller v. City of Galveston*, 23 Tex. Civ. App. 693; s. c. 57 S. W. 1116. Bonds held to comply with requirements of statute as to form in *Village of Kent v. Dana*, 100 Fed. 56.

²¹² *City of Gladstone v. Throop*, 71 Fed. 341.

²¹³ *City of Gladstone v. Throop*, 71 Fed. 341.

²¹⁴ *Cromwell v. Sac Co.*, 96 U. S. 51; *New Providence Tp. v. Halsey*, 117 U. S. 336; s. c. 6 S. Ct. 764; *Ottawa v. National Bank*, 105 U. S. 342; *Wilson Co. v. National Bank*, 103 U. S. 770; *Block v. Commissioners*, 99 U. S. 686; *Supervisors v. Galbraith*, 99 U. S. 214; *Macon Co. v. Shores*, 97 U. S. 272; *Humboldt Tp. v. Long*, 92 U. S. 642; *United States v. Union Pac. R. Co.*, 91 U. S. 72; *Burleigh v. Town of Rochester*, 5 Fed. 667; *Supervisors &c. v. Schenck*, 5 Wall. 772; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Mercer Co. v. Hackett*, 1 Wall. 83; *Moran v. Commissioners*, 2 Black 722; *White v. Vermont &c. R. Co.*, 21 How. 575; *City of Lexington v. But-*

ler, 14 Wall. 282; *St. Joseph v. Rogers*, 16 Wall. 644; *Blackman v. Lehman*, 63 Ala. 547; *Goodman v. Simonds*, 20 How. 343; *Murray v. Lardner*, 2 Wall. 110; *National Bank &c. v. Kirby*, 108 Mass. 497; *City of San Antonio v. Lane*, 32 Tex. 405; *Boss v. Hewett*, 15 Wis. 285; *Burnham v. Brown*, 23 Maine 400; *Gorgier v. Mieville*, 3 B. & C. 45; *Brooks v. Mitchell*, 9 M. & W. 15; *Goodwin v. Roberts*, L. R. 1 App. Cas. 476; *Ackley School Dist. v. Hall*, 113 U. S. 135; s. c. 5 S. Ct. 371.

²¹⁵ *Field, J.*, in *Cromwell v. Sac Co.*, 96 U. S. 51, 57. It was there held that an overdue and unpaid coupon for interest, attached to a municipal bond which has several years to run, does not render the bond and the subsequently maturing coupons dishonored paper so as to subject them in the hands of a purchaser for value to defenses good against the original holder; and that such a holder is entitled to recover its full amount against the maker, although he may have paid less than its par value, whatever may have

§ 990. Coupons.—The interest certificates attached to bonds are termed coupons and are so called because they are detachable. As regards their form and execution the law governing the bonds themselves equally applies. When they are made negotiable, as they generally are, by the words “to order” or “bearer,” no defenses can be raised as against their validity which could not be raised against the bonds, as they are in fact part of the bond. But they are, when containing the proper words, negotiable instruments themselves; and it has been held that when detached from the bonds and payable to bearer, although overdue, they are still negotiable instruments.²¹⁶ Where a mortgage is given, the coupons are equally with the bonds a part of the mortgage debt, and upon foreclosure the holders are entitled to share pro rata in the proceeds.²¹⁷ All holders of detached coupons are upon the same level, and there is no priority in the order of their payment out of the proceeds of a mortgage; nor have they any precedence over the bonds to which they were originally attached.²¹⁸

§ 991. Payment of coupons.—A coupon becomes due and payable on the day fixed in the bond and coupon for payment, but it has been decided and it is accepted that they are entitled to three days of grace like other negotiable instruments.²¹⁹ Upon the expiration of the days of grace and non-payment they are dishonored and pass subject to all equities existing against the transferrer. But the presumption exists in favor of the holder that he is a holder for value before maturity, and the burden of proof devolves upon him who contests the

been its original infirmity. “This rule in no respect infringes upon the doctrine that one who makes only a loan upon such paper or takes it as collateral security for a precedent debt, may be limited in his recovery to the amount advanced or secured;” citing *Stoddard v. Kimball*, 6 Cush. (Mass.) 469; *Allaire v. Hartshorne*, 21 N. J. L. 665; *Williams v. Smith*, 2 Hill (N. Y.) 301; *President &c. v. Chapin*, 8 Met. (Mass.) 40; *Lay v. Wissman*, 36 Iowa 305.

²¹⁶ *Thompson v. Perrine*, 106 U. S. 589; s. c. 1 S. Ct. 564, 568; *Grand Rapids &c. R. Co. v. Sanders*, 54 How. Pr. (N. Y.) 214.

²¹⁷ *Union Trust Co. v. Monticello &c. R. Co.*, 63 N. Y. 311, 314; *Haven*

v. Grand Junction R. &c. Co., 109 Mass. 88; *Beaver County v. Armstrong*, 44 Pa. St. 63. And if by a condition in the mortgage, securing the bonds, they become prematurely due, the holder is entitled to payment of the coupons which become subsequently due: *Welsh v. First Div. R. &c. Co.*, 25 Minn. 314.

²¹⁸ *Ketchum v. Duncan*, 96 U. S. 659; *Sewall v. Brainard*, 38 Vt. 364.

²¹⁹ *Jones Corp. Bonds & Mtgs.*, § 245; *Evertson v. National Bank*, 66 N. Y. 14. Contra, *Daniels Negotiable Instruments* (3d ed.), § 1490a. Money bonds and interest coupons are not entitled to days of grace in Massachusetts: *Chaffee v. Middlesex R. Co.*, 146 Mass. 224, 335; s. c. 16 N. E. 34.

payment.²²⁰ Contrary to the ordinary rule governing negotiable paper, a coupon need not be presented for payment unless there are words in it requiring the holder to make a demand.²²¹

§ 992. **Interest upon interest.**—Coupons being negotiable instruments in themselves are as a matter of course entitled to interest upon their face value after non-payment at maturity.²²² Ordinarily demand is not necessary to fix the time from which the interest is to run. But if the bond is payable at a particular time on demand, it is a condition precedent and must be complied with.²²³ The interest upon coupons after maturity is not calculated at the rate expressed in the bond, but at the legal rate.²²⁴

§ 993. **Refunding, substituted and renewal bonds.**—When the municipality has the power to issue bonds and they have been issued, it may substitute other bonds of the same nature in their stead—may change the form though not the substance of its liability. To do this, however, there must be a substantial consent of the holders of the original bonds. Likewise refunding bonds may be issued to redeem those falling due. When they are issued under the proper conditions, which is determined by the legislative enactment, the municipality is liable as under the original issue.²²⁵ A city has no power to issue

²²⁰ *Murray v. Lardner*, 2 Wall. 110.

²²¹ *Jones Corp. Bonds & Mtgs.*, § 244; *Walnut Tp. v. Wade*, 103 U. S. 683; *Warner v. Rising Fawn Iron Co.*, 3 Woods 514. But see *Gorman v. Sinking Fund Com'rs*, 25 Fed. 641, 647, which holds that, where the holder of state coupons has a right to have them funded, he must offer them and demand that they be funded in order that his right may be fixed. It is no excuse that his demand would have been fruitless.

²²² *Pana v. Bowler*, 107 U. S. 529; s. c. 2 S. Ct. 704; *Koshkonong v. Burton*, 104 U. S. 668; *Walnut Tp. v. Wade*, 103 U. S. 683, 695; *Amy v. Dubuque*, 98 U. S. 470; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Ashuelot R. Co. v. Elliott*, 57 N. H. 397; *North Penn. R. Co. v. Adams*, 54 Pa. St. 94; *City of Jeffersonville v. Patterson*, 26 Ind. 16; *Welsh v. First Div. & C. R. Co.*, 25 Minn. 314.

²²³ *Aurora City v. West*, 7 Wall. 82; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Jones Corp. Bonds & Mtgs.*, § 256. Where the corporation in its answer sets up that it had money and was ready to pay coupons had they been presented, it is sufficient to defeat the claim for interest: *Walnut Tp. v. Wade*, 103 U. S. 683. The same rule obtains when the coupon holders are non-residents of the country and have failed to make demand and are unable to prove that the corporation was unable or unwilling to pay them upon demand: *Emlen v. Lehigh Coal & C. Co.*, 47 Pa. St. 76.

²²⁴ *Cromwell v. Sac Co.*, 96 U. S. 51; *Langston v. South Car. R. Co.*, 2 S. C. 248; *Spencer v. Pierce*, 5 R. I. 63.

²²⁵ *Jasper Co. v. Ballou*, 103 U. S. 745; *Little Rock v. National Bank*, 98 U. S. 308; *Portland Sav. Bank v. City of Evansville*, 25 Fed. 389;

bonds to pay off bonds of a water company, secured by mortgage and which property the city has purchased subject to the mortgage, under a statute authorizing cities to refund outstanding indebtedness.²²⁶ Where a city is authorized to retire existing bonds by the sale of new bonds, or a direct exchange, it can not sell more than are required to pay the outstanding bonds.²²⁷ Where a municipality is authorized to issue bonds for borrowed money for any legitimate municipal purpose, it may issue bonds to fund its floating debts.²²⁸ The issuance of refunding bonds and the change of the terms of a contract, when done under proper legislative authority by the court, is not the impairment of a contract by the taxpayers or electors, where the bonds are issued on the petition of taxpayers or on the vote of the electors.²²⁹ Where a municipality has power to issue bonds for refunding purposes it has implied power to agree to pay in gold.²³⁰ Where the constitution and charter require that on the creation of an indebtedness a sinking fund and interest shall be provided for, it is not an objection that this provision was complied with prior to the issuing of the bonds.²³¹ Funding a debt is not creating a new debt.²³² A statute authorizing refunding bonds is authority for issuing negotiable bonds in the usual form.²³³ Bonds issued to refund an unlawful debt are void in the hands of an innocent purchaser.²³⁴ Refunding bonds may in turn be refunded.²³⁵

City of Galena v. Corwith, 48 Ill. 423; *Sullivan v. Walton*, 20 Fla. 552. See also, *Blanton v. Board &c.*, 101 N. C. 532; s. c. 8 S. E. 162, where it was held that under the constitution of North Carolina a new issue of bonds declaring that they are in place of bonds maturing and are a continuation of the old liability need not be submitted to a vote of the people. - - - The same remedies may be used for the enforcement as were provided in the old issue: *People v. Lippincott*, 81 Ill. 193.

²²⁶ *City of Santa Cruz v. Waite*, 98 Fed. 387.

²²⁷ *Commissioners &c. v. Zimmerman*, 101 Ky. 432; s. c. 41 S. W. 428.

²²⁸ *Second Ward Sav. Bank v. City of Huron*, 80 Fed. 660; *Morris v. Taylor*, 31 Or. 62; s. c. 49 Pac. 660.

²²⁹ *Board &c. v. National Life Ins. Co.*, 90 Fed. 228.

²³⁰ *Packwood v. Kittitas Co.*, 15 Wash. 88; s. c. 45 Pac. 640.

²³¹ *Berlin Iron Bridge Co. v. City of San Antonio*, 92 Tex. 388; s. c. 50 S. W. 408.

²³² *City of Los Angeles v. Teed*, 112 Cal. 319; s. c. 44 Pac. 580; *Heins v. Lincoln*, 102 Iowa 69; s. c. 71 N. W. 189; *City of Mitchell v. Smith*, 12 S. D. 241; s. c. 80 N. W. 1077.

²³³ *Waite v. City of Santa Cruz*, 89 Fed. 619.

²³⁴ *Edminson v. City of Abilene*, 7 Kan. App. 305; s. c. 54 Pac. 568.

²³⁵ *Heins v. Lincoln*, 102 Iowa 69; s. c. 71 N. W. 189. *Starr & Curt. Ann. St.*, § 63, pp. 462, 463, is not in conflict with constitution of 1870, art. 9, § 12, in relation to refunding indebtedness: *Kane v. City of Charleston*, 161 Ill. 179; s. c. 43 N. E. 611.

§ 994. **The same subject continued.**—The municipality, by issue of the new bonds, waives any defenses it may have to the old bonds. By the new issue it obtains an advantage in postponing the time of payment, and generally in the rate of interest; and after the holders of the original issue have surrendered their evidence, the town will not be permitted to set up old irregularities as defenses which the creditor had the right to assume were waived when it made him the new offer. The municipality must do equity.²³⁶ So careful have the courts been to protect the interests of holders of renewal bonds, that where an old issue had been held invalid and the municipality could not ordinarily issue new bonds in renewal, yet where it was specially authorized to issue new bonds in payment of its indebtedness, the holders of the original bonds were deemed creditors and were entitled to new bonds.²³⁷ When, however, the bonds were issued in positive violation of statute, the holders of old bonds can not substitute them.²³⁸

§ 995. **Estoppel by matter in pais.**—Before the bonds are actually issued or the rights of third parties have attached to the transaction the question of estoppel can not arise,²³⁹ and it is generally declared that there can be no estoppel to set up a want of power to issue the bonds.²⁴⁰ In *Pendleton Co. v. Amy*²⁴¹ a county had authority to issue

²³⁶ *Jasper Co. v. Ballou*, 103 U. S. 745; *Warren Co. v. Marcy*, 97 U. S. 96; *Moultrie Co. v. Rockingham & Co. Bank*, 92 U. S. 631; *Commissioners v. Bolles*, 94 U. S. 104; *Marcy v. Oswego Tp.*, 92 U. S. 637. A holder of valid bonds who has surrendered them for renewal bonds subsequently held invalid may sue upon the original bond, although it has been canceled: *Deyo v. Otoe Co.*, 37 Fed. 246; *Gause v. City of Clarksville*, 1 McCrary 78; *Town of Plattsburgh v. Fitzgerald*, 10 Neb. 401; s. c. 6 N. W. 470.

²³⁷ *Town of Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122; s. c. 21 N. E. 168. See also, *Hills v. Peekskill Sav. Bank*, 101 N. Y. 490; s. c. 5 N. E. 327.

²³⁸ *McKee v. Vernon Co.*, 3 Dill. 210; *Horton v. Town of Thompson*, 71 N. Y. 513.

²³⁹ *Union Pac. R. Co. v. Lincoln Co.*,

3 Dill. 300; *Union Pac. R. Co. v. Merrick Co.*, 3 Dill. 359; *Portland & Co. R. Co. v. Inhabitants &c.*, 58 Maine 23.

²⁴⁰ See § 1001, post; *Bloomfield v. Charter Oak Bank*, 121 U. S. 121; s. c. 7 S. Ct. 865. "By want of power . . . is meant the want of any existing valid legislative act authorizing the municipality to make the bonds or instruments; not irregularities in the exercise of the power, but want of legislative power itself:" 1 Dillon *Munic. Corp.* (4th ed.), § 545. In another place Judge Dillon defines "ultra vires," when used in this connection, as "the want of legislative power, under any circumstances or conditions, to do the particular act in question:" 1 Dillon *Munic. Corp.* (4th ed.), § 548.

²⁴¹ 13 Wall. 297.

bonds upon a vote by a majority of the real-estate holders. No vote was actually taken, but it was held estopped to set up that defense for reasons which were stated by Mr. Justice Strong as follows: "The county received in exchange for the bonds a certificate of stock of the railroad company, which it held about seventeen years before the present suit was brought and which it still holds. Having exchanged the bonds for the stock, we think the county can not retain the proceeds of the exchange and assert against a purchaser of the bonds for value that though the legislature empowered it to make them and put them upon the market, upon certain conditions, they were issued in disregard of the conditions."²⁴² And where an election was ordered by the wrong authority the same rule was applied.²⁴³

§ 996. Estoppel to set up overissue in violation of statute.—A statute enabling a township to issue its bonds provided that the amount of bonds voted should not be above such a sum as would require a levy of more than one per cent. per annum on the taxable property of such township to pay the annual interest. The bonds were executed by the officers designated in the act, and contained a recital of the act and that they were issued "in virtue of and in accordance" with it, and "in pursuance of and in accordance with the vote [required in the act] of three-fifths of the legal voters * * * at an election held," etc. It was held by a divided court that in the face of this recital it was no defense that the amount issued was in excess of the statutory limit.²⁴⁴

²⁴² *Pendleton Co. v. Amy*, 13 Wall. 297 (three judges dissenting). Cf. *Marsh v. Fulton Co.*, 10 Wall. 676.

²⁴³ *Supervisors &c. v. Schenck*, 5 Wall. 772. Contra, *Supervisors &c. v. Cook*, 38 Ill. 44. See also, *Redd v. Henry Co.*, 31 Gratt. (Va.) 695. And that an estoppel to set up irregularities arises from levy of taxes, payment of interest, or retention of consideration, see *Ray Co. v. Vansycle*, 96 U. S. 675; *McKee v. Vernon Co.*, 3 Dill. 210; *Luling v. City of Racine*, 1 Biss. 314; *Jasper Co. v. Ballou*, 103 U. S. 745; *Beloit v. Morgan*, 7 Wall. 619; *New Haven R. Co. v. Town of Chatham*, 42 Conn. 465; *People v. Cline*, 63 Ill. 394; *Schaeffer v. Bonham*, 95 Ill. 368; *Goshen Trustees &c. v. Springfield &c. R. Co.*, 12 Ohio St. 624; *Whiting*

v. Town of Potter, 18 Blatchf. 165, 180; *Alvord v. Syracuse &c. Bank*, 98 N. Y. 599 (cf. *Town of Mentz v. Cook*, 108 N. Y. 504, 505; s. c. 15 N. E. 541); *Moulton v. City of Evansville*, 25 Fed. 382; *Portsmouth Sav. Bank v. City of Springfield*, 4 Fed. 276. See also, *Anderson Co. Com'r's v. Beal*, 113 U. S. 227; s. c. 5 S. Ct. 433; *Town of East Lincoln v. Dav-enport*, 94 U. S. 801; *Belo v. Commissioners &c.*, 76 N. C. 489; *Lane v. Schomp*, 20 N. J. Eq. 82; *McPherson v. Foster*, 43 Iowa 48; *Butler v. Dunham*, 27 Ill. 473.

²⁴⁴ *Marcy v. Oswego Township*, 92 U. S. 637. See also, *Humboldt Township v. Long*, 92 U. S. 642; *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 625; *Wilson v. Salamanca*, 99 U. S. 499; *Dalles Co.*

§ 997. **Overissue in violation of the constitution—No estoppel by recitals.**—It was held in *Buchanan v. Litchfield*²⁴⁵ that where a bond showed on its face that the aggregate issue was in excess of the constitutional limit of indebtedness the municipality was not estopped from setting up that fact to defeat an innocent holder by a recital that it was issued under and in pursuance of the constitution of the state. The case was distinguished from previous decisions where the overissue was in violation of a statutory limitation. It was followed in *Dixon County v. Field*,²⁴⁶ in which the court said: "There was no power at all conferred to issue bonds in excess of an amount equal to ten per cent. upon the assessed valuation of the taxable property of the county. The amount of the bonds issued was known. It is stated in the recital itself." In the still later case of *Lake County v. Graham*²⁴⁷ the court declared the same doctrine. These cases are further considered in the opinion delivered by Justice Lamar in *Chaffee County v. Potter*,²⁴⁸ which is quoted in the following section.

§ 998. **The same subject continued—The rule qualified.**—In *Chaffee County v. Potter*²⁴⁹ the bonds were issued under authority of the same statute of Colorado as were those which were litigated in *Lake County v. Graham*.²⁵⁰ But there was this difference: that in the *Chaffee county* case the bonds contained the additional recital that "the total amount of this issue does not exceed the limit prescribed by the constitution of the state of Colorado," and did not show upon their face as did those in the *Lake county* case how many bonds were issued or how large each series was. These features were held to distinguish it from the *Lake county* case and to estop the county from setting up that the issue actually exceeded the constitutional limit of indebtedness.²⁵¹

v. McKenzie, 110 U. S. 686; s. c. 4 S. Ct. 184; *Darlington v. Laclede*, 4 Dill. 200; *Nicolay v. St. Clair Co.*, 3 Dill. 163; *Sherman Co. v. Simons*, 109 U. S. 735; s. c. 3 S. Ct. 502; *Cumins v. Lawrence Co.*, 1 S. Dak. 158; s. c. 46 N. W. 182, 184.

²⁴⁵ 102 U. S. 278.

²⁴⁶ 111 U. S. 83; s. c. 4 S. Ct. 315. See also, *Northern Bank &c. v. Porter Tp. Trustees*, 110 U. S. 608; s. c. 4 S. Ct. 254; and especially *Nesbit v. Independent Dist. of Riverside*, 144 U. S. 610; s. c. 12 S. Ct. 746.

²⁴⁷ 130 U. S. 674; s. c. 9 S. Ct. 654.

See also, *Cummins v. District Tp. of Doon*, 42 Fed. 644.

²⁴⁸ 142 U. S. 355; s. c. 12 S. Ct. 216.

²⁴⁹ 142 U. S. 355; s. c. 12 S. Ct. 216.

²⁵⁰ 130 U. S. 674; s. c. 9 S. Ct. 654, cited in the preceding section.

²⁵¹ "We held in that case [*the Lake county case*]," said Justice Lamar, "that the county was not estopped from pleading the constitutional limitation because there was no recital in the bonds in regard to it, and because also, the bonds showing upon their face that they were issued to the amount of

§ 999. **Bona fide holders.**—A bona fide holder of bonds must be a purchaser for value without notice or the successor of one who was.²⁵²

\$500,000, a purchaser having that data before him was bound to ascertain from the records the total assessed valuation of the taxable property of the county and determine for himself, by a simple arithmetical calculation, whether the issue was in harmony with the constitution; and that the bonds having been issued in violation of that provision of the constitution were not valid obligations of the county. Our decision was based upon the ruling of this court in *Dixon Co. v. Field*, 111 U. S. 83; s. c. 4 S. Ct. 315. To the views expressed in that case we still adhere, and the only question for us now to consider, therefore, is: Did the additional recital in these bonds above set out, and the absence from their face of anything showing the total number issued of each series and the total amount in all, estop the county from pleading the constitutional limitation? In our opinion these two features are of vital importance in distinguishing this case from *Lake county and Dixon county*, and are sufficient to operate as an estoppel against the county. Of course the purchaser of bonds in open market was bound to take notice of the constitutional limitation of the county with respect to indebtedness which it might incur. But when upon the face of the bonds there was an express recital that that limitation had not been passed and the bonds themselves did not show that it had, he was bound to look no further. An examination of any particular bond would not disclose, as it would in the *Lake county* case and in *Dixon Co. v. Field*, that, as a matter of fact, the constitutional limitation had been exceeded in the issue of

the series of bonds. The purchaser might even know, in fact, it may be admitted that he would be bound to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll whether the county had exceeded its power under the constitution in the premises. True, if a purchaser had seen the whole of each series of bonds and then compared it with the assessment roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the constitution. But that is not the test to apply to a transaction of this nature. It is not supposed that any one person would purchase all of the bonds at one time, as that is not the usual course of business of this kind. The test is: What does each individual bond disclose? . . . The statute in terms gave to the commissioners the determination of a fact, that is, whether the issue of bonds was in accordance with the constitution of the state and the statute under which they were issued, and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made and that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves do not show such recital to be untrue under the law, estops the county from showing that it is untrue."

²⁵²*McClure v. Oxford Tp.*, 94 U. S. 429. "A purchaser without notice . . . takes a title purged of any fraud or infirmity. This title he

A party with notice may buy from one without notice and will be protected. The object of the rule is to protect the bona fide holder, and to enable him to transfer the security to others with the same immunity which attaches in his own hands.²⁵³ But where the holder of bonds had such knowledge of the circumstances under which they were issued as to preclude a recovery by him, and he delivered them to his attorney to sell, who, having the same information, sold them to a client, the plaintiff, it was held that the latter was not a bona fide purchaser of the bonds.²⁵⁴ The pendency of a suit relating to the validity of negotiable bonds not yet due is not constructive notice to holders thereof.²⁵⁵ Where the validity of a bond is litigated and a decree entered before its maturity denying the right of the holder to sustain the suit, the decree is not effectual against the bond itself.²⁵⁶ But a purchaser of overdue bonds, after a judgment rendered that the bonds are void, is bound by the judgment.²⁵⁷

§ 1000. **The same subject continued.**—One is not the less a bona fide holder for value of municipal bonds because he took them in

can transfer, and it is immaterial whether the person to whom he transfers it knows of the taint or infirmity or not:" *Suffolk Sav. Bank v. City of Boston*, 149 Mass. 364; s. c. 21 N. E. 665.

²⁵³ *City of Lynchburg v. Slaughter*, 75 Va. 57; 1 Daniel Neg. Instr. 803; *Cromwell v. Sac Co.*, 96 U. S. 51; *Cass Co. v. Green*, 66 Mo. 498; *Suffolk Sav. Bank v. City of Boston*, 149 Mass. 364; s. c. 21 N. E. 665.

²⁵⁴ *Carter v. Ottawa*, 24 Fed. 546.

²⁵⁵ *Scotland Co. v. Hill*, 132 U. S. 107; s. c. 10 S. Ct. 26; *Olcott v. Supervisors*, 16 Wall. 678; *Warren Co. v. Marcy*, 97 U. S. 96; *Warren Co. v. Post*, 97 U. S. 110; *New Orleans v. Platt*, 99 U. S. 676; *Cass Co. v. Gillett*, 100 U. S. 585; *Warren Co. v. Portsmouth Sav. Bank*, 97 U. S. 110; *Leitch v. Wells*, 48 N. Y. 586; *Durant v. Iowa Co.*, 1 Woolw. 69; *Keiffer v. Ehler*, 18 Pa. St. 388; *Stone v. Elliott*, 11 Ohio St. 252; *Mims v. West*, 38 Ga. 18; *Winston v. Westfeldt*, 22 Ala. 760. This general rule can not be changed by state laws or

decisions so as to affect the rights of persons not residing and not being within the state, any more than the publication of suit can be made constructive service of process upon such persons. Rights to real property and personal chattels within the jurisdiction of the court and subject to its power may be affected by lis pendens but not those acquired by the transfer of negotiable securities: *Enfield v. Jordan*, 119 U. S. 680; s. c. 7 S. Ct. 358. See also, *Brooklyn v. Insurance Co.*, 99 U. S. 362; *Empire v. Darlington*, 101 U. S. 87; *Pana v. Bowler*, 107 U. S. 529, 545; s. c. 2 S. Ct. 704.

²⁵⁶ *Enfield v. Jordan*, 119 U. S. 680; s. c. 7 S. Ct. 358. See also, *Carroll Co. v. Smith*, 111 U. S. 556; s. c. 4 S. Ct. 539, where it was held that municipal officers might, notwithstanding an injunction against them, give a good title to one who purchased from them without notice.

²⁵⁷ *Louis v. Brown Tp.*, 109 U. S. 162; s. c. 3 S. Ct. 92.

pledge to secure a debt²⁵⁸ or in payment of an antecedent debt.²⁵⁹ The fact that overdue coupons are attached to the bond does not necessarily charge a purchaser with notice of defenses.²⁶⁰

§ 1001. **Defenses available against bona fide holders.**—An entire want of power to issue the bonds renders them invalid even in the hands of a bona fide holder.²⁶¹ Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds which upon their face refer to the statute under which they are issued is bound to take notice of the statute and all its requirements.²⁶²

²⁵⁸ *Allen v. Dallas &c. R. Co.*, 3 Woods (C. C.) 316.

²⁵⁹ *Mobile Sav. Bank v. Board &c.*, 24 Fed. 110; *Foot v. Town of Hancock*, 15 Blatchf. 343. A bona fide purchaser of stolen bonds will be protected: *Consolidated &c. Ass'n v. Avigno*, 28 La. An. 552; *Battles v. Laudenslager*, 84 Pa. St. 446; *City of Elizabeth v. Force*, 29 N. J. Eq. 587. Irregularities in an election which would have been fatal to the issue of bonds on objection before issue are of no avail when raised for the first time in a suit on the bonds by a bona fide holder: *State v. Board &c.*, 39 Kan. 657; s. c. 19 Pac. 925; *State v. City Council &c.*, 74 Ala. 226. Municipal officers, after having issued the full authorized amount of corporate bonds, received a quantity of them back, canceled them, and issued in their stead to the holder other bonds to the same amount, but of a different denomination, the change being made for convenience in negotiating them. It was held that this irregularity could not, in equity, be used to invalidate the bonds in the hands of a bona fide purchaser: *Town of Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122; s. c. 21 N. E. 168.

²⁶⁰ *Cromwell v. Sac Co.*, 96 U. S. 51; *Miller v. Town of Berlen*, 13 Blatchf. 245; *State v. Cobb*, 64 Ala. 127; *Roude v. Mayor &c.*, 18 Fed. 719. Cf.

First Nat'l Bank v. Scott, 14 Minn. 77. And see *Parsons v. Jackson*, 99 U. S. 434; *Railway Co. v. Sprague*, 103 U. S. 756.

²⁶¹ *St. Joseph Tp. v. Rogers*, 16 Wall. 644; *Merchants' &c. Bank v. Bergen Co.*, 115 U. S. 384; s. c. 6 S. Ct. 88. "There can be no estoppel in favor of bona fide holders where there is an entire absence of power:" 15 Am. & Eng. Encyc. of Law 1292, and cases cited. Where the act authorizing the issue of bonds imposes upon the officers signing them the duty to determine whether there has been a compliance with its terms and provisions, and the recitals state such a compliance, the corporation is estopped as against an innocent purchaser to claim that the bonds are invalid on any other ground than that upon their face they appear to have been issued in violation of some constitutional or statutory restriction: *Washington Tp. v. Coler*, 2 C. C. A. 272; s. c. 51 Fed. 362.

²⁶² *McClure v. Oxford Tp.*, 94 U. S. 429; *National Bank &c. v. City of St. Joseph*, 31 Fed. 216; *Town of Pana v. Lippincott*, 2 Ill. App. 466. See also, *City of Aurora v. West*, 22 Ind. 88; *George v. Oxford Tp.*, 16 Kan. 72; *Bates Co. v. Winters*, 97 U. S. 83; *LaMoille Valley &c. R. Co. v. Town of Fairfield*, 51 Vt. 257; *Lewis v. Commissioners &c.*, 12 Kan. 186;

§ 1002. **The same subject continued.**—The bona fide holder for value of a bond containing no recitals, apparently one of a series issued under authority of an act of the legislature of the state but actually in excess of the number of bonds authorized by that act, and as security for the personal debt of a fiscal officer of the corporation to the holder, was held not entitled to recover.²⁶³ A municipal bond which on its face refers to the statute under which it purports to be issued, and is so numbered as to make it apparent, from an examination of the statute and proceedings thereunder, that it was issued without authority, is void; nor can one holding it claim to be a bona fide purchaser for value.²⁶⁴

§ 1003. **Validity of bonds.**—A statute which provides that bonds issued for a city assessment shall be conclusive evidence of the regularity of the proceedings and of the validity of the lien will be enforced.²⁶⁵ A judgment in proceedings instituted by the state against a corporation declaring void the proceedings for its organization does not affect the validity of bonds which the district had previously issued after having obtained a judgment confirming its organization and the issuance and sale of the bonds, pursuant to the statute.²⁶⁶

Veeder v. Town of Lima, 19 Wis. 298.

²⁶³ *Merchants' Bank v. Bergen Co.*, 115 U. S. 384; s. c. 6 S. Ct. 88. See also, *The Floyd Acceptances*, 7 Wall. 666; *Marsh v. Fulton*, 10 Wall. 676.

²⁶⁴ *Thompson v. Town of Mamaroneck*, 37 Hun (N. Y.) 400. The purchase of school-district bonds charges the purchaser with knowledge of the financial condition of the district in so far as it affects the constitutional power of the district to issue the bonds: *Nesbit v. Independent School Dist.*, 25 Fed. 635. The holder of municipal bonds who took them knowing that conditions had not been complied with by the railroad company in whose favor they were issued is not a bona fide holder, and the fact of non-compliance with the conditions may be set up by the municipality in his suit against it: *Mobile Sav. Bank v. Board &c.*, 24 Fed. 110. Where a city has, by ordinance, granted a franchise to S. and his assigns for thirty years, to con-

struct and maintain water-works, purchasers of bonds issued by the assigns of S., and secured by a mortgage on the water-works, franchise, contracts, etc., though they purchase in good faith, acquire no rights, as against the city, which will deprive it of a right to rescission of the contract, to which it would have been entitled as against S. or his assigns, since they purchased the bonds knowing that the city was not a party to them, and that they were subject to a compliance with the terms of the ordinance, of which they were bound to take notice: *Farmers' Loan & Trust Co. v. City of Galesburg*, 133 U. S. 156; s. c. 10 S. Ct. 316. In a suit on municipal bonds fraudulently issued, plaintiff must show himself a bona fide holder for value: *Tracey v. Town of Phelps*, 22 Fed. 634.

²⁶⁵ *Ramish v. Hartwell*, 126 Cal. 443; s. c. 58 Pac. 920.

²⁶⁶ *Miller v. Perris Irr. Dist.*, 85 Fed. 693; *American Salt Co. v.*

Bonds issued to replace warrants which are not in excess of the limit of legal indebtedness are valid unless such bonds are part of a series in excess of the limit.²⁶⁷ The failure of the clerk to record the proceedings relating to the issuance of bonds will not defeat the enforcement of such bonds since parol evidence is admissible to show the missing parts of the record.²⁶⁸ Where bonds are issued to take up a floating indebtedness it is not a defense that the proceeds were used to take up illegal warrants,²⁶⁹ and so refunding bonds are valid in the hands of a bona fide purchaser although the original bonds were void.²⁷⁰ The dissolution of a municipal corporation and its reincorporation does not impair the validity of bonds issued prior to dissolution.²⁷¹ Where a charter provides that bonds shall be payable at a time not exceeding thirty years, as may be determined, and the bonds are made payable in thirty years from the time they first begin to draw interest, they are valid although it may be more than thirty years from the time they are executed.²⁷² The fact that coupons were not signed by the clerk as required by statute does not invalidate the bonds if recognized as valid by the town and by the legislature by a subsequent act.²⁷³

§ 1004. Invalidity of bonds.—In an action upon bonds illegally issued it is not a ground of equitable relief against landowners that such owners advocated and used their influence to secure the passage of the law under which they were issued which was subsequently declared unconstitutional and void, in the absence of fraud, and where both landowner and bond purchaser acted under the mistaken belief that the law was valid.²⁷⁴ Nor in such case can it be urged that the landowners have received benefit from the public work and

Heidenheimer, 80 Tex. 344; *Society Perun v. Cleveland*, 43 Ohio St. 481; s. c. 3 N. E. 357; *Shapleigh v. City of San Angelo*, 167 U. S. 646; s. c. 17 S. Ct. 957; 84 Fed. 1020; *Ashley v. Board &c.*, 60 Fed. 55; *Havemeyer v. Iowa Co.*, 3 Wall. 294.

²⁶⁷ *Reynolds v. Lyon Co.*, 97 Fed. 155.

²⁶⁸ *Rondot v. Rogers Tp.*, 99 Fed. 202. Cf. *President &c. v. Dandridge*, 12 Wheat. 64; *Bidgford v. City of Tuscomb*, 16 Fed. 910; *School Dist. v. Clark*, 90 Mich. 435, 437; s. c. 51 N. W. 529; *Toymouth Tp. v. Koehler*, 35 Mich. 22.

²⁶⁹ *Second Ward Sav. Bank v. City of Huron*, 80 Fed. 660.

²⁷⁰ *Brown v. Ingalls Tp.*, 81 Fed. 485; *Town of Coloma v. Eaves*, 92 U. S. 484; *Jasper Co. v. Ballou*, 103 U. S. 745; *National Life Ins. Co. v. Board &c.*, 62 Fed. 778; s. c. 27 U. S. App. 244.

²⁷¹ *City of Uvalde v. Spier*, 91 Fed. 594.

²⁷² *City of South St. Paul v. Lamprecht*, 88 Fed. 449.

²⁷³ *Town of Lexington v. Union Nat'l Bank*, 75 Miss. 1; s. c. 22 So. 291.

²⁷⁴ *O'Brien v. Wheelock*, 95 Fed. 883.

therefore are estopped to set up that the bonds were illegal and void.²⁷⁵ Bonds in excess of the debt limit are void notwithstanding the recitals.²⁷⁶ And so, bonds illegally issued and in disregard of the statutory requirements are void, by reason of the fact that the purchaser takes with knowledge of the powers of the officers issuing.²⁷⁷ Where a bond is illegal by reason of the amount being in excess of the statutory allowance, recovery may be had on a quantum meruit for the value of the property retained and used by the municipality.²⁷⁸ Where bonds are issued under a valid statute and recite that they are issued pursuant to its provisions, and are regular on their face, the defendant under a cross-bill may show that they are really void and thus prevent a sale under the original bill to innocent purchasers.²⁷⁹ Bonds which are payable out of a special fund are void where issued to reimburse the city for money paid under a void contract, as where the constitutional limit of indebtedness has been reached.²⁸⁰ The location of a county seat and the erection of public buildings in a city are not such public improvements as the city is authorized to donate money for or bonds.²⁸¹ A vote to issue bonds in excess of the amount allowed by statute does not affect their validity up to the amount allowed, but all beyond this are void.²⁸² Bonds issued on authority of an illegal election are void.²⁸³

§ 1005. Sale of bonds.—(a) *Notice to purchaser:* Where a bond recites that it is issued pursuant to a certain ordinance, giving date and title, a purchaser is put on notice of the provisions of the ordinance and the validity.²⁸⁴ The purchaser of bonds is chargeable with notice of want of power on the part of the city to issue them.²⁸⁵ Where the statute charges the purchasers of bonds with notice of the facts shown by the record in regard to the character of the indebtedness to be refunded the officers have no power to make recitals in the bonds which will relieve the purchasers of the effect of the notice, or estop the city from showing the invalidity of the bonds by the rec-

²⁷⁵ *O'Brien v. Wheelock*, 95 Fed. 883.

²⁷⁶ *Shaw v. Independent School Dist. &c.*, 77 Fed. 277; *John Hancock M. L. Ins. Co. v. City of Huron*, 80 Fed. 652.

²⁷⁷ *Hughson v. Crane*, 115 Cal. 404; s. c. 47 Pac. 120.

²⁷⁸ *Livingston v. School Dist. &c.*, 11 S. D. 150; s. c. 76 N. W. 301.

²⁷⁹ *Alesandro Irr. Dist. v. Savings &c. Co.*, 88 Fed. 928.

²⁸⁰ *Allen v. City of Davenport*, 107 Iowa 90; s. c. 77 N. W. 532.

²⁸¹ *Schneck v. City of Jeffersonville*, 152 Ind. 204; s. c. 52 N. E. 212.

²⁸² *Rathbone v. Board &c.*, 73 Fed. 395.

²⁸³ *Morton v. Carlin*, 51 Neb. 202; s. c. 70 N. W. 966.

²⁸⁴ *Town of Klamath Falls v. Sachs*, 35 Or. 325; s. c. 57 Pac. 329.

²⁸⁵ *Union Bank &c. v. Commissioners &c.*, 119 N. C. 214; s. c. 25 S. E. 966; 34 L. R. A. 487.

ords.²⁸⁶ A purchaser of court-house and jail bonds is presumed to have notice of the order of the commissioners' court under which they were issued, which should put him on inquiry as to the terms of the contract, and, therefore, he is not an innocent purchaser.²⁸⁷

(b) *Rights of purchaser*: Where a subsequent bona fide purchaser of municipal bonds sues on the same, it is not a defense that the city authorities gave credit to the original purchaser thereof, instead of selling them for cash as required by law.²⁸⁸ Where plaintiff is a bona fide holder without notice the deviation of the agents of the town from the terms of their authority is not a defense.²⁸⁹ (c) *Rights of transferee*: The purchaser of negotiable bonds of a municipal corporation from a bona fide holder thereof takes with all the rights of the assignor, although he may take them as a gift or an advancement after maturity and with notice of the alleged defenses.²⁹⁰ A subsequent transferee of bonds issued without legal authority can not be subrogated to any right of action against the municipality that may have existed in favor of the original purchaser who paid the consideration therefor to the municipality, and the city is not liable to him.²⁹¹ The assignee of a bona fide purchaser of negotiable bonds before maturity is invested with all the rights of his assignor whether he be a purchaser for value or not, or whether he purchased before or after maturity.²⁹² (d) *Bona fide purchaser—Who is*: The receipt of municipal bonds as collateral security, before maturity, to secure payment of an antecedent debt, on the surrender of other collateral, is a bona fide purchase.²⁹⁴ The purchaser from a bona fide holder takes all the rights and title of such holder regardless of any knowledge he may have affecting their validity.²⁹⁵ The purchase of bonds

²⁸⁶ *City of Santa Cruz v. Waite*, 98 Fed. 387.

²⁸⁷ *Noel Young & Co. v. Mitchell Co.*, 21 Tex. Civ. App. 638; s. c. 54 S. W. 284.

²⁸⁸ *Town of Greenburg v. International Tr. Co.*, 94 Fed. 755.

²⁸⁹ *Mercer Co. v. Hackett*, 1 Wall. 83; *Grand Chute v. Winegar*, 15 Wall. 355; *Provident Life & Co. v. Mercer Co.*, 170 U. S. 593; s. c. 18 S. Ct. 788.

²⁹⁰ *Board & Co. v. Sutliff*, 97 Fed. 270; *E. H. Rollins & Sons v. Board & Co.*, 49 U. S. App. 399; s. c. 80 Fed. 692; 26 C. C. A. 91; *Commissioners v. Bolles*, 94 U. S. 104; *Commissioners v. Clark*, 94 U. S. 278; *Gunnison County & Co. v. E. H. Rollins &*

Sons, 173 U. S. 255; s. c. 19 S. Ct. 390; *Rathbone v. Board & Co.*, 49 U. S. App. 577; s. c. 83 Fed. 125; 27 C. C. A. 477; *Hill v. Scotland Co.*, 34 Fed. 208.

²⁹¹ *German Ins. Co. v. City of Manning*, 95 Fed. 597.

²⁹² *Rondot v. Rogers Tp.*, 99 Fed. 202.

²⁹⁴ *American File Co. v. Garrett*, 110 U. S. 288; s. c. 4 S. Ct. 90; *D'Esterre v. City of Brooklyn*, 90 Fed. 586; *Railroad Co. v. National Bank*, 102 U. S. 14.

²⁹⁵ *Gunnison Co. v. E. H. Rollins & Sons*, 173 U. S. 255, 275; s. c. 19 S. Ct. 390; *Commissioners & Co. v. Clark*, 94 U. S. 278, 286; *Hill v. Scotland Co.*, 34 Fed. 208.

in the open market by one innocent of the non-completion of the road does not make him a bona fide purchaser for value, though the bonds are negotiable in form.²⁹⁶ A purchaser is only required to ascertain whether the power to issue has been conferred and is not required to see that the proceeds are properly applied.²⁹⁷ Purchasers of bonds may rely on the decision of the supreme court as to their validity.²⁹⁸ The law will presume bonds in the hands of purchasers for value, before maturity, to have been issued legally and not to have increased the county indebtedness, they being negotiable refunding bonds.²⁹⁹ A purchaser, in good faith, of municipal bonds is unaffected by constructive notice of a pending suit to determine the validity of the statute under which the bonds are issued.³⁰⁰ A purchaser of negotiable municipal bonds from a prior holder acquired all the rights of such holder and his rights are unaffected by his own knowledge of the defense at the time of his purchase.³⁰¹ The antedating of bonds prior to the time the ordinance under which they went into effect was passed will not invalidate the bonds in the hands of a bona fide holder, for value, in the absence of proof as to the date of the actual issue, and where a premature issue would contradict the recitals.³⁰² The holder of a negotiable instrument will be presumed to have taken it before maturity without notice of defenses and for value.³⁰³ The holder of negotiable bonds who purchased without notice of one who held in escrow, will be protected.³⁰⁴ The purchaser of bonds which a city had no right to issue could not recover from the city the amount of money paid therefor, as in such case the stock purchased with the bonds was void in the hands of the city for want of power to become a stockholder.³⁰⁵ The holders of bonds are protected although at the time the bonds were delivered no tax had actually been levied or assessed for the payment, as required by the constitution, where the required declaration was filed in court showing that a tax had been levied for their payment.³⁰⁶

²⁹⁶ *Mercer Co. v. Provident Life & Co.*, 72 Fed. 623; s. c. 19 C. C. A. 44.

²⁹⁷ *Jones v. City of Camden*, 44 S. C. 319; s. c. 23 S. E. 141.

²⁹⁸ *Stallcup v. City of Tacoma*, 13 Wash. 141; s. c. 42 Pac. 541.

²⁹⁹ *Lyon Co. v. Keene & Co. Bank*, 100 Fed. 337.

³⁰⁰ *Pickens Tp. v. Post*, 99 Fed. 659; s. c. 41 C. C. A. 1.

³⁰¹ *Pickens Tp. v. Post*, 99 Fed. 659; s. c. 41 C. C. A. 1; *Goodman v. Simonds*, 20 How. 343; *Brown v. Spof-*

ford, 95 U. S. 474; *Gunnison Co. & Co. v. E. H. Rollins & Sons*, 173 U. S. 255, 275; s. c. 19 S. Ct. 390.

³⁰² *Village of Kent v. Dana*, 100 Fed. 56.

³⁰³ *Pickens Tp. v. Post*, 99 Fed. 659.

³⁰⁴ *Pickens Tp. v. Post*, 99 Fed. 659.

³⁰⁵ *Travelers' Ins. Co. v. Mayor & Co.*, 99 Fed. 663; s. c. 40 C. C. A. 58.

³⁰⁶ *Bell v. Waynesboro Borough*, 195 Pa. St. 299; s. c. 45 Atl. 930.

(e) *When state courts bind federal courts:* As a general rule, whether state statutes are duly enacted, is a question for state courts and is not a federal question. To this are two exceptions: As against a party who became the owner of municipal bonds before a decision of the state court invalidating them, the decision is not necessarily binding on the federal court.³⁰⁷ Also when, at the date of the issue of municipal bonds, the decisions of the court of last resort sustained their validity, bona fide purchasers for value are not affected by subsequent decisions declaring them invalid.³⁰⁸

§ 1006. *Miscellaneous.*—Where the constitution provides that all laws of a general nature shall have a uniform operation throughout the state, a statute authorizing a township to issue bonds to refund its existing indebtedness is not governed thereby, not being of a general nature.³⁰⁹ A municipality is not liable for interest in the absence of a contract to pay interest.³¹⁰ The production of bonds, which are negotiable, by plaintiff's attorney on the trial, raises a presumption that plaintiff is the owner thereof.³¹¹

³⁰⁷ *Coler v. Board &c.*, 89 Fed. 257; *Enfield v. Jordan*, 119 U. S. 680; s. c. 7 S. Ct. 358; *Bolles v. Brimfield*, 120 U. S. 759; s. c. 7 S. Ct. 736; *Barnum v. Okolona*, 148 U. S. 393, 396; s. c. 13 S. Ct. 638; *Folsom v. Township &c.*, 159 U. S. 611; s. c. 16 S. Ct. 174; *Burgess v. Seligman*, 107 U. S. 20; s. c. 2 S. Ct. 10.

³⁰⁸ *Coler v. Board*, 89 Fed. 257; *Anderson v. Santa Anna Tp.*, 116 U. S. 356; s. c. 6 S. Ct. 413.

³⁰⁹ *Brattleboro Sav. Bank v. Board &c.*, 98 Fed. 524.

³¹⁰ *City of Chicago v. English*, 80 Ill. App. 163.

³¹¹ *Rondot v. Rogers Tp.*, 99 Fed. 202. Construction of ordinance in reference to validity of bonds,—see *Town of Klamath Falls v. Sachs*, 35 Or. 325; s. c. 57 Pac. 329. Construction of charter of Greater New York relative to exchange of bonds,—see *Whann v. Coler*, 159 N. Y. 535; s. c. 53 N. E. 1133. Construction of Oregon act of February 2, 1893, in relation to interest on special assessments,—see *Mall v. City of Portland*,

35 Or. 89; s. c. 56 Pac. 654. The bonding act of 1893, p. 174, Oregon, was not repealed by amended Oregon City Charter Laws of 1895, p. 486: *Stratton v. City of Oregon*, 35 Or. 409. Construction of *Burns Rev. St. Ind.* 1901, § 4275,—see *People's Nat. Bank v. Ayer*, 24 Ind. App. 212; s. c. 56 N. E. 267. Construction of Kan. St. 1879, ch. 49, § 3, as to issuance of bonds,—see *School Dist. &c. v. Cushing*, 8 Kan. App. 728; s. c. 54 Pac. 924. Payment to a broker of 10 per cent. commission is not as a matter of law a violation of Minn. St. 1895, ch. 289, § 4; *State v. West Duluth Land Co.* (In re Taxes Delinquent &c.), 75 Minn. 456; s. c. 78 N. W. 115. Construction of Ft. Worth charter in relation to voting of bonds,—see *Winston v. City of Ft. Worth (Tex.)*, 47 S. W. 740. Construction of S. C. constitution (1895) and statute of 1890 in reference to municipal bonds,—see *Cleveland v. City Council &c.*, 54 S. C. 83; s. c. 31 S. E. 871.

CHAPTER XXIV.

CHARITIES AND CORRECTION.

SECTION	SECTION
1007. General rules governing directors of poor, etc.	1029. Support of patient at state lunatic asylum—Persons “in need of immediate relief.”
1008. Rulings in Massachusetts as to overseers of the poor.	1030. The same subject continued.
1009. Rulings in Maine and New York.	1031. Support of insane poor further considered.
1010. Contracts by governing boards for the support of the poor.	1032. Aid to children.
1011. Discretionary powers of governing boards.	1033. Liability of corporations to those furnishing support to paupers.
1012. Medical treatment for the poor.	1034. The same subject continued.
1013. The same subject continued.	1035. Duty to furnish immediate relief.
1014. Settlement of paupers—Generally.	1036. Proceedings to compel relative to support paupers.
1015. The same subject continued.	1037. Liability of a pauper for his support.
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1017. Massachusetts decisions on settlement of soldiers mustered out of service.	1039. Actions for support of paupers.
1018. Settlement of married women.	1040. The same subject continued.
1019. Settlement acquired by residence and payment of taxes.	1041. Statutes prohibiting bringing paupers from other states.
1020. The same subject continued.	1042. Liability to paupers for negligence of employes.
1021. Constitutionality of laws for the removal of paupers.	1043. Support of the insane.
1022. Rulings on removal of paupers.	1044. The same subject continued.
1023. Notice in cases for removal of paupers.	1045. Soldiers’ homes.
1024. Notice of charge by one town to another.	1046. Reformatories.
1025. What corporations are liable for support of paupers.	1047. Liability of counties for the care of prisoners.
1026. No implied liability.	1048. Care of prisoners continued.
1027. Special liabilities.	1049. Hiring of convicts.
1028. Various rulings as to the poor.	1050. Liability for personal injuries to prisoners.
	1051. The same subject continued.

§ 1007. General rules governing directors of poor, etc.—The directors of the poor of a county can perform no official act, nor bind

the county by any contract, except when lawfully convened and acting as such.¹ The Indiana statute which requires each township trustee to keep a "poor book" in which shall be enrolled all those in his township who, in his judgment, will require assistance from the public, does not prevent the trustee from granting relief to one not enrolled in his "poor book."² The Pennsylvania statute which makes it the duty of the county auditors to audit the accounts of the directors of the poor "and of the treasurer and steward of each and every poor-house," etc., authorizes the auditing of accounts of the treasurer of directors of the poor.³

¹Nason v. Directors of Poor, 126 Pa. St. 445; s. c. 17 Atl. 616; 24 W. N. C. (Pa.) 60, in which a settlement of accounts between the members of the board of directors of poor with the treasurer of the board was held to be no settlement at all. See also, School Dist. v. Fuess, 98 Pa. St. 600, where Trunkey, J., said of a board of school directors:—"The directors as a board must exercise their power; the board may make contracts, may authorize a committee to make a contract, and may appoint an agent for a proper and specific purpose. One or more of the directors, without authority from the board, can make no contract binding upon the district, can not change a contract, can do no act fixing the district for a liability. He may be personally responsible to those who suffer from his unauthorized act, as any citizen would be."

²Board &c. v. Osburn, 4 Ind. App. 590; 31 N. E. 541. And a decision of a trustee that the necessities of one in his township are such as to entitle him to public aid is final and conclusive: Board &c. v. Holman, 34 Ind. 256; Washburn v. Board &c., 104 Ind. 321; s. c. 3 N. E. 757.

³Nason v. Directors of the Poor, 126 Pa. St. 445; s. c. 17 Atl. 616; 24 W. N. C. (Pa.) 60, holding the treasurer of the directors of the poor liable to account according to the report of the county auditors. It was also held that this treasurer

was not relieved from liability on his bond for the safe-keeping of public moneys on account of the failure of the bank in which he deposited the funds. See also, Baily v. Commonwealth, 20 W. N. C. (Pa.) 221; s. c. 9 Cent. Rep. 223. In Board of Com'rs v. McLeod, 34 Kan. 306; s. c. 8 Pac. 399, it was held that the superintendent of a county asylum, in the management thereof, and in the care and custody of paupers placed therein, was under the control and subject to the order and direction of the board of county commissioners; and therefore, where the commissioners find that persons who have been placed in such asylum are no longer entitled to support at the public expense, and make an order directing the superintendent to discharge them from the asylum, it is his duty to comply with such order. In Smith v. Commissioners, 21 Kan. 669, it was held that the county was not liable for the services of a physician as rendered and medicines furnished during an epidemic in a township by order of the township trustee, it appearing that the county had a poorhouse and the powers of a township trustee were limited in such counties as had poorhouses to relieving paupers by sending them to the poorhouse. This case also gives some rules prevailing in such counties different from those where there are no poorhouses.

§ 1008. Rulings in Massachusetts as to overseers of the poor.—

Overseers of the poor are public officers who commonly act under the authority of the law and not as agents of the town. But in some matters they may represent the town as its agents.⁴ They have the care and custody of the paupers in their respective cities and towns, and are to see that they are suitably relieved, supported and employed; but the city or town is to direct the manner and provide the means of supporting its paupers.⁵ If a town sees fit to buy a farm and cultivate it in connection with an almshouse, there is nothing in the statute which gives the overseers of the poor a right to manage it without authority from the town.⁶

§ 1009. Rulings in Maine and New York.—

Towns in Maine have the discretionary power to choose any number of overseers of the poor not exceeding twelve; but if they deem the election of separate overseers unnecessary, the duties pertaining to those officers are to be discharged by the selectmen, of whom there must be three, five or seven.⁷ The election of a county superintendent of the poor, under

⁴ *City of New Bedford v. Inhabitants &c.*, 9 Allen (Mass.) 207.

⁵ Pub. Stats. Mass., ch. 84, § 2.

⁶ *Neff v. Inhabitants &c.*, 148 Mass. 487; s. c. 20 N. E. 111. In *Inhabitants &c. v. Inhabitants &c.*, 13 Met. (Mass.) 192, it was held that support granted to a person, as a pauper, by the overseers of the poor of the town in which he has a settlement, will prevent his acquiring a settlement in another town in which he resides, although the act of the overseers in granting such support be not ratified by the town of whose poor they are overseers. The ground of this decision was that acts done by these officers in pursuance of their authority and duty needed no ratification to make them binding on the town. See Rev. Stats., ch. 46, §§ 1, 2, 13, 26; *Inhabitants &c. v. Inhabitants &c.*, 1 Pick. (Mass.) 123. Shaw, C. J., in another place says:—"If overseers, who are bound by law to afford immediate relief to actual want, and who must act upon the evidence before them, are sometimes deceived by appearances, still, their

acts done in good faith must be deemed acts binding on the town."

In *City of New Bedford v. Inhabitants &c.*, 9 Allen (Mass.) 207, the court held the admission of overseers of the poor, in a binding-out indenture, that a certain pauper was chargeable to their town, and their acts in paying bills to other towns for his support, were not admissible in evidence against the town in a litigation for the purpose of showing the residence of that pauper and his descendants to be in the town; the reason being, as given by the court, that:—"The overseers exercise their discretion upon the evidence before them, and the town is bound by their acts as officers of the law having power by statute to bind them as to those particular matters; but the inhabitants are not the actors through the overseers as their agents; and as such determinations are made without any hearing of parties interested, their binding force should be limited to the particular transaction."

⁷ *Inhabitants &c. v. Inhabitants*

the New York act which authorizes and requires the board of supervisors of the county of Richmond to elect an officer to be known as "county superintendent of the poor," who was to be keeper of the poor-house by virtue of his office, operated as a removal of a keeper of the poor-house who had been appointed prior to the passage of the act.⁸ The overseers of the poor of a town, whose board is annually re-constituted by the retirement of one member and the election of another, under the Massachusetts statute, have no authority, while acting as almshouse directors, to bind a town respecting the management of the almshouse for the next municipal year.⁹

§ 1010. Contracts by governing boards for the support of the poor.—The Indiana statute which provides as follows: "It shall be lawful for the board of county commissioners of any county of this state, whenever it may deem it advisable, to purchase a tract of land in the name of such county, and thereon to build, establish and organize an asylum for the poor, and to employ some humane and responsible person, resident in such county, to take charge of the same upon such terms and under such restrictions as the board shall consider most advantageous for the interests of the county, who shall be called the 'superintendent of the county asylum,'" confers the power upon the board to contract with one as superintendent for a

&c., 83 Maine 219; s. c. 22 Atl. 102, in which case the court held that the election of only one overseer of the poor was valid, and overruled the defense that the notice from the town suing another for supplies furnished a pauper from one overseer of the poor was not regular and sufficient in form and that the town should not recover.

⁸ *People v. Weldon*, 14 N. Y. S. 447, in which it was held that the former appointee could not recover in an action for his salary as keeper of the poorhouse for the balance of the year for which he had been appointed, as his action assumed. His appointment under the Laws of New York, 1847, ch. 498, as amended by the Laws of New York, 1862, ch. 298, was subject to a power given therein to remove him.

⁹ *Reed v. Inhabitants &c.*, 152 Mass. 500; s. c. 25 N. E. 974, which sustained the exceptions to a judg-

ment in favor of one who brought action on an agreement for the rendering of personal services to a town entered into with him by a board of overseers of the poor, after its re-constitution under the statute. The court held it was an invalid executory contract, and that it could not be ratified by the members of the re-constituted board acting separately. While they may act by a majority, the members are still to act together; citing *Mayor &c. v. Board &c.*, 113 Mass. 161; *Shea v. Inhabitants &c.*, 145 Mass. 525; s. c. 14 N. E. 769. They also held that the continuance of services under such a contract, and knowledge on the part of the new member of the board that there was some sort of agreement for such services of the terms of which he had been only partially informed, were insufficient to show a ratification by the board as re-constituted.

period of five years, and such a contract will not be disturbed unless there has been an abuse of discretion by the board in making it.¹⁰ And such a contract can not be assailed on the ground that it extended beyond the official term of the members making it.¹¹ Nor is it void as in contravention of public policy for the reason that to uphold it would put it in the power of one board of commissioners to bind the hands of its successors; and that it operates as an unwarranted abridgment of the "administrative, executive and legislative" powers of the board.¹² But the statute which authorizes the board of commissioners to discontinue the poor-farm and asylum and dispose of the property at any time forms a part of such a contract, and carries into it an implied condition subjecting it to the discretionary power of the board to so discontinue; and where a contract does not attempt to bind the board not to discontinue it is valid.¹³ If a board waive the making of the report by the superintendent which the law requires him to make, as it is for their information only, they can not rescind a contract with him because the report was not made.¹⁴ And if a superintendent becomes a candidate for office with the consent of the board, and while a candidate supervises the farm under their direction and causes the work to be done at his expense, and neither

¹⁰ Board &c. v. Shields, 130 Ind. 6; s. c. 29 N. E. 385.

¹¹ Board &c. v. Shields, 130 Ind. 6; s. c. 29 N. E. 385. This rule is based upon the ruling of courts—that the board of commissioners constitutes a corporation, and that its rights, duties and liabilities are substantially the same as those of a municipal corporation. See also, Platter v. Board &c., 103 Ind. 360, 369; s. c. 2 N. E. 544, 549. In State v. Clark, 4 Ind. 315, it was said:—"In legal contemplation the board of commissioners is the county." As to power to make contracts with agents to carry out the purposes or attain the objects for which a corporation is established, see City of Indianapolis v. Indianapolis Gas &c. Co., 66 Ind. 396; City of Logansport v. Dykeman, 116 Ind. 15; s. c. 17 N. E. 587; City of Valparaiso v. Gardner, 97 Ind. 1; Duncan v. Board &c., 101 Ind. 403; Crow v. Board &c., 118 Ind. 51; s. c. 20 N. E. 642; City of Vincennes v. Callender, 86 Ind. 484;

Crowder v. Town of Sullivan, 128 Ind. 486; s. c. 28 N. E. 94.

¹² Board &c. v. Shields, 130 Ind. 6; s. c. 29 N. E. 385. The court said:—"It [the board] is a continuous body. While the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its members. An essential characteristic of a valid contract is that it is mutually binding upon the parties to it. A contract by a board of commissioners the duration of which extends beyond the term of service of its then members is not therefore invalid for that reason. As individuals they are not parties to it;" citing Reubelt v. School Town of Noblesville, 106 Ind. 478; s. c. 7 N. E. 206; Wait v. Ray, 67 N. Y. 36.

¹³ Board &c. v. Shields, 130 Ind. 6; s. c. 29 N. E. 385.

¹⁴ Board &c. v. Shields, 130 Ind. 6; s. c. 29 N. E. 385.

the county nor the paupers nor the asylum suffers any damage, the loss of time on his part would not be such a breach of contract as would justify his dismissal by the board.¹⁵

§ 1011. Discretionary powers of governing boards.—The power to purchase and receive a conveyance of land for a poor-house and to make the necessary improvements is expressly given to the county court by the Kentucky statute; and the county judge and justices, who constitute the county court, alone are the judges of the necessity of such an expenditure.¹⁶ Under the New York statute which provides that “the powers and duties heretofore conferred upon and exercised by the supervisors of the respective towns in said county of Montgomery, so far as relates to the adjudication in relation to and the relief and support of the poor, are hereby conferred upon the overseers of the poor of the respective towns in said county,” the overseer of the poor in one of those towns is the sole and exclusive judge (subject, perhaps, to review for abuse of that power) as to who are paupers of the town, and consequently who may be relieved by him. In furnishing such relief he is necessarily invested with the power to make contracts for the care of such as he may adjudge paupers, and the exercise of that power can not be reviewed collaterally either in a court or by the town auditors.¹⁷

¹⁵ Board &c. v. Shields, 130 Ind. 6; s. c. 29 N. E. 385.

¹⁶ Lee v. Pendleton Co. Court, 14 Ky. L. 159; s. c. sub nom. Jones v. Pendleton Co. Court, 19 S. W. 740, sustaining the dismissal of this action of a taxpayer so far as it sought to enjoin making such a purchase. The court said:—“It is well-settled law that such tribunals [county courts] are alone to determine the wants and necessities of matters pertaining to the government and control of county affairs; and so long as they act within their jurisdiction, no one can interfere, unless there is fraud or corruption, or some individual right is to be affected by their action. In the performance of their duties, the mode of its exercise, and the discretion connected with it, are with the court and not with the taxpayer.” Again:—“It [the county court] is authorized by law to make such appropriations, and the taxpayer is

not; and if the discretion of a county court is to be questioned in a court of equity by a taxpayer in regard to appropriations within the scope of its authority or as to the wants of the county, it would be impossible for that tribunal to discharge the duties and obligations imposed on it by statute.”

¹⁷ Christman v. Phillips, 58 Hun (N. Y.) 282; s. c. 12 N. Y. S. 338, which reversed the court below in its directing a verdict in this action for defendant on proof that the town-board orders, on which suit was brought, given by the overseer of the poor, defendant here, to the plaintiff's assignors in payment for services rendered by them as nurses of a pauper by contract with the overseer of the poor, had been presented to the town board of auditors for payment and disallowed by them on the ground that they were not proper charges against the town.

§ 1012. **Medical treatment for the poor.**—Where a county has made suitable provision for the medical treatment of the poor in a township, the trustee has no authority to engage other physicians to render the service.¹⁸ But where the physician so employed abandons the contract or refuses to perform it, or is at such a distance that his attendance can not be readily procured, and an emergency exists, it is equivalent to no provision by the county, and the trustee is authorized to act.¹⁹ In an action against a county by a physician employed by a township trustee for services rendered to a pauper under the statute, where the county had provided a physician for the township, the burden is on the plaintiff to show a necessity for employing a physician other than the one provided by the county.²⁰ Employment by a trustee is prima facie evidence that the county has failed in the first instance to contract with a physician to treat the poor, and casts the burden of showing otherwise upon the defendant.²¹ Under the Indiana statute which makes it the duty of the county commissioners to employ physicians for the poor, but authorizes the overseers of the poor in townships not otherwise provided for to employ such medical or surgical services as paupers within their jurisdiction may require, the overseer of the poor may, at the county's expense, employ a physician to treat a pauper in urgent need of medical aid where the regular county physician refuses to take the case.²²

¹⁸ Board &c. v. Boynton, 30 Ind. 359; Board &c. v. Hon, 87 Ind. 356; Board &c. v. Seaton, 90 Ind. 158; Washburn v. Board &c., 104 Ind. 321; s. c. 3 N. E. 757.

¹⁹ Conner v. Board &c., 57 Ind. 15.

²⁰ Board &c. v. Osburn, 4 Ind. App. 590; s. c. 31 N. E. 541, holding also, that an order from a trustee to render such services need not be in writing.

²¹ Board &c. v. Ritter, 90 Ind. 362.

²² Board &c. v. Lomax, 5 Ind. App. 567; s. c. 32 N. E. 800. But it was held that no recovery could be had upon a case showing that the overseer of the poor had not requested the services of the county physician simply because he considered him incompetent. - - - Under this statute the support of the poor is made a county charge. The township trustees only perform such duties with reference to the poor as may be prescribed by law. If the

overseer of the poor exceeds his authority the county is not bound. Those who accept employment from him, must, at their own risk, inquire into his power to bind the county: Robbins v. Board &c., 91 Ind. 537; Washburn v. Board &c., 104 Ind. 321; s. c. 3 N. E. 757; Morgan Co. v. Seaton, 122 Ind. 521; s. c. 24 N. E. 213. In Christian Co. v. Rockwell, 25 Ill. App. 20, the court sustained a judgment in favor of a physician against a county, for services in amputating a leg of a boy whose mother was dead, and whose father was without means and did nothing towards his support, holding that though the boy owned an interest in real estate of a small value, not sufficient to pay the amount properly due for such services, the physician was not obliged to exhaust that before bringing suit; also, that it was a case, he needing immediate attention, where the

§ 1013. **The same subject continued.**—Where a county physician refuses to attend a poor person in destitute circumstances and requiring immediate medical assistance, the overseer of the poor of the proper district of the county may employ a physician for that purpose, and the county will be liable for the fair value of his services.²³ An overseer of the poor, in making contracts for the support and labor of the poor, under the discretion vested in him by the statutes, acts as the agent of the town under the authority of the law to make the contracts for the town.²⁴ And he may make a contract as to a pauper's labor and support, and make a settlement under the contract which will be binding on the pauper.²⁵ A physician can not recover of a town for medical services to paupers of a town on a contract which he has made with the supervisors of a town, rendered at a time beyond their term of office, where it is shown that the contract was limited to their term of office and so understood by the physician.²⁶

§ 1014. **Settlement of paupers—Generally.**—As to the settlement of paupers the legislatures of the different states, in the exercise of their discretion, have established systems of positive rules, and the courts give a strict construction to these statutes and act upon the principle declared in the case cited in the note.²⁷ This principle was that the obligations of towns to support paupers result from provisions of positive law; that towns must be brought strictly within them; and that analogy, equitable construction and approximation are all insufficient.²⁸

emergency was such as to warrant immediate action on the part of plaintiff without waiting to confer with county officials. See also, *Seagraves v. City of Alton*, 13 Ill. 366, 371; *Board &c. v. Reynolds*, 49 Ill. 186; *Perry Co. v. City of Du Quoin*, 99 Ill. 479.

²³ *Gage Co. v. Fulton*, 16 Neb. 5; s. c. 19 N. W. 731.

²⁴ *Billings v. Kneen*, 57 Vt. 428. See also, *Poquet v. Town of North Hero*, 44 Vt. 91, holding that a selectman, in making a contract that he was authorized to make, was an agent of the town, and not a party to the contract.

²⁵ *Billings v. Kneen*, 57 Vt. 428. In *Fletcher v. Inhabitants &c.*, 77 Maine 334, the city, which by an ordinance

had appointed a city physician for the poor under a contract that as additional compensation for his services rendered in that capacity he should have all moneys collected of other towns for medicines and supplies furnished by the city to paupers chargeable to such towns, was held liable, in an action for money had and received, for a sum of money collected in a suit of another town, although the council had appropriated the same to another purpose, to the payment of one caring for its poor under contract.

²⁶ *Jones v. Town of Lind*, 79 Wis. 64; s. c. 48 N. W. 247.

²⁷ *Inhabitants &c. v. Inhabitants &c.*, 10 Met. (Mass.) 115.

²⁸ *Inhabitants &c. v. Inhabitants*

§ 1015. **The same subject continued.**—The rules as to settlement were declared in an Illinois case. Persons under legal restraint and insane persons are incapable of losing or gaining a residence, which rule applies to persons confined in prisons, lunatics confined in an asylum and paupers sent to a poor-house. Where one comes into a county or town, and makes no arrangement for a home, and has no fixed or actual residence, but hires out and is employed by some person, his apparent residence is at the place of his employment.²⁹

&c., 19 Pick. (Mass.) 389; *Inhabitants &c. v. Inhabitants &c.*, 19 Pick. (Mass.) 489; *Robbins v. Inhabitants &c.*, 20 Pick. (Mass.) 345, 349. In *Inhabitants &c. v. Inhabitants &c.*, 24 Pick. (Mass.) 166, it was said that the rule itself is of less importance than that it should be fixed and known. In *Town of Rockingham v. Town of Springfield*, 59 Vt. 521; s. c. 9 Atl. 241, the court sustained an order of removal of a mother and her three children, who had come to reside in a town which had on her request furnished aid to her children, but had never acquired a residence therein, to a town in which it was discovered afterwards that she had a settlement; ruling incidentally that the furnishing to her children aid, her husband having deserted her, was furnishing it to her as the head of the family, and that though she was going from town to town seeking and doing work, she was constructively present when the order of removal was made. See also, as to the furnishing of the supplies to the children being the furnishing to her, *Town of Croydon v. Sullivan Co.*, 47 N. H. 179; as to her residence in the town where her children were left, for all legal purposes affecting its remedy against the town of her legal settlement continuing unbroken, *Town of Middlebury v. Waltham*, 6 Vt. 200; *Town of Stamford v. Town of Readsboro'*, 46 Vt. 606; *Densmore v. United States*, 93 U. S. 605, 610; *Mitchell v. United States*, 21 Wall. 350; *Inhabitants &c.*

v. Inhabitants &c., 23 Pick. (Mass.) 170, 177. In *Merrimack Co. v. Grafton Co.*, 63 N. H. 550; s. c. 4 Atl. 390, it was held that residence without relief in a county for one year fixed the liability of a county for sums expended by another county in aid of a pauper, under the statute which makes liable for the support of a pauper the county in which he has been relieved within a year or in which he has last resided for a year. Commenting upon the laws making at one time and abolishing at another town settlements the court said:—"Pauper settlements are the mere creations of the statutes and may be made or unmade at the pleasure of the legislature. No vested rights can accrue to any one to retain a settlement thus gained, longer than the statute giving it shall remain in force: *Northfield v. Merrimack Co.*, 43 N. H. 165. See *Town of Worcester v. Town of East Montpelier*, 61 Vt. 139; s. c. 17 Atl. 842, as to the liability of towns for the support of paupers being purely statutory, and *Town of Chittenden v. Town of Barnard*, 61 Vt. 145; s. c. 17 Atl. 844.

²⁹ *Franklin Co. v. Henry Co.*, 26 Ill. App. 193. See also, *Town of Freeport v. Board of Supervisors*, 41 Ill. 495; *Payne v. Town of Dunham*, 29 Ill. 125; *Inhabitants &c. v. Inhabitants &c.*, 15 Mass. 237; *Town of Reading v. Town of Westport*, 19 Conn. 561; *Amherst v. Hollis*, 9 N. H. 107; *Inhabitants &c. v. Inhabitants &c.*, 4 Mass. 123; *Inhabitants*

§ 1016. The same subject continued — Illegitimate children.— Where a town in a suit brought against it for support of a pauper

&c. v. Inhabitants &c., 13 Mass. 547. In *State v. Inhabitants &c.*, 49 N. J. L. 188; s. c. 6 Atl. 319, the court construed the poor-act of New Jersey, which provides that in order to gain a settlement the pauper must be seized of a freehold estate of the value of \$130, and dwell thereon or in the township in which the estate is situate for one continuous year, not to require the continuous actual presence of the party, but to be satisfied by an unbroken residence on the estate or in the township. It was further held that the continuity of such "dwelling" would not be broken by temporary absences for business or pleasure, accompanied with a continued intent to return when the purpose of the absence had been accomplished. See *Queen v. St. Leonard*, 1 Q. B. 21; *Queen v. Inhabitants &c.*, L. R. 1 Q. B. 227; *Queen v. Abingdon*, L. R. 5 Q. B. 406; *Queen v. St. Ives*, L. R. 7 Q. B. 467; *Queen v. Worcester*, L. R. 9 Q. B. 340; *Overseers &c. v. Guardians &c.*, L. R. 16 Q. B. D. 723. In *Inhabitants &c. v. Inhabitants &c.*, 82 Maine 524; s. c. 20 Atl. 89, it was held that the voting lists of a town on which the name of a voter is checked with a cross are prima facie evidence, in a case against the town for the support of such voter as a pauper, that the pauper voted at the election at which such lists were used. In *Derry v. Rockingham Co.*, 62 N. H. 485, it was held that the assessor's valuation of the estate of a person, under the New Hampshire statute providing that any person having real estate of the value of \$150 in the town where he lives, on which he pays the taxes for four consecutive years, gains a settlement in the town, was not conclusive as to the value thereof; therefore, in a case involving

the settlement of a pauper to fix a liability for his support upon a town, it was proper to have the value of such estate submitted to and settled by a jury. In *Commissioners &c. v. Commissioners &c.*, 101 N. C. 520; s. c. 8 S. E. 176, it was held that a complaint in an action against a county for taking care of an insane pauper, which alleged that such pauper was an inmate of the almshouse of that county, under lawful authority, from which she escaped and came into the complaining county, sufficiently alleged that she was "last legally settled" in the defendant county, under the North Carolina poor-laws; also that though the complaint showed that the pauper was continuously in the complaining county for almost six years, it was demurrable under the code, which provides that one year's continuous residence shall confer a legal settlement, where it is also shown that during such time she was an inmate of the almshouse of the complaining county, and insane; citing *Neal v. Commissioners &c.*, 85 N. C. 420. In *Overseers &c. v. Overseers &c.*, 114 Pa. St. 394; s. c. 6 Atl. 475, it was held that the district in which a poor person having no legal settlement within the state of Pennsylvania first becomes helpless and a fit subject for relief must provide for the same until the necessity therefor ceases. The court said:—"For the purpose of carrying out their spirit [the spirit of the poor-laws], one who has no actual settlement anywhere must be considered as having acquired a quasi-settlement in a poor-district by reason of his having become helpless and requiring assistance therein." *Overseers &c. v. McCoy*, 2 P. & W. (Pa.) 432; *Kelly Tp. v. Union Tp.*, 5 W. & S. (Pa.) 535; *Lower Augusta v.*

by another town admits that at the age of twenty-one the person aided had a residence therein, the burden is upon such town to show that he had thereafter acquired a residence in the town suing by having his home therein for "five successive years without receiving supplies as a pauper," and that any absences therefrom during the five years were of such a character as not to interrupt his residence.³⁰ The supreme court of Pennsylvania sustained an appeal from an order of removal of a woman and three children as paupers to another township on the ground that though the woman had married and borne three children to a man resident of this other township, it being shown that at the time of the supposed marriage the man was an undivorced husband, the settlement of this man did not become her settlement. Her settlement continued as before marriage and that of her illegitimate children followed hers.³¹

§ 1017. Massachusetts decisions on settlement of soldiers mustered out of service.—Massachusetts has a statute as to acquiring a settlement which provides that "any person who was duly enlisted and mustered into military service during the late civil war, as a part of the quota of any city or town in the commonwealth, and become disabled from disease contracted while engaged in such service, shall be deemed to have acquired a settlement in such city or town." A town which had expended money in relief of a pauper who had been discharged from the army sought in an action to recover from a city the money thus expended, on the contention that he was discharged, after enlisting from this city, on account of disease contracted in the service and had therefrom acquired a settlement in the city. The court sustained instructions directing a verdict for defendant in the court below.³²

Selinsgrove, 64 Pa. St. 166; Overseers &c. v. Overseers &c., 118 Pa. St. 84; s. c. 11 Atl. 791.

³⁰ *Inhabitants &c. v. Inhabitants &c.*, 83 Maine 75; s. c. 21 Atl. 747; *Inhabitants &c. v. Inhabitants &c.*, 60 Maine 379; *Martin v. Stanaback*, 53 N. J. L. 529; s. c. 22 Atl. 58.

³¹ *Wayne Tp. v. Porter Tp.*, 138 Pa. St. 181; s. c. 20 Atl. 939. *Inhabitants &c. v. Inhabitants &c.*, 155 Mass. 428; s. c. 29 N. E. 639.

³² *Inhabitants &c. v. Inhabitants &c.*, 155 Mass. 428; s. c. 29 N. E. 639. The court held that a duly authenti-

cated copy of the surgeon's certificate made at the time of the pauper's discharge from the service, and stating that he was "incapable of performing the duties of a soldier because of epilepsy," was conclusive evidence of the cause of his discharge and therefore the best evidence, and should have been introduced by the plaintiff on the question of the pauper's disability; further, that assuming the record showing that the pauper was examined and passed for enlistment should have the effect of a certificate that

§ 1018. **Settlement of married women.**—The New Jersey statute which provides “that any person or persons who shall have last resided in any township of this state for the period of ten consecutive years shall be considered as legally settled in said township” has been construed several times by the supreme court of New Jersey. In one case it was held that a woman who had previously to her marriage resided in a town for ten consecutive years, but married a husband whose settlement was in another township, and afterwards returned to the township in which she had had a settlement before marriage, did not thereby re-acquire a settlement in that town. Under the statute the former settlement of the wife was lost or suspended by her marriage, and her settlement followed that of her husband, and as long as she was not divorced from him continued there.³³

the surgeon examining him found no disability to prevent enlistment, and that the evidence was competent, it was not conclusive; and conceding that the fact of the pauper's examination and muster would have some tendency to show freedom from a disabling disease at the time of enlistment, where the plaintiff introduced the pauper and other witnesses, who testified that the disease existed prior to enlistment, it was proper for the court to withdraw the case from the jury and direct a verdict for the defendant. See also, *City of Waltham v. City of Newburyport*, 150 Mass. 569; s. c. 23 N. E. 379; *Inhabitants &c. v. Inhabitants &c.*, 102 Mass. 358, 361; *Inhabitants &c. v. Inhabitants &c.*, 115 Mass. 336.

³³ *Bateman v. Mathes*, 54 N. J. L. 536; s. c. 24 Atl. 444; *Franklin Tp. v. Lebanon Tp.*, 51 N. J. L. 93; s. c. 16 Atl. 184. In the latter case the court said the statute “includes cases in which the stated period of residence had been completed before the act was passed, and those in which it was then running as well as those in which it should thereafter begin.” In the first case the true meaning and construction of the statute was declared to be that “an actual legal

settlement is imparted to every one by ten years' continuous residence, whether the person be a minor or an adult, or with or without a prior legal settlement, and such settlement continues until another is gained.” That a wife can acquire no separate settlement during the coverture, at least not in the absence of desertion, see also, *Little Falls Tp. v. Bernards Tp.*, 44 N. J. L. 621; *McLorinan v. Bridgewater Tp.*, 49 N. J. L. 624; s. c. 10 Atl. 187. In *Marden v. City of Boston*, 155 Mass. 359; s. c. 29 N. E. 588, an action to recover expense and charges for the support of an alleged widow, an insane pauper, at a lunatic hospital, the court, considering the evidence as to absence of the husband from his family for more than twenty years a sufficient evidence of his death to establish the widowhood of the pauper patient, held that under clause 7 of the settlement law the provisions of clause 6 applied even to those widows who had settlements derived from their former husbands, and that the city was liable for her support. See also, *City of Somerville v. City of Boston*, 120 Mass. 574, a decision prior to the passage of the statute, which is now clause 7. As to the capacity of a

§ 1019. Settlement acquired by residence and payment of taxes.—

The statute of New Hampshire exempts every person seventy years old from poll tax. Another statute provides that every person who has resided in a town for seven years and shall have paid all taxes legally assessed on his poll or estate during such term shall gain a settlement therein. Construing the two statutes together, the supreme court of that state have held that a person who has paid such taxes in a town for six years, but in his seventieth year pays none by reason of his exemption, acquires no settlement in the town so as to make him chargeable as a pauper to that town.³⁴

wife to acquire a settlement, see *Inhabitants &c. v. Inhabitants &c.*, 3 Mass. 322; *Inhabitants &c. v. Inhabitants &c.*, 1 Maine 93; *Inhabitants &c. v. Inhabitants &c.*, 36 Maine 235; *Inhabitants &c. v. Inhabitants &c.*, 15 Maine 434; *Inhabitants &c. v. Inhabitants &c.*, 17 Maine 117; *Inhabitants &c. v. Inhabitants &c.*, 4 Mass. 123; *Inhabitants &c. v. Inhabitants &c.*, 7 Pick. (Mass.) 42.

³⁴ *Sunapee v. Lempster*, 65 N. H. 655; s. c. 23 Atl. 525. The construction of statutes for acquiring a settlement in towns has always been strict: *Town of Weare v. Town of New Boston*, 3 N. H. 203; *Town of Burton v. Town of Wakefield*, 4 N. H. 47; *Henniker v. Weare*, 9 N. H. 573; *Tamworth v. Freedom*, 17 N. H. 279. In *Overseers &c. v. Overseers &c.*, 148 Pa. St. 380; s. c. 23 Atl. 1124, the court ordered the discharge of an order of removal of a pauper from a township to another, who claimed that he had acquired a settlement in the latter by the payment of taxes for two years under the terms of the statute which provides that "A settlement may be gained in any district . . . by any such person who shall be charged with and pay his proportion of any public taxes or levies for two years successively." The court held in this case that a

pauper can not be said to have acquired a settlement by the payment of taxes for two successive years where the tax of one of the years was paid by a third person, who did not claim to represent the pauper or say anything explanatory of his act, but who according to the statement of the tax collector was one of a committee sent to him to pay taxes, to enable delinquents to vote. It was also held that a person who was charged with and actually paid his taxes for two successive years would not be prevented from obtaining a settlement in such township by the fact that he accepted from the other township temporary relief in the spring of one of the years, under an order for which he did not apply, where it did not appear that he was receiving aid as a pauper when the taxes were assessed and paid. The facts of this case do not bring it within the principle of *Overseers &c. v. Overseers &c.* (Pa.), 18 W. N. C. 141, where it was held that a person who is chargeable to and receiving aid as a pauper from one district can not acquire a settlement in another so long as that relation exists. Same view of the law in *Overseers &c. v. Overseers &c.*, 3 Penny. (Pa.) 107; *Poor Dist. of Lock Haven v. Poor Dist. (Pa.)*, 13 Atl. 742.

§ 1020. **The same subject continued.**—An adult person, in order to gain a settlement in a town or city under the Massachusetts statute which declares him a resident for such purposes by a five years' residence and the payment of all taxes assessed to him "for any three years within that time," must have resided within the town or city during the whole of the three years for which the taxes were assessed.³⁵ A township-road tax is a public tax within the meaning of the Pennsylvania statute which provides that a settlement may be gained in any poor district by any person who shall come to inhabit in the same and "shall be charged with and pay his proportion of any public taxes or levies for two years successively."³⁶

³⁵ *City of Taunton v. Inhabitants &c.*, 153 Mass. 192; s. c. 26 N. E. 451. This was an action for recovery of a town from which he had removed to the city for the support of a pauper in the state lunatic asylum by the city from which he was committed to the state lunatic asylum, but not on the application of the overseer of the poor. The town contended that he had acquired a settlement in the city, and that the latter was chargeable with his support. The court held that by his commitment to the hospital and his then becoming a public charge his capacity to gain a settlement in the city ceased at that time. See *Choate v. Inhabitants &c.*, 13 Gray (Mass.) 92; *City of Worcester v. Inhabitants &c.*, 4 Allen (Mass.) 574; *Inhabitants &c. v. Inhabitants &c.*, 14 Mass. 384, holding that to gain a settlement a citizen must dwell in the town the same three years that he holds therein an estate of freehold of the value prescribed by the statute in case of freehold giving a settlement; *Inhabitants &c. v. Inhabitants &c.*, 24 Pick. (Mass.) 166, where it was held that as a person did not reside in the town for the same five years for which he was assessed he did not there gain a settlement, although he had resided there more than five years; *Town of Wakefield v. Town*

of Alton, 3 N. H. 378; *Tamworth v. Freedom*, 17 N. H. 279; *Inhabitants &c. v. Inhabitants &c.*, 1 Pick. (Mass.) 129.

³⁶ *Huston Tp. Poor Dist. v. Benetzette Tp. Poor Dist.*, 135 Pa. St. 393; 19 Atl. 1060. The court said:—"A settlement under the poor-laws is a residence of such permanent and continuing character as, under certain circumstances, will entitle a person to support or assistance as a pauper. When not derived by birth or marriage, or from the relation of parent and child, when it is gained through the residence of others, it is acquired generally upon the basis of a settled personal residence, the permanency of which must be shown in a certain way specified by law. This being so, we can not see why any greater significance attaches to the payment of a county or state tax than to the payment of a poor or road tax, as these are levied upon the general valuations or assessments for county purposes upon all such subjects as are taxable for the purposes mentioned." That a settlement can not be gained by residence and payment of taxes while a person is a public charge as a pauper, see *Inhabitants &c. v. Inhabitants &c.*, 13 Mass. 461; *Inhabitants &c. v. Sudbury*, 12 Pick. (Mass.) 1; *Inhabitants &c. v. Inhabitants &c.*, 13 Met.

§ 1021. Constitutionality of laws for the removal of paupers.—

The question as to whether the enactment by a legislature of a statute authorizing the governing authorities of a municipal corporation to order the removal of paupers who have come within its limits and are liable to become a charge upon the corporation, to another in which they have acquired a legal settlement, is an interference with the rights of personal liberty "without due process of law," seems to have been raised in but one case in the United States. The Minnesota supreme court have discussed this question very fully, and sustained the constitutionality in this respect of the law of that state upon this subject. The court said: "It [the statute] should not be so declared [to be unconstitutional] unless it was clearly beyond the power of the legislature to authorize removals under the conditions specified in the law. Its validity, giving lawful authority to county commissioners to the extent to which we have above indicated, may be sustained upon the ground that such power, resting probably upon grounds of general necessity and expediency, was sanctioned by statute before the adoption of our constitution, has ever since been acquiesced in, and that similar statutes have been in force since the early settlement of this country. It is a measure pertaining to the administration of public affairs, and concerning the reasonable necessity for which a considerable discretion must be allowed to the law-making department of the government, although of course subject to such constitutional limitations as under the circumstances shall be considered as clearly intended to be applicable to such cases."³⁷

(Mass.) 192; *Inhabitants &c. v. Inhabitants &c.*, 21 Pick. (Mass.) 233; *Inhabitants &c. v. Inhabitants &c.*, 3 Met. (Mass.) 428; *Inhabitants &c. v. Inhabitants &c.*, 12 Met. (Mass.) 35; *Choate v. Inhabitants &c.*, 13 Gray (Mass.) 92; *Inhabitants &c. v. Inhabitants &c.*, 19 Maine 441; *Inhabitants &c. v. Inhabitants &c.*, 26 Maine 167; *Inhabitants &c. v. Inhabitants &c.*, 5 Conn. 384. As to the furnishing of supplies to a person as a pauper defeating his acquiring a settlement, see *Inhabitants &c. v. Inhabitants &c.*, 19 Pick. (Mass.) 480; *Inhabitants &c. v. Inhabitants &c.*, 3 Greenl. (Maine) 136; *Inhabitants &c. v. Inhabitants &c.*, 5 Greenl. (Maine) 143; *Inhabitants*

&c. v. Inhabitants &c., 32 Maine 60; *Inhabitants &c. v. Inhabitants &c.*, 36 Maine 390; *South Hampton v. Hampton Falls*, 11 N. H. 134.

³⁷ *Lovell v. Seebach*, 45 Minn. 465; s. c. 48 N. W. 23, an action for kidnapping by a person removed under orders of county commissioners as a pauper. The court relied upon the opinion of Judge Cook in a Michigan case as follows:—"If there existed before that instrument [the constitution] was adopted well known administrative proceedings, which, having their origin in a legislative conviction of their necessity, had been sanctioned by long and general acceptance, we are no more at liberty to infer an intent in the people

§ 1022. **Rulings on removal of paupers.**—An order for the removal of a pauper from one township to another, providing only for her removal, but containing nothing to prevent her husband from accompanying her, can not be said to violate the statute forbidding the separation of a wife from her husband.³⁸ A denial of the liability

to prohibit them by implication from any general language than we should to infer an intent to abridge the judicial authority by the use of similar words. . . . Nothing previously in use, regarded as necessary in government and sanctioned by usage, can be looked upon as condemned by it. Administrative process of the customary sort is as much due process of law as judicial process. . . . A day in court is a matter of right in judicial proceedings, but administrative proceedings rest upon different principles. The party affected by them may always test their validity by a suit instituted for the purpose, and this is supposed to give him ample protection.” *Weimer v. Bunbury*, 30 Mich. 201, 213. See also, *State v. Allen*, 2 McCord (S. C.) 55, where the court said:—“Any legal process which was originally founded in necessity, has been consecrated by time and approved and acquiesced in by universal consent, must be an exception to the right of trial by jury and is embraced in the alternative—the law of the land.” See also, *Murray v. Hoboken Land Co.*, 18 How. 272.

³⁸ *Overseers &c. v. Overseers &c.*, 148 Pa. St. 333; s. c. 23 Atl. 1003. In *Inhabitants &c. v. City of Taunton*, 152 Mass. 484; s. c. 25 N. E. 965, it was held that a notice from a town to a city that it was giving aid to a mother and three children, and requesting their removal by the city, was not sufficiently explicit as to the children to require their removal, as it appeared that the mother had five children living with her in the town. The description should be such as to enable the town

or city notified to avoid mistake and a liability to a suit for the commission of a wrong. *Inhabitants &c. v. Inhabitants &c.*, 4 Pick. (Mass.) 358; *Inhabitants &c. v. Inhabitants &c.*, 4 Met. (Mass.) 433; *Inhabitants &c. v. Inhabitants &c.*, 138 Mass. 256; and *City of Lynn v. City of Newburyport*, 5 Allen (Mass.) 545, are distinguished in *Inhabitants &c. v. City of Taunton*, supra. In *Houston Overseers v. Jay Overseers*, 9 Pa. Co. Ct. R. 412, the expenses of removal of a pauper to the defendant township were adjudged against it, the court holding that it was a sufficient compliance with the poor-act on that subject if the overseers of the poor serve an order of removal by leaving a copy thereof with the clerk of an overseer of the accepting district, who afterwards delivers it to the overseer, and by removing the pauper into that district and leaving her at a house of a resident therein, it being impracticable to deliver the body of the pauper to the overseers of the district. In *Madison Overseers v. Poor Directors*, 9 Pa. Co. Ct. R. 435, where the overseers had succeeded in an appeal from an order of removal of paupers to their township, a question of costs arose under the provision of a Pennsylvania statute that the court “shall order to the party in whose behalf such appeal shall be determined, or to whom such notice did appear to have been given, such costs and charges as the said court shall consider reasonable and just.” The court held that “costs and charges” did not include counsel fees or expenses of overseers in taking appeal, and hunting and procuring evidence. They were lim-

of a town for the support of a pauper by its overseer of the poor, when notified by the superintendent of the poor of a county that the pauper had removed to a town in that county and that he must provide for his support, need not follow the language of the statute.³⁹

§ 1023. **Notice in cases for removal of paupers.**—A notice under the New York statute providing that, when a pauper strays or is removed from one municipality to another, the county superintendents of the poor shall give the overseers of the poor of the pauper's town notice of such improper removal, and require them to take charge of the pauper, which does not state that the pauper was a pauper while in the town from which he came, nor that his voluntary change of residence was improper, is insufficient.⁴⁰ The requirements of these statutes, which provide that if a pauper is brought into a county the superintendent may notify the overseer of the town from which the pauper was brought of the facts, and require his removal, and that the overseer to whom such notice is directed shall within thirty days either remove the pauper, or by "a written instrument" under his hand notify the superintendent from whom the notice was received that he denies its allegations as to notice and denial of liability, are sufficiently complied with when the superintendent of the poor of the county by written notice informs the overseer of the poor of the city that a pauper, naming him, was being supported by the county and that he claimed he was a resident of and chargeable to the city, and a reply of the overseer of the poor of the city acknowledging receipt of the notice and denying that the pauper had ever resided in the city or that the city was liable for his support.⁴¹

ited to those which a party would be entitled to in any other successful litigation and expenses of return of paupers.

³⁹ *Stillwell v. Coons*, 122 N. Y. 242; s. c. 25 N. E. 316, where a denial of such liability was held sufficient to bring the case within the limitation of the statute in such cases, and that the action not having been brought within three months after receipt of the denial was barred. The receipt of the denial was a sufficient service upon the superintendent of the poor of the county. See also, *Stillwell v. Kennedy*, 51 Hun (N. Y.) 114; s. c. 5 N. Y. S. 407. In *Coe v. Smith*, 24 Wend. (N. Y.) 341, it was held that the New York statute as to removal

or enticement of paupers into a county was not to be construed to prevent a destitute person, or one who happens to be disabled while temporarily residing in one county, from returning to his friends in another.

⁴⁰ *McKay v. Welch*, 6 N. Y. S. 358.

⁴¹ *Stillwell v. Kennedy*, 2 Silv. S. Ct. (N. Y.) 463; s. c. 51 Hun (N. Y.) 114; 5 N. Y. S. 407. The notice and reply were sufficient as to form and substance to enable the parties to the action to contest the question as to which was liable; and the statute being silent as to the mode in which the reply denying liability should be put into the possession of the person showing notice of claim, the reply

§ 1024. **Notice of charge by one town to another.**—It was urged in a Vermont case that where a person was taking care of a pauper under a contract with the overseer of the poor of a town at so much per month until the termination of a law-suit involving the question of whether this town or another was liable for the pauper's support, a notice by the overseer of the poor that the town would no longer pay for the support of this pauper and would make other arrangements if the contractor removed him from the town was sufficient to put an end to the contract, and that whatever claim the contractor had was by way of damages for breach of the contract. But the court held that the notice did not have that effect; that the town was bound to take away the pauper and provide otherwise for his support.⁴² A notice of support furnished paupers, sent by the selectmen of one town in Connecticut to the selectmen of another town, which stated that the wife and six children of — (giving their names) "are in this town on expense and are inhabitants of your town, and we must look to your town for all legal charges for their support," has been held to sufficiently show that the persons named were paupers and in need of support, that they were then residing in the plaintiff town, and that the town had furnished them assistance.⁴³ The giving of the notice provided for in the code of Iowa, that "if the commissioners [of a county] find that the person committed to the hospital, has, or probably has, a legal settlement in some other county, they shall immediately notify the auditor of such county of such finding and commitment, and the auditor so notified shall thereupon inquire and ascertain, if possible, whether the person in question has a legal settlement in that county, and shall immediately notify the superintendent of the hospital and the commissioners of the county of the inquiry," is a condition precedent to a right of recovery by suit for expenses paid for support of an insane person committed to the insane hospital by one county, of another in which it

here having come into his hands in due time, and he retaining, without objection, this service upon him, was sufficient to enable defendant to contest the question at issue. Statutes which deprive a person or municipality of the right to contest in the courts alleged liabilities must be construed favorably to the person or corporation seeking to contest such liability.

⁴² *Durfey v. Town of Worcester*, 63 Vt. 418; s. c. 22 Atl. 609.

⁴³ *Town of Bethlehem v. Town of Watertown*, 51 Conn. 490. The supreme court of Connecticut said:—"Nothing technical is required in notices of this kind. They should be interpreted as plain, practical men understand them." See also, *Town of Hamden v. Town of Bethany*, 43 Conn. 212; *Town of Beacon Falls v. Town of Seymour*, 44 Conn. 210.

claims the person committed had a settlement.⁴⁴ A notice from one town to another which is required by the statute of Connecticut, giving the right to one town to an action to recover of another town for moneys expended in aid of a pauper having a settlement in the latter, describing the paupers as "A., colored, and wife and four children, aged from ten years down to an infant," has been held sufficient for parents and children.⁴⁵

§ 1025. What corporations are liable for support of paupers.— The county where a person resides when he falls sick or becomes insane or a pauper, even though his residence there is but temporary, is liable for his support primarily and until it can show that some other county is therewith legally chargeable, and is able to impose the burden of his support upon such county.⁴⁶

⁴⁴ Poweshiek Co. v. Cass Co., 63 Iowa 244; s. c. 18 N. W. 895.

⁴⁵ Town of Windham v. Town of Lebanon, 51 Conn. 319. See also, Town of Washington v. Town of Kent, 38 Conn. 249. In *Inhabitants &c. v. Inhabitants &c.*, 138 Mass. 256, a notice given by a town to another that "A. B. and family (wife and two children), whose legal settlement is in your town, but now residing in this town, being in needy circumstances," had applied for relief, etc., was held sufficient to indicate that it referred to the two children he had living with him, although he had two others away from him; citing *Inhabitants &c. v. Inhabitants &c.*, 16 Mass. 102; *Inhabitants &c. v. Inhabitants &c.*, 4 Pick. (Mass.) 358; *City of Lynn v. City of Newburyport*, 5 Allen (Mass.) 545.

⁴⁶ *Franklin Co. v. Henry Co.*, 26 Ill. App. 193, in which the county of apparent residence of one who had been transferred from a penitentiary to an insane hospital, and from there, by mistake, to the poorhouse of a county of which he was not a resident, was held liable in a suit by the latter county for his support. In *Clark Co. v. Huie*, 49 Ark. 145; s. c. 4 S. W. 452, it was held

that a county could not be charged with the expenses of burial of one who, though he was admitted to be a resident of the county and in indigent circumstances, had never been adjudged a pauper by the county court; citing *Lee Co. v. Lackie*, 30 Ark. 764; *Prewett v. Mississippi Co.*, 38 Ark. 213; *Cantrell v. Clark Co.*, 47 Ark. 239; s. c. 1 S. W. 200. So under the statute in Washington Territory it was held, in *Collins v. King Co.*, 1 Wash. 416, and *King Co. v. Collins*, 1 Wash. 469, that there can be no recovery of a county for the keeping of paupers, where it is not shown that the governing authorities of the county had adjudicated such persons to be paupers and authorized the one seeking to enforce such liability to keep them as such. In *Mussel v. Tama Co.*, 73 Iowa 101; s. c. 34 N. W. 762, a certificate of the trustees of a township to the effect that a claim presented to the supervisors of the county that the items of the account were necessary and proper for a pauper, temporarily in their township, disabled while there by breaking his leg, and that they were furnished by the claimant at their request, was held to be binding upon the county, and it could not be allowed, in the absence of fraud, to

§ 1026. **No implied liability.**—A town is not liable to a parent for the support of his idiotic or helpless child who is more than twenty-one years of age unless the overseers of the poor have made an express contract with him for such support at the town's expense.⁴⁷ While overseers of the poor of a town are responsible to the public for gross neglect of their official duty, no action can be maintained against a town upon their implied promise to do what it is their official duty to do.⁴⁸ To relieve a municipal corporation from its liability for the support of a child of tender years to one furnishing that support, in an action to recover pauper supplies furnished after notice, under the Maine statutes the removal, or offer of removal, of the child to the corporation almshouse must be the act of the board of overseers of the poor, and not the individual, personal act of one member alone, unauthorized by the board.⁴⁹

contradict it by the parol testimony of the trustees that the aid was not furnished at their request or on their order. The court said:—"Under the statute their [the trustees'] determination partakes of a judicial character, and settles the relations of the parties, in the absence of fraud."

⁴⁷ *Buxton v. Chesterfield*, 60 N. H. 357. The supreme court said:—"Towns are liable for the support of paupers because the statute has imposed that duty upon them. There was no such liability at common law. The duty of discharging this obligation is devolved by statute upon the overseers of the poor, and it is only through their action that the town can be made liable to a person who furnishes relief to a pauper." It was urged that the town was made liable for the support of this child by the statute, in which it is directed that, "Whenever, by reason of any infirmity of body or mind, it is fit and proper that children should remain in the family and under the control of a parent after they arrive at the age of twenty-one years, and such parent is unable to support such children without diminishing his estate, such children shall be supported by

the town or county liable for their support, and the parent shall not be regarded or deemed a pauper by reason of the support so furnished to such idiotic or feeble adult child or children residing in his family and under his control." The court held that it was not the intention of the legislature in this enactment to impose any new liability on towns, either as to the class of persons to be assisted or as to the manner of rendering such assistance.

⁴⁸ *Mace v. Nottingham-West*, 1 N. H. 52; *Woodes v. Dennett*, 9 N. H. 55; *Mason v. Bristol*, 10 N. H. 36; *Otis v. Strafford*, 10 N. H. 352; *French v. Benton*, 44 N. H. 28.

⁴⁹ *Carter v. City of Augusta*, 84 Maine 418; s. c. 24 Atl. 892. The court said:—"Overseers of the poor are required to determine and direct their action as a body. The action of one overseer is the action of the board when authorized by them; and, in many cases, when consistent with implied authority, although no express authority had been given, becomes the action of the board when approved or ratified." See also, *Inhabitants &c. v. Inhabitants &c.*, 70 Maine 114; *Inhabitants &c. v. Inhabitants &c.*, 64 Maine 412. The court distinguished *Lamson v. City*

§ 1027. **Special liabilities.**—Charitable institutions in the state of New York to which children, under the age of sixteen, convicted as vagrants, truants or disorderly, under the provisions of the penal code of the state, are committed by the magistrates, are entitled to compensation from the county in which they may be convicted.⁵⁰

§ 1028. **Various rulings as to the poor.**—Officers of the poor are liable on the contracts of their predecessors made within the scope of their authority.⁵¹ An overseer of the poor in an action upon a bond

of Newburyport, 14 Allen (Mass.) 30, and Knight v. Inhabitants &c., 70 Maine 500.

⁵⁰ People v. Dickson, 57 Hun (N. Y.) 312; s. c. 10 N. Y. S. 604, awarding a peremptory writ of mandamus to the county treasurer to pay a bill in favor of a charitable institution which had been audited and allowed by the supervisors of the county. It was urged by the respondent, the county treasurer, that the commitments of the children were irregular. The court held that as to the validity of the commitments, that was a question which might be raised on habeas corpus between the children and the institution, but it was not available to the respondent as a reason why he should not pay the bill, which had been audited and allowed by the supervisors of the county. See Osterhoudt v. Rigney, 98 N. Y. 222. In Town of New Hartford v. Town of Canaan, 52 Conn. 158, it was held that, where any family is in want, they are "poor and unable to support themselves," within the statutes, although the head of the family earns enough for their partial support, and although their poverty is caused by intemperance or improvidence. The supreme court said:—"Our laws for the relief of the poor, whether considered in their letter or their spirit, take no cognizance of the origin and causes of poverty, but only of its existence." In Fish v. Perkins, 52 Conn. 200, a man who was partially

blind and nearly incapacitated for work, who occupied with his wife a basement of a small house, with an acre of ground, having a life interest in the land and basement, which interest was not worth over two hundred dollars, with no other property, was held entitled to help from the town, under the statute of Connecticut which provides for support by the town of "all persons who have not estate sufficient for their support." See also, Wallingford v. Southington, 16 Conn. 435, where the judge said:—"We can not think the law upon this subject is so rigid that if a poor man owns a miserable hovel, used as a shelter for himself and family, he must sell it, provided it is of any value whatever, before he can properly call on the selectmen to assist him in procuring medicine and bread for his sick and famishing children. Such a rule would be harsh and inconvenient."

⁵¹ Hayes v. Symonds, 9 Barb. (N. Y.) 260. And county superintendents of the poor may contract so as to bind their successors in office for ordinary supplies, as well as for labor and services for the county poorhouse. See also, Palmer v. Vandenberg, 3 Wend. (N. Y.) 193. In Gere v. Supervisors &c., 7 How. Pr. (N. Y.) 255, it was held that an overseer of the poor, giving temporary relief, was not bound to employ, in illness, the physician employed by county superintendents.

given in proceedings against one as a disorderly person in not supporting his wife and children, in which proceeding the defendant was "required to give security in the sum of two hundred and fifty dollars to the town of O. to indemnify said town against his wife and children becoming in one year chargeable to the public," and the bond given pursuant to the requirement contained an undertaking that the principal's wife and children should not in one year become chargeable on the town, and "in case of a failure of such undertaking we * * * will pay to the town of O. the said sum of two hundred and fifty dollars," can only recover such sum as had been paid out on account of the principal's wife and children.⁵² A justice of the peace, a taxpayer in a town which with two other towns had united in an association for a union poor-farm upon an agreement as to apportionment of expenses and a plan of settling any deficit there might be upon the basis of so much per capita for the paupers each town had had on the farm, was held not to be disqualified by reason of that fact in an action by one of the two towns against the other for the recovery of payments it had made on account of a pauper from this other town on account of a deficit.⁵³

§ 1029. **Support of patient at state lunatic asylum—Persons "in need of immediate relief."**—Although the finding of county commissioners upon the question of a pauper's settlement may be conclusive as a judgment until impeached or set aside, it may be set aside for fraud or mistake if justice requires it.⁵⁴ Where the statute of a state provides that a pay patient at a lunatic asylum may become a county patient upon an order of the county court to that effect, and a certificate from the clerk that such "patient * * * has not sufficient estate to support him at the asylum," it is not essential to the validity of an order of the county court that there should be an express finding that the patient has not sufficient estate to support him: this will be presumed.⁵⁵ A town which has furnished aid to a person as standing "in need of immediate relief," whose relatives, had they

⁵² Breichbiel v. Powles, 39 N. Y. St. 856; s. c. 15 N. Y. S. 465, the court holding the bond to be one of indemnity only.

⁵³ Town of Jericho v. Town of Underhill, 64 Vt. 362; s. c. 24 Atl. 251, in which the court overruled the plea in abatement filed by the defendant town, holding that as each town was to pay for the expense of its own paupers, the town in which

the justice resided was not interested in the suit.

⁵⁴ Concord v. Merrimack Co., 60 N. H. 521. See also, Salisbury v. Merrimack Co., 59 N. H. 359; Great Falls Mfg. Co. v. Worster, 45 N. H. 110; Judge of Probate v. Webster, 46 N. H. 518; Cheshire Prov. Inst. v. Stone, 52 N. H. 365, 367.

⁵⁵ State v. Cole Co. Court, 80 Mo. 80, in which the supreme court held

known it was applied for, were ready and willing and would have offered all the aid that was needed, which they had before afforded, can not recover, under the Massachusetts statute relative to such cases, of the town in which that person had a settlement the amount expended; for the reason that a person may have no property, and yet if he is supported by relatives or friends would not be in need of immediate relief, within the meaning of the statute.⁵⁶ An overseer's abandonment of an order of removal of a pauper from his township is a bar to another proceeding between the same parties for the removal of the same pauper, except for a subsequently acquired settlement.⁵⁷

§ 1030. The same subject continued.—In the absence of express statutory provisions there is no obligation or duty imposed upon towns to contribute to the support of persons residing within their limits.⁵⁸ Liability for the support of indigent insane persons, not paupers, is placed by the statutes of New York on counties, and not upon the towns.⁵⁹ The issuing of a writ of prohibition is the proper remedy, and properly issued when the board of supervisors of a county are attempting by action to collect the expenses paid for the support of indigent insane persons at an asylum from the towns where they had resided when sent to the asylum.⁶⁰

that an order that a patient already in the asylum "became a county patient at the lunatic asylum from this date," without more, bound the county for his support there.

⁵⁶ *Inhabitants &c. v. Inhabitants &c.*, 138 Mass. 109.

⁵⁷ *Cadwallader v. Durham*, 46 N. J. L. 53. See also, *Overseers &c. v. Overseers &c.*, 19 N. J. L. 173.

⁵⁸ *People v. Board &c.*, 121 N. Y. 345; s. c. 24 N. E. 830, which held that a county which had paid the expenses in a lunatic asylum of indigent insane persons who had been sent there on the certificate of a county judge acting under Laws of N. Y. 1874, as amended in Laws of N. Y. 1880, ch. 164, could not recover of the town where the insane person resided.

⁵⁹ *People v. Board &c.*, 121 N. Y. 345; s. c. 24 N. E. 830; reversing s. c. 49 Hun (N. Y.) 308; followed in *People v. Board &c.*, 122 N. Y. 652; s.

c. 25 N. E. 853. See also, *People v. Board &c.*, 7 Hill (N. Y.) 171; approved in *Supervisors v. Morgan*, 4 Abb. App. Dec. (N. Y.) 335, 339. In this case Bronson, J., said, speaking of this class of patients:—"They are such as usually provide for themselves or are provided for by friends, and who only need assistance when sent to the asylum under the visitation of insanity. It is accordingly provided that they shall be admitted into the asylum and supported there at the expense of the county. As it is a new class of persons, the case does not come within the operation of any prior law, and there is nothing to relieve the county from the burden expressly laid upon it. . . ." *People v. Board &c.*, 46 Hun (N. Y.) 354, was overruled in *People v. Board &c.*, 121 N. Y. 345; s. c. 24 N. E. 830.

⁶⁰ *People v. Board &c.*, 121 N. Y. 345; s. c. 24 N. E. 830; reversing s. c.

§ 1031. **Support of insane poor further considered.**—In Massachusetts a city, in order to recover the expenses paid by it for the support of a pauper committed to a state lunatic hospital from the town of the pauper's settlement, must first give the town notice thereof;⁶¹ and the amount recoverable in such case is limited to the expenses incurred by the city within three months next before such notice is given.⁶² The directors of the poor are entitled to be reimbursed out of the after-acquired estate of an insane criminal for his past maintenance in custody in a county or state lunatic asylum, under the Pennsylvania statutes.⁶³

49 Hun (N. Y.) 308. In *Board &c. v. Burkey*, 1 Ind. App. 565; s. c. 27 N. E. 1108, it was held that the estate of a husband was not liable to reimburse a county for money expended by it in furnishing his insane wife with clothing while confined in the state hospital for the insane, nor for the expense of her inquest of insanity and for taking her to such hospital.

⁶¹ *City of Taunton v. Inhabitants &c.*, 153 Mass. 192; s. c. 26 N. E. 451; Pub. Stat. Mass., ch. 84, §§ 14, 28, 29, as to remedies, applied to Pub. Stat. Mass., ch. 87, § 34. It was intended by the legislature by these last statutes to give to towns paying such expenses of a lunatic the same rights and remedies against the place of his settlement as if the expenses had been incurred in the ordinary support of a pauper, and the same rules of law apply as if this had been a suit to recover the expenses of the ordinary support of a pauper: *Inhabitants &c. v. Inhabitants &c.*, 119 Mass. 479; *Inhabitants &c. v. Inhabitants &c.*, 18 Pick. (Mass.) 379.

⁶² *City of Taunton v. Inhabitants &c.*, 153 Mass. 192; s. c. 26 N. E. 451. In *Inhabitants &c. v. Inhabitants &c.*, 11 Gray (Mass.) 107, it was held that notice from one town to another of a claim, made by the treasurer of a state lunatic hospital,

for the past and future support of a pauper, was sufficient to support an action for the past expenses, though not actually paid until more than three months thereafter, but not for the expenses for the support of the pauper after such notice.

⁶³ The court gave judgment on a case stated against the committee of the lunatic, but stated that the appropriate remedy would seem to be an application for an order: *Lancaster Co. Poor Directors v. Hartman*, 9 Pa. Co. Ct. Rep. 177 (the court further holding that pension money paid to a pensioner or to his committee, where he is a lunatic (as in this case), and where such money can no longer be recalled by the pension department or its disposal be qualified or in any manner limited or abridged, it being no longer within the grasp of the government or its officers, inures wholly to his benefit under United States Revised Statutes, § 4747, and is subject to his disposal, and is liable to the payment of his debts, and in case of lunacy may, with the direction of the court, be applied to the payment of his debts and subsistence); *Lower Augusta Tp. v. Northumberland Co.*, 37 Pa. St. 143 (where the supreme court say, under the act of 1845, when a lunatic is committed to the state lunatic hospital, the county is primarily liable to the hospital for

§ 1032. **Aid to children.**—A father whose child is of weak mind, so that it is incapable of making choice of a residence or caring for itself, being as much bound to care for it after it attains the age of legal majority as before, can not require aid in its support from a town as long as he has sufficient means himself.⁶⁴

§ 1033. **Liability of corporations to those furnishing support to paupers.**—The law raises an implied promise on the part of a township chargeable with the support of a pauper to furnish such support. And the township is liable for necessities furnished a poor person, with whose support it is chargeable, after due notice to the supervisor

the expense of maintenance, which the proper poor district must refund, the district to be reimbursed by the estate of relatives of the lunatic); *Keefer v. Schwartz*, 47 Pa. St. 503; *Wertz v. Blair Co.*, 66 Pa. St. 18.

⁶⁴ *Rowell v. Town of Vershire*, 62 Vt. 405; s. c. 19 Atl. 990, holding a town not to be liable upon a contract, the town expressly promising aid to such a father, upon his application for it in support of his child, the promise being without consideration. As to incapacity of a weak-minded person to gain a settlement in his own right, see *Town of Ryegate v. Town of Wardsboro*, 30 Vt. 746; and taking the settlement of the father after coming of age, *Town of Hardwick v. Town of Pawlet*, 36 Vt. 320; *Town of Topsham v. Town of Chelsea*, 60 Vt. 219; s. c. 13 Atl. 861; *Landgrove v. Town of Plymouth*, 52 Vt. 503; *Overseers &c. v. Overseers &c.*, 2 Vt. 151; *Gilman-ton v. Sanbornton*, 56 N. H. 336; *Town of Croydon v. Sullivan Co.*, 47 N. H. 179. In *Inhabitants &c. v. Inhabitants &c.*, 79 Maine 473; s. c. 10 Atl. 455, it was held that pauper supplies furnished to a minor child will not be considered as supplies indirectly furnished the father when there is a destruction of the parental and filial relations and the father has deliberately abandoned such child and has taken up his residence

in another town, emancipating the child from all duty to him and renouncing all obligation to it. Therefore, supplies furnished such a child, even with the knowledge of the father, will not be considered as supplies furnished to him to prevent his acquiring a settlement in his new place of residence. This is the principle declared in *Inhabitants &c. v. Inhabitants &c.*, 64 Maine 246; *Inhabitants &c. v. Inhabitants &c.*, 11 Maine 190; *Inhabitants &c. v. Inhabitants &c.*, 5 Maine 143; *Inhabitants &c. v. Inhabitants &c.*, 66 Maine 78; *Inhabitants &c. v. Inhabitants &c.*, 55 Maine 55. As to liability of father to support his unemancipated children, see *Litchfield v. Londonderry*, 39 N. H. 247; *Hillsborough v. Deering*, 4 N. H. 86; *Dover v. McMurphy*, 4 N. H. 158, 161; *Town of Poplin v. Town of Hawke*, 8 N. H. 305. And in *Gleason v. City of Boston*, 144 Mass. 25; s. c. 10 N. E. 476, it was held that as a married woman whose husband is living is neither at common law nor by the statutes of Massachusetts under legal obligation to support their children, even if the husband is imprisoned for crime, her right to acquire a settlement under the statutes of that state by a residence of five years is not taken away by her receiving money during the five years to be used for the board of her pauper child.

that such person is a township charge, and his refusal or neglect to furnish such support.⁶⁵

§ 1034. **The same subject continued.**—A head of a family who owns land with improvements which he values at a sum over and above the incumbrances upon it is not a “poor person” for whose support, under the Wisconsin statute which provides that “if any poor person shall become a charge to any town, having no settlement therein, the town in which he may have a legal settlement shall be liable for his support,” the town in which he had a legal settlement is liable.⁶⁶ One who had bought a house and lot in a town, and sup-

⁶⁵ *Eckman v. Brady Tp.*, 81 Mich. 70; s. c. 45 N. W. 502, in which action it was further ruled that nowhere in the statutes of Michigan relating to the support of the poor by townships is the amount to be expended for any one person limited, or is at all placed in the discretion of the supervisor, or any other township officer, to determine who is a poor person, or the amount to be expended on behalf of such person. In this case it was determined that the commencement of the suit by a person who was receiving a sum fixed for the support of a poor person, by the supervisor, to recover a greater sum, was notice that the amount so received was deemed insufficient. The court approved the charge of the court below, that:—“The public authorities owe a duty to the pauper or to the poor person within its boundaries that is plain and undisguised. It is not the policy of the law, and it would be contrary to the humanity of the times, to permit any poor person to actually suffer in a township where there was plenty and wealth; and so it is that the law is express and explicit that the support shall be adequate and sufficient to meet the needs of the person who is a charge upon the township.” In *Tufts v. Town of Chester*, 62 Vt. 353; s. c. 19 Atl. 988, in a suit by a daughter for the support of her mother, it was

held that her testimony that for a long time she had cared for her mother for nothing; that in 1882 she sent her father to the overseer of the poor with word that if she continued to do so she must be paid; that, later the same year, she had a conversation with the overseer, in the course of which he said that the town “was willing” to pay her, was evidence of a contract sufficient to sustain the verdict against the town. An implied promise may be raised against a town the same as against an individual. There need be no special request to raise it. The request may be implied from the circumstances. See *Worcester v. Ballard*, 38 Vt. 60. In *Waltham v. Town of Mullally*, 27 Neb. 483, it was held that a contractor under a contract to care for paupers, made with the supervisors of a township, who are the officers charged by law with the duty of caring for and contracting for the support and maintenance of the poor, furnishing such support and maintenance in good faith, according to the terms of the contract, could hold the township liable and legally bound therefor; and that such liability could not be avoided by refusing or neglecting to vote and levy the necessary taxes for its payment.

⁶⁶ *Town of Rhine v. City of Sheboygan*, 82 Wis. 352; s. c. 52 N. W. 444. “Poor,” in the statute, has a restricted and technical meaning,

ported his family there for a time before he became indigent, is not a "transient pauper" within the statute of Vermont, which applies only to the support of such a person as "is suddenly taken sick or lame, or is otherwise disabled and confined at any house, in any town, or is committed to jail and is in need of relief," for whose support such town can recover of the town whence he came.⁶⁷

§ 1035. **Duty to furnish immediate relief.**—A statute provided that "when a person not an inhabitant of the town in which he resides shall become poor and unable to support himself, the selectmen of such town shall furnish him with necessary support as soon as his condition shall come to their knowledge, and each selectman neglecting such duty shall forfeit" a penalty. The plaintiff was requested, by a selectman to whom he had given notice that a person temporarily in that town was in want, to furnish necessities, for which the town would pay him. In holding the town liable the court said: "This statute, framed in the interest of humanity, is intended to make provision for the poor so complete that if a man is overtaken by want when he is absent from home, and the fact comes to the knowledge of any of the selectmen of the town in which he happens to be, there instantly springs up the duty to give him food if he is hungry, or medicine if he is sick. In this particular matter this section of the

and it is practically synonymous with "destitute," denoting extreme want and helplessness: *Anderson's Law Dict.*, "Poor." In *Board &c. v. Brown*, 4 Ind. App. 288; s. c. 30 N. E. 925, the court sustained a verdict in favor of one who had cared for a pauper resident of the county who had been injured on a railroad and brought to his house, and who, it was shown, had, after frequent conferences with the town trustee on the subject, been told by him generally to care for the pauper and the county would pay for it. And that after such a contract the fact that the pauper was a brother of the plaintiff would not affect the county's liability for the services rendered him; nor did it matter that the pauper was found injured in another county and removed to the one sued, as he was a resident of the latter: *State v. Osawkee Tp.*, 14

Kan. 418, 422. Until the man and wife who had received aid in the case cited below had exhausted their resources, they could not be considered as poor persons within the meaning of the statute for the relief of the poor: *Stewart v. Sherman*, 4 Conn. 553; *Wallingford v. Southington*, 16 Conn. 431, 435; *Peters v. Town of Litchfield*, 34 Conn. 264.

⁶⁷ *Town of New Haven v. Town of Middlebury*, 63 Vt. 399; s. c. 21 Atl. 608. This was the result of what is known as the Poland Pauper Law (Acts Vt. 1886, No. 42), which so amended R. L. Vt. 2814, that it was the duty of every town to relieve and support poor and indigent persons residing therein, the court holding that the person supported, from the facts stated in the text, resided in the plaintiff town.

statute does not intend to give time for investigation as to where his legal settlement may be before action; nor does it allow of the operation of that rule of law which determines that when power is given to two or more selectmen for public purposes, and especially for purposes of a judicial character, it shall, when all have been legally notified, be executed by a majority and not by one of them. This necessary assistance is not a matter of discretion, and is not dependent upon the result of consultation; the mandate seems to be to each selectman; and it requires action as soon as there is knowledge. The intent to furnish immediate relief is the marked characteristic of the section, and we should nullify its whole purpose if we determined that it imposes no duty upon and requires no action from one until notice has been given to all."⁶⁸

§ 1036. Proceedings to compel relatives to support paupers.—A New York statute makes it the duty of persons having sufficient means to maintain their relatives within prescribed degrees who are unable to maintain themselves; and provides that, if such relatives of a poor person fail in such duty, the overseer of the poor of the town where such poor person is, or the superintendent of the poor in certain counties, may apply to the court of sessions of the county where the relatives dwell, on a notice prescribed, for an order to compel such relief; that after acquiring jurisdiction of such relatives, and having heard the allegations and proofs, the court may make an order directing the relatives to furnish such maintenance, specifying the sum to be paid for a certain period, or until the further order of the court; and the court may, from time to time, vary such order as the circumstances may require. In a proceeding to compel the maintenance of a pauper mother by her children, the court held that the order made by the court might be set aside, "so far as it limited the place of support to be at the alms or county poor-house." Under this statute the court of sessions has no power to prescribe the place where such poor person shall be supported, nor the conditions of such support, except that it shall be by the approval of the superintendent of the poor.⁶⁹

⁶⁸ *Welton v. Town of Wolcott*, 45 Conn. 329.

⁶⁹ *Weaver v. Benjamin*, 45 N. Y. St. 95; s. c. 18 N. Y. S. 630. In *Duel v. Lamb*, 1 Thomp. & C. (N. Y.) 66, 69, the court sustained the text and added:—"Whatever power there is over that support is vested in the overseers or superintendents of the poor; the sessions can only declare

the duty to support, and, in default, to fix the sum to be paid." It was held in this last case that where an order is made requiring a relative of a pauper to support him, and fixing a sum to be paid weekly, the relative may provide for the support of the pauper at such place, and in such manner, as he may deem proper, provided the place and manner

§ 1037. **Liability of a pauper for his support.**—It seems that under the Pennsylvania statute which declares that “it shall be lawful for the directors of the poor of any county, and for the overseers of any district, as the case may be, in which any person shall become chargeable, to sue for and recover any real and personal estate belonging to such person, and to sell or otherwise dispose of the personal property, and to collect and receive the rents and profits of the real estate, and to apply the proceeds, or so much thereof as may be necessary, to defray the expenses incurred in the support and funeral of such person; and if any balance shall remain, the same shall be paid over to the legal representatives of such person after his death, upon demand made and security being given to indemnify such directors or overseers from the claims of all other persons,” a person who ceases to be a charge upon a poor-district by reason of after-acquired property is liable for previous maintenance.⁷⁰

§ 1038. **Municipality can not recover for voluntary aid.**—A person who receives aid from the officers of the poor of a city without having made application therefor, or representations as to his responsibility or physical condition, is not liable for the amount expended by the city in his support.⁷¹ An institution organized for the avowed

are approved by the overseer; and it is not until he has neglected or refused to do this that he is liable for the sum directed to be paid; following *Converse v. McArthur*, 17 Barb. (N. Y.) 410.

⁷⁰ *Lancaster Co. v. Hartman*, 9 Pa. Co. Ct. 177. See also, *Jester v. Overseers*, 11 Pa. St. 540, where, in an ejectment suit, the plaintiff before the trial of his cause became a pauper, and upon his death the overseers of the poor of the township were substituted as plaintiffs and the cause proceeded in their name; *White Deer Tp. Poor Overseers' Appeal*, 95 Pa. St. 191, where it was held that the act of 1836 did not divest the pauper of all rights in or to his property. It merely gives the overseers of the poor an authority over his property, which, when exercised, is superior to his; *Mumma's Appeal*, 127 Pa. St. 474; s. c. 18 Atl. 6.

⁷¹ *City of Albany v. McNamara*,

117 N. Y. 168; s. c. 22 N. E. 931, in which the corporation sought to recover of defendant's testatrix money paid for the support of testatrix at a hospital, under an order made by the overseer of the poor directing the hospital to extend aid to her. The court summed up the reason for its ruling as follows:—“The question of propriety of relief is confided to the discretion of the poor authorities, and if they grant the relief asked for, it is presumed they have made such investigations as they deem necessary, and have determined the question as to the rights of the party examined to such relief. There is no provision made in the law for a review of that determination, and such aid once furnished must therefore be regarded as a charity extended by the city to the object of their benevolence without expectation of reimbursement;” citing *Inhabitants &c. v. Eaton*, 12 Mass. 328; *Inhabitants &c. v. Learned*, 16

purpose of treating or administering charity, unless specially authorized by its charter to do so, can not contract to bestow what purports to be a benefaction for a price, or to dispense charity for pay.⁷²

§ 1039. **Actions for support of paupers.**—If a township trustee in relieving a poor person having a settlement elsewhere acts in good faith, the county of the settlement can not escape liability on the ground that the person relieved had some property.⁷³ The cause of

Mass. 215. The court held that in this action no request for support would be implied from the presumption that the officers of the poor performed their legal duty, and investigated and afforded aid, as the duty is discretionary, and the request is a fact in issue; also, that in the absence of evidence that some one had authority to make application and representations for defendants' testatrix, and of the nature of the representations, no presumption arose that application was made for her merely because it was usually made; also, that the duty of the officers of the poor being discretionary, they will be presumed to have found defendants' testatrix in need of aid, and furnished it gratuitously, in the absence of evidence showing a promise to pay therefor; and that though money was paid for the support of defendants' testatrix under a mistake of fact, no right of action arose in the absence of a request.

⁷² Board &c. v. Ristine, 124 Ind. 242; s. c. 24 N. E. 990, holding upon the principle of the text that there could be no recovery of the administrator of a deceased person of unsound mind by the county on a contract made with the guardian of the deceased for board and care of him in the county asylum for the poor, by the board of commissioners. Nor could there be a recovery on a quantum meruit, as a person who is admitted into a county asylum, organized for the support of the poor,

can not be charged therefor either on an express or implied contract; citing Board &c. v. Hildebrand, 1 Ind. 555 (holding "that county commissioners had no power to convert an institution that was intended as a public charity into a boarding-house for such as wished accommodation for themselves or for their relatives for pay"); Board &c. v. Schmoke, 51 Ind. 416; Ramsey v. Ramsey, 121 Ind. 215, 222; s. c. 23 N. E. 69; St. Joseph's Orphan Society v. Wolpert, 80 Ky. 86. Two judges dissented, however, and cited as out of line with these Indiana decisions, Howard v. Trustees &c., 10 Ohio 365; Trustees &c. v. Demott, 13 Ohio 104; Inhabitants &c. v. Turner, 14 Mass. 227; Jasper Co. v. Osborn, 59 Iowa 208; s. c. 13 N. W. 104; Inhabitants &c. v. Stratton, 128 Mass. 137; City of Bangor v. Inhabitants &c., 71 Maine 535; Town of Dakota v. Town of Winnebago, 55 Wis. 522; s. c. 13 N. W. 559; Directors &c. v. Malany, 64 Pa. St. 144; Turner v. Hadden, 62 Barb. (N. Y.) 480; Wertz v. Blair Co., 66 Pa. St. 18; Commissioners &c. v. Directors &c., 7 Ohio St. 65; Goodale v. Lawrence, 88 N. Y. 513; Inhabitants &c. v. Lyons, 131 Mass. 328.

⁷³ Hardin Co. v. Wright Co., 67 Iowa 127; s. c. 24 N. W. 754. The court said:—"The duty of township trustees when applied to for poor relief is not to be determined by very rigid rules. They must, in the exercise of a wise discretion, grant relief where they judge that human-

action under the Massachusetts statute providing that the expenses incurred in the relief of a pauper within three months next before

ity requires it. They must, too, oftentimes act promptly and without taking time to make an extensive examination of the applicant's circumstances:" *Town of Poplin v. Town of Hawke*, 8 N. H. 305; *Inhabitants &c. v. Inhabitants &c.*, 12 Mass. 355; *Armstrong v. Tama Co.*, 34 Iowa 309. In *Winchester v. Cheshire Co.*, 64 N. H. 100; s. c. 5 Atl. 767, it was held that the fact that a county pauper refused to comply with an order of the board of county commissioners that she be removed to the county almshouse, and that she thereafter supported herself for several months, did not deprive her of the right to county aid after she became wholly dependent, and physically unable to be removed, and the county was liable to a township which thereafter supported her, though the statute provided that no town shall be entitled to any compensation for the support of a county pauper after notice and neglect to comply with an order of the county commissioners that the pauper be removed to the county almshouse. In *Bellows v. Courter*, 53 Hun (N. Y.) 631; s. c. 2 Silv. S. Ct. 367; 6 N. Y. S. 73, it was held that the amendment (Laws N. Y. 1885, ch. 546) to 1 Revised Statutes of New York, pp. 628, 629, §§ 58-62, making it a misdemeanor to remove or entice any poor person from any city, town or county, without legal authority, to any other city, town or county, with intent to make the latter chargeable with his support, and provide for the return of such pauper to and his support by the town or county from which he had been removed, with indemnity to the other county or town for its expenses incurred in the pauper's support and return, applying the

above sections to "any pauper . . . who shall of his own accord come or stray from any city, town or county into any other city, town or county not legally chargeable with his support," did not give a right of action for the support of a pauper by a county into which he had voluntarily removed, at a time when he was not a pauper, against the county from which he had so removed. In *Park Co. v. Jefferson Co.*, 12 Colo. 585; s. c. 21 Pac. 912, it was held that the two provisions embraced in the statutes of Colorado, one that claims against a county may be presented to the board of county commissioners, and if disallowed, in whole or in part, the claimant may appeal to the district court; and the other concerning paupers, that if a pauper in certain cases requires and receives help from a county other than that of his settlement, "then the county taking charge of such pauper may sue for and recover from the county to which" such pauper belongs, "in any proper action before any court having competent jurisdiction, the amount expended," etc., were not antagonistic, and that a county may sue to recover the expense of caring for a pauper, notwithstanding it has previously filed a claim therefor with the commissioners of the county of his settlement and taken no appeal from the order disallowing it; citing *Murphy v. Commissioners*, 14 Minn. 67, 69; *Grundy Co. v. Hughes*, 8 Ill. App. 34. In *Kirk v. Brazos Co.*, 73 Tex. 56; s. c. 11 S. W. 143, an action by one with a contract for taking care of and boarding "the blind and helpless paupers" of the county, and "all other paupers" at the poor-farm, against the county for the board of paupers who had received partial as-

notice given to the place to be charged may be recovered of such place by the place incurring the same, in an action "to be instituted within two years after the cause of action arises, but not otherwise," arises at the time the notice is given, and this fixes the time from which the limitation of the suit begins to run.⁷⁴

§ 1040. **The same subject continued.**—The court in the case cited in the note sustained the dismissal of the suit brought to restrain a levy to pay a warrant drawn in favor of the overseer of the poor for disbursements made by him on the ground that they were illegal expenditures under the taxpayers' act.⁷⁵ The New York statute which provides in one place that penalties under the excise laws shall be recovered by the town overseers of the poor, and in another that if the overseers "shall, for the period of ten days after complaint to them that any person has incurred such penalty, * * * neglect or refuse to prosecute for such penalty, any other person may

sistance from the county, but had never been at the poor-farm, it was held that the county was entitled to show by parol evidence that the words "other paupers" included only such as were supported at the poor-farm, and also the past course of the county as to such paupers, if notorious; also that the county could show that plaintiff had a contract of the same character the previous year, and had not charged for paupers partially supported outside of the poor-farm, to show the intent and understanding of the parties in making the second contract.

⁷⁴ *Inhabitants &c. v. City of Malden*, 141 Mass. 580; s. c. 7 N. E. 21; *Inhabitants &c. v. Inhabitants &c.*, 15 Pick. (Mass.) 19; *Inhabitants &c. v. Inhabitants &c.*, 10 Mass. 411; *Inhabitants &c. v. Inhabitants &c.*, 14 Mass. 186; *Inhabitants &c. v. Inhabitants &c.*, 10 Pick. (Mass.) 150.

⁷⁵ *Cobb v. Ramsdell*, 14 N. Y. S. 93; s. c. 37 N. Y. St. 457. The overseer had, in a number of cases, in good faith and in ignorance of a statute which required that he first obtain an order from a justice of the peace allowing the same, expended more than ten dollars for the relief of the

poor. The town auditors had audited and allowed his claim for such expenditures, and at the annual town meeting it was voted that the tax levy be made to pay it. The town auditors were also in ignorance of this requirement of the statute, and supposed that they were acting within their power. The court in holding the payment of the order for the expenditures enforceable said:—"It is entirely clear that no fraud was intended or practiced by the overseer of the poor or any other officer of the town. The formality of getting a certificate of the justice of the peace or the superintendent of the poor for expenditures of more than ten dollars was omitted for want of knowledge of the existence of the statute requiring it, but nothing was paid or allowed which had not been honestly expended for the benefit of the poor. The omission to obtain a certificate resulted in no practical wrong, or the infliction of any pecuniary damage or injury. The taxpayers' act was not intended to include cases of inadvertence or mistake which resulted in no damage."

prosecute therefor in the name of the overseers," was held to authorize a prosecution of such a suit by the relator in the name of the successor in office of a sole overseer of the poor in a town who neglected to prosecute during his term, which expired more than ten days after the complaint was made, without again making a complaint.⁷⁶

§ 1041. Statutes prohibiting bringing paupers from other states.—The Michigan statute provides that "any person who shall bring or

⁷⁶ *Root v. Alexander*, 18 N. Y. S. 632. The court said:—"The overseer of the poor is a quasi-municipal corporation, having perpetual succession. The incumbency of the office changes but the office remains the same. All rights acquired by others under one incumbency of the office continue under those which succeed." In *Wood v. Simmons*, 51 Hun (N. Y.) 325; s. c. 4 N. Y. S. 368, the court construed the following statutes, one providing that no person shall be removed as a pauper from any city or town to any other city or town of the same or any other county, or from any county to any other county, and others providing that any pauper who shall of his own accord come from one city, town or county into any other city, town or county not legally chargeable with his support, shall be maintained by the superintendent of the county where he may be; and that by taking certain proceedings the liability of the county or town from whence he came for his support may be fixed if such county is so liable. It was held that one who had always been able to support himself and family by manual labor, though the wages earned by him were not more than sufficient for that purpose, was not a pauper within the meaning of the statute; and where, having been a resident of the city and county of New York, he went to another county and there met with an accident which rendered him unable to support himself, the county whence he came

was not liable for his support. In *Board &c. v. City of Kingston*, 50 Hun (N. Y.) 435; s. c. 3 N. Y. S. 221, the city which was the residence before his conviction of one who was convicted in another county of crime and sent to the penitentiary and thence to a lunatic asylum and his expenses therein paid by this county was held liable to the county in its suit under Laws of New York, 1874, ch. 446, tit. 1, art. 2, § 32, for the sum expended in that way. It was claimed that the county in which the city was situate was liable; but this contention of the city was overruled, as the city by law was constituted a separate poor district. The city further claimed that the commissioners of the almshouse of the city were responsible. This, too, was overruled, as these commissioners only had under the statute the care and management of the poor of the city, and the responsibility and liability and duty to raise money to support the poor of the city rested finally upon the municipal corporation and not upon these commissioners of the almshouse of the city. In *Goodale v. Brocknor*, 61 How. Pr. (N. Y.) 451, it was held that though a husband, whose wife, while insane, leaves him is liable at common law to any one supplying her with necessities or maintaining her, this not being a desertion of him, yet an action on such common-law liability could not be maintained by a superintendent of the poor.

remove, or cause to be brought or removed, any poor or indigent person from any place without this state into any county within it, with intent to make such county chargeable with the support of such pauper, shall forfeit and pay fifty dollars, to be recovered before any justice of the peace of the county into which such pauper shall be brought or in which the offender may be, and shall also be obliged to convey such pauper out of the state, or support him at his own expense.” It was held that a suit to recover for the support of a pauper illegally brought from another state into a county of Michigan should be brought in the name of the superintendents of the poor of the county.⁷⁷ But such a suit will not lie until after the pauper is adjudicated such, nor until expenses for such support have been paid, or the liability therefor incurred by the superintendent.⁷⁸ And an order of a court of the state from which the pauper was removed, under a statute of that state for the removal of the pauper who had not gained a legal settlement therein to her former place of residence in Michigan, could not be pleaded as a justification to the person who executes it, where the removal is in violation of the statutes of Michigan.⁷⁹ But a conviction for a violation of the statute must precede a suit to recover the forfeiture provided for therein, and until the person bringing the pauper into the state is so convicted and required to indemnify the county against liability for the pauper’s support in case he fails to remove the pauper from the state, he is under no obligation to give the bond, nor will a suit lie against him for such non-removal.⁸⁰ Upon an indictment for a violation of the New Hampshire statute, which provides, in substance, that if any person shall bring from another state and leave in any town in this state a poor and indigent person having no settlement therein, and having no visible means of support, knowing such person to be poor and indigent, with the intent to charge such town with the support of such poor person, he shall be punished by fine and imprisonment, a defendant could not show, as bearing upon the question of criminal intent, that she investigated the matter in connection with the statute of Massachusetts, and became satisfied that the indigent person was entitled to a settlement within the state of New Hampshire.⁸¹

⁷⁷ *Superintendents &c. v. Nelson*, 75 Mich. 154; s. c. 42 N. W. 797.

⁷⁸ *Superintendents &c. v. Nelson*, supra.

⁷⁹ *Superintendents &c. v. Nelson*, supra.

⁸⁰ *Superintendents &c. v. Nelson*, supra.

⁸¹ *State v. Cornish*, 66 N. H. 329; s. c. 21 Atl. 180. This statute comes

within the class where the offense needs no criminal intent to constitute it a crime, but the offense is a crime by reason of its being prohibited. When the defendant brought this indigent person into the state, she assumed the peril of not knowing the facts as well as the law: *Booth v. Hillsborough Co.*, 45 N. H. 139, distinguished as being

§ 1042. **Liability to paupers for negligence of employees.**—A town has been held liable in an action of tort for negligence of an employe at its almshouse, as it appeared that the overseers of the poor, highway surveyors and selectmen of the town were the same persons, and they used its almshouse farm partly for the support of its poor, partly for the maintenance of its highway department, and incidentally for the production of income.⁸² A physician employed by a city to treat patients at the city almshouse is liable to one of such patients who is injured through his negligence, though there is no contractual relation between the patient and the physician.⁸³

§ 1043. **Support of the insane.**—The Nebraska statute in the chapter entitled "Paupers," which provides that the persons named shall be supported by their relatives designated in the act, has no reference to the support and care of insane persons confined in the insane hospital at public charge.⁸⁴ There is no liability at common law

decided on the authority of *Inhabitants &c. v. Delano*, 1 Pick. (Mass.) 469, and *Inhabitants &c. v. Cushman*, 16 Mass. 393, which had been essentially overruled in Massachusetts.

⁸² *Neff v. Inhabitants &c.*, 148 Mass. 487; s. c. 20 N. E. 111. It was also held that their use of the farm was not illegal, so as to exonerate the town from liability on account of it. The court said:—"A city or town may make any reasonable provision for the support of paupers, or for sustaining other public burdens imposed upon it, and for that purpose may manage a farm which produces more crops than are needed for the food of the paupers, and may sell or exchange the surplus. It may transact business outside of the authority expressly given it, if the business is incidental to the performance of its public duties." The reason for a departure from the general rule of non-liability of towns in such actions as given in *Hill v. City of Boston*, 122 Mass. 344, and *Tindley v. City of Salem*, 137 Mass. 171, 172, was that the use of the town's property by its

agents in part for profit brought it within the rule in *Oliver v. City of Worcester*, 102 Mass. 489; *Worden v. City of New Bedford*, 131 Mass. 23.

⁸³ *Du Bois v. Decker*, 130 N. Y. 325; s. c. 29 N. E. 313; affirming s. c. 4 N. Y. S. 768; 52 Hun (N. Y.) 610. The court said:—"The fact that he [the physician] was paid by the city instead of the plaintiff did not relieve him from the duty to exercise ordinary care and skill."

⁸⁴ *Richardson Co. v. Frederick*, 24 Neb. 596; s. c. 39 N. W. 621, in which it was held that the brothers and sisters of an insane person were not liable for the expenses of his treatment in the insane hospital during such insanity, under Compiled Statutes of Nebraska, 1887, ch. 40. As to the distinction in the state's taking charge of the insane and the adjudication of matters of paupers, see *Delaware Co. v. McDonald*, 46 Iowa 170; *Monroe Co. v. Teller*, 51 Iowa 670; s. c. 2 N. W. 533, holding a father not liable for the support of his insane son; *Speedling v. Worth Co.*, 68 Iowa 152; s. c. 26 N. W. 50, in which a father recovered of the county the value of his serv-

or by statute against the children of insane persons for the maintenance of such persons in a state hospital for the insane.⁸⁵

§ 1044. **The same subject continued.**—Under the New Hampshire statute which provides that any insane person committed to the asylum shall be supported by the county from which he is committed, and that such county shall be entitled to recover the amount so paid of any town, county or individual by law liable for his support, the liability of a town for the support of persons who have acquired a settlement therein is not absolute, but embraces only those who subsequently become destitute and unable to support themselves.⁸⁶ Under

ices in caring for his daughter found to be insane by the commissioners of insanity.

⁸⁵ So held in a Nebraska case: *Richardson Co. v. Smith*, 25 Neb. 767; s. c. 41 N. W. 774; *Walker Am. Law*, § 109; *Browne Dom. Rel.* 82; 2 *Kent Com.* (13th ed.) 208; *Chase Blackstone*, 168; *Schouler Dom. Rel.*, § 265; *Edwards v. Davis*, 16 *Johns. (N. Y.)* 282. In *City of Newburyport v. Creedon*, 148 *Mass.* 158; s. c. 19 *N. E.* 341, in an action brought by a city to recover of defendant the money it had paid for his support in a county retreat for the insane, under Public Statutes of Massachusetts, 1882, ch. 113, it was held that the city should show that some action of the county commissioners had been taken to direct the sum to be allowed and paid per week for such person's support, as that is required by Public Statutes of Massachusetts, ch. 87, § 49; and that it was not so erroneous as to require a reversal that the trial judge was not satisfied upon that point by evidence of the city treasurer that a certain amount per week for each had been paid by the city for several years.

⁸⁶ *Merrimack Co. v. City of Concord*, 66 *N. H.* 389; s. c. 23 *Atl.* 87, holding the action of the county against the city for the money paid by the court for the support of an insane person who had acquired a

settlement in the city not maintainable, as it was not shown that this insane person was a pauper. In *People v. Board &c.*, 46 *Hun (N. Y.)* 354, the supreme court construed the New York statutes which provide that an indigent insane person confined in an asylum under order of a judge should be supported at the expense of the county in which he lived; and that when an indigent person not a pauper becomes insane, notice shall be given to the superintendent of the poor of the county chargeable with his support in an asylum, and that the supervisors shall raise the means for his support; and that the expense of sending any lunatic to a state asylum shall be borne by the county or town to which he may be chargeable. They held that, as to counties in which the distinction between town and county poor is maintained, the expense of supporting indigent insane persons, not paupers, is chargeable to the town in which they have legal settlement. It was also held that the contention of the town that it could not be charged with the cost of supporting such persons which was involved in this case, upon the ground that although they had a legal settlement in the town, they had not, previously to their being adjudged proper persons to be sent to the insane asylum, become chargeable to it, could not be

the Ohio statute which authorizes the sequestration of the property of one who, whether sane or insane, "is admitted into the [county] infirmary as a pauper," the property of a person who has been adjudged insane by the proper court, and committed to the state asylum for the insane, but removed to the county infirmary for the time, under the warrant of the judge of that court, and there kept at public expense, can not be sequestered.⁸⁷

§ 1045. Soldiers' homes.—A Michigan statute providing for the establishment of a soldiers' home and creating a board vested with the duty of its management makes it the duty of such board to "prepare and carefully digest and mature a system of government for said home, embracing all such rules, regulations and general laws as they may deem necessary for preserving order, enforcing discipline and preserving the health" of the inmates. It is within the power of the board of managers to require the pension money of the inmates to be deposited, subject to the disposal of the board, if, in the words of the statute, they deem it necessary to preserve order, enforce discipline or preserve the health of the inmates. But there is no right conferred by the statute upon the board to determine what relatives are dependent upon the pensioner for support, and to direct how much of such money shall be sent to such relatives.⁸⁸

§ 1046. Reformatories.—The supreme court of Minnesota sustained the action of the municipal court of a city in committing an infant, in consequence of incorrigibly vicious conduct, to the care and guardianship of the board of managers of the state reform school, the power of the municipal court in such matters being the same as that of justices of the peace under the statutes of the state, which confer upon justices of the peace power to commit infants, in consequence of incorrigibly vicious conduct, to the care and guardianship of the

sustained, as under the law of 1874 no distinction was preserved between poverty caused by insanity and that caused by other disease or misfortune. See, however, § 1030, n. 58, ante.

⁸⁷ *Brown v. Board &c.*, 49 Ohio St. 578; s. c. 31 N. E. 744. This removal was unauthorized. The power of the probate judge, under Revised Statutes of Ohio, 707, 708, is to commit an adjudged lunatic to the infirmary only until he can be admitted to the state asylum, or, when

not entitled to admission, such person is at large and dangerous. Besides, it is only the property of a pauper which can be sequestered.

⁸⁸ *Loser v. Board &c.*, 92 Mich. 633; s. c. 52 N. W. 956, holding that such a deposit is not an assignment or transfer of a pension within the meaning of the act of congress of February 28, 1883, which makes void any "pledge, mortgage, sale, assignment or transfer of any right, claim or interest in any pension."

board of managers of the state reform school for terms exceeding a period of three months. They held this statute not repugnant to the provisions of the state constitution relating to the jurisdiction of justices of the peace in criminal matters.⁸⁹ Nor was it repugnant to the provisions of the constitution relating to jurisdiction of probate courts.⁹⁰ Nor is the mode of procedure pointed out in this legis-

⁸⁹ *State v. Brown*, 50 Minn. 353; s. c. 52 N. W. 935. The ruling was based upon the rulings in *Milwaukee Industrial School v. Supervisors &c.*, 40 Wis. 328; *Farnham v. Pierce*, 141 Mass. 203; s. c. 6 N. E. 830; *Prescott v. State*, 19 Ohio St. 184; *House of Refuge v. Ryan*, 37 Ohio St. 197; *Roth v. House of Refuge*, 31 Md. 329; *Ex parte Crouse*, 4 Whart. 9; *In re Ferrier*, 103 Ill. 367; *McLean Co. v. Humphreys*, 104 Ill. 378; *Tiedeman Limitations of Police Power*, ch. 13. In *Milwaukee Industrial School v. Supervisors*, supra, Judge Ryan expressed the views of the court as follows:—"And in the first place we can not understand that the detention of the child at one of those schools should be considered as imprisonment any more than its detention in the poorhouse—any more than the detention of any child at any boarding-school, standing for the time in loco parentis to the child. Parental authority implies restraint, not imprisonment. And every school must necessarily exercise some measure of parental power of restraint over children committed to it. And when the state as *parens patriæ* is compelled by the misfortune of a child to assume for it parental duty, and to charge itself with its nurture, it is compelled also to assume parental authority over it. This authority must necessarily be delegated to those to whom the state delegates the nurture and education of the child. The state does not, indeed we might say could not, intrude this assumption of authority between parent and child stand-

ing in no need of it. It assumes it only upon the detention and necessity of the child arising from want or default of parents. And in exercising a wholesome parental restraint over the child, it can be properly said to imprison the child no more than the tenderest parent exercising like power of restraint over children."

⁹⁰ *State v. Brown*, 50 Minn. 353; s. c. 52 N. W. 935. Upon this point the court said:—"When committing an infant to the care and custody of the board of managers of the reform school, the magistrate is not appointing a guardian for him, nor does such officer or the board of managers assume any control over his estate if he has one. A proceeding of this nature would not stand in the way of, nor would it be prevented by, the appointment of a statutory or testamentary guardian,—the only guardian coming within the purview of the constitution. It is no more a violation of the fundamental law for the magistrate to commit a child to the guardianship of the managers of an institution of this kind than it would be for a competent court to appoint a guardian ad litem for him. The language of the constitution does not apply where the state acts as the common guardian of the community, exercising its power whenever the welfare of an infant demands it, or where the state acts in the legitimate exercise of its police power. Therefore, the lawmakers were not prohibited from conferring jurisdiction in such cases upon any of the judicial officers of the state."

lation in violation of that portion of the fundamental law of the state which provides that the right of trial by jury shall remain inviolate.⁹¹

§ 1047. Liability of counties for the care of prisoners.—In Kansas the duty of keeping the county jail and supplying the prisoners committed thereto with board and lodging devolves upon the sheriff of the county by statute, and to him alone is a county liable for such supplies.⁹² But a statute of that state provides that the board of county commissioners may allow a moderate compensation for medical services, fuel, bedding and menial attendance furnished for prisoners committed to the county jail, which shall be paid out of the county treasury. The supreme court of Kansas has held the allowance of claims for such services, supplies and attendance to be discretionary with the board, and that the liability of a county for them could only arise upon an order made by the county commissioners when duly convened and acting as a board.⁹³ The liability of a county for expenses connected with prisoners in its jail depends entirely upon the statute, it not being liable unless the statute has created the liability.⁹⁴

⁹¹ *State v. Brown*, 50 Minn. 353; s. c. 52 N. W. 935; *City of Mankato v. Arnold*, 36 Minn. 62; s. c. 30 N. W. 305. As to whether the natural or legal guardian should be a party to the proceeding, the court said:—"The statute does not seem to contemplate it, and it is possible that it is not necessary." See *Milwaukee Industrial School v. Supervisors &c.*, 40 Wis. 328; *Fitzgerald v. Commonwealth*, 5 Allen (Mass.) 509.

⁹² *Commissioners &c. v. Tomlinson*, 9 Kan. 167.

⁹³ *Hendricks v. Board &c.*, 35 Kan. 483; s. c. 11 Pac. 450, which held a demurrer to a petition to have been properly sustained which alleged that a prisoner was placed by the sheriff in charge of the plaintiff, with the knowledge and consent of the county commissioners, and that the supplies were furnished and the services rendered by the plaintiff at the request of the sheriff, and with the knowledge and consent and approval of the county commissioners, as not stating a

cause of action. A county can not be held liable because the services and supplies were furnished upon the request of the sheriff; nor by reason of the individual consent or action of the members of the county board. See *Roberts v. Commissioners*, 10 Kan. 29.

⁹⁴ *Kelly v. Multnomah Co.*, 18 Or. 356; s. c. 22 Pac. 1110, in which the county was held to be liable for the cost of blankets furnished by the keeper to prisoners confined under criminal process in its jail, as the statutes made it the duty of the keeper to furnish and keep clean the necessary bedding and clothing for all such prisoners, and in another statute the charges and expenses for safe-keeping and maintaining such prisoners were payable out of the treasury of the county. The supreme court held also that where those persons whose duty it is to execute a law have uniformly given it a particular construction and that construction has been acquiesced in and acted upon for a

§ 1048. **Care of prisoners continued.**—Medical services to prisoners in jails are provided for by an Indiana statute which constitutes certain officers a board of health *ex officio*, to be completed by the election of a physician as secretary, who, in the case of a county board of health, shall render such medical services as may be required by persons confined in the county jail. Though there may be a regularly elected secretary of a county board of health in accordance with this statute, still, where he is at such a distance from the jail that he could not be reached in time to save the life of a prisoner suddenly taken sick, the jailer may employ a physician at the expense of the county.⁹⁵ It has been held in New York that there was no power in the county of Queens to contract with the authorities of Kings county for the support of prisoners convicted in the former of crimes punishable in a state prison.⁹⁶ Where an inquest is necessary to ascertain the cause of a death, the coroner has authority to call in a physician to make an autopsy, and the county is liable for reasonable compensation therefor, under the Arkansas statute which provides that a coroner shall, when holding an inquest, inquire into the cause of death, and shall use "all proper means" and "all proper witnesses" to ascertain the truth.⁹⁷

§ 1049. **Hiring of convicts.**—Under the laws of Arkansas empowering county courts to hire out for labor county convicts in certain cases, it has been held that exercising the power to hire them to a contractor for another county's convicts, upon the representation of the hirer that he was such a contractor, and the county judge reciting in his order hiring the convict to him that he was, was a determination of that fact—a judgment of the county court which could not be collaterally

long time, it is a contemporary construction which always commands the attention of the courts and will be followed unless clearly and manifestly wrong.

⁹⁵ *Lamar v. Board &c.*, 4 Ind. App. 191; s. c. 30 N. E. 912.

⁹⁶ *Board &c. v. Board &c.*, 46 N. Y. St. 376; s. c. 18 N. Y. S. 883, rendering a judgment for defendant on the case submitted. The court said:—"The contract must be held to be within the spirit of the law, which is to authorize Queens county to board its jail prisoners, who are sentenced to detention over sixty

days, to be detained in a penitentiary where occupation will be furnished to the prisoner, and incidentally to compel the prisoner to earn his own support."

⁹⁷ *St. Francis Co. v. Cummings*, 55 Ark. 419; s. c. 18 S. W. 461. The court said:—"As a rule the counties are responsible for the expenses of the administration of the criminal laws. Both justice and policy demand an adherence to the rule in this case." See also, *Allegheny Co. v. Watt*, 3 Pa. St. 462; *Northampton Co. v. Innes*, 26 Pa. St. 156.

attacked.⁹⁸ The Arkansas statutes, one of which authorizes the county court to contract for the safe keeping of persons committed to the county jail, and the other providing that "in case the county court is unable to make a contract with any person in the county, the court may contract for the work of its prisoners with the contractor of any other county," have been construed to intend that the contractor should keep his prisoners in the county in which they were convicted, except when the state of affairs is such as is described in the last named statute. In that case a contractor for another county can work them where he has the others employed.⁹⁹ Under the Tennessee statute which authorizes branch prisons, and permits the lessees of the penitentiary, with certain exceptions, to work the convicts at any place in Tennessee, subject to the rules prescribed by the act, a convict who is regularly sentenced to imprisonment and labor in the penitentiary, and who is worked in a coal mine by a lessee, and confined in a branch prison under the control of an assistant or deputy warden, as provided by the act, is not illegally confined and can not be discharged on habeas corpus.¹⁰⁰ A county would be entitled to recover for work and labor done by its convicts, let under an agreement with a private person, although there is no bond with sureties taken of the lessee, and the contract did not set out the kind of labor which they were to perform, all of which are statutory requirements in the leasing of the convicts.¹⁰¹

§ 1050. Liability for personal injuries to prisoners.—A municipal corporation is not liable for personal injuries sustained by one prisoner at the hands of another confined in the same cell or room of the city prison, notwithstanding the police officer who arrested the injured man and put him in prison may have been guilty of wrong or negli-

⁹⁸ *In re Burrows*, 55 Ark. 275; s. c. sub nom. *State v. Cross*, 18 S. W. 170. See also, *Ex parte Jackson*, 45 Ark. 158; *Ex parte Brandon*, 49 Ark. 143; s. c. 4 S. W. 452; *Ex parte Barnett*, 51 Ark. 215; s. c. 10 S. W. 492.

⁹⁹ *In re Burrows*, 55 Ark. 275; s. c. sub nom. *State v. Cross*, 18 S. W. 170, in which a contract with one who was not a contractor for another county was held to be void.

¹⁰⁰ *State v. Jack*, 90 Tenn. 614; s. c. 18 S. W. 257.

¹⁰¹ *Trammell v. Lee*, 94 Ala. 194;

s. c. 10 So. 213, the court holding that all these provisions of the statute were intended only for the security of the county and the welfare of the convicts and their omission could not in anywise affect the hirer. Further, it was held that where the hirer had bound himself to pay for the full terms of their sentences, less the services lost to him by death, and there was no provision for abatement in case of escape, testimony that some of the convicts did escape was properly excluded in this action for their hire.

gence in confining him with an intoxicated fellow-prisoner, who was on that account violent and dangerous.¹⁰²

§ 1051. The same subject continued.—In the absence of a statute imposing such liability a county is not liable in damages for the failure of the board of commissioners to keep the county jail in a pure and inhabitable condition, though the board may be required by statute to build and keep the jail in repair.¹⁰³ “The ground upon which

¹⁰² *Wilson v. Mayor &c.*, 88 Ga. 455; s. c. 14 S. E. 710. See also, *Cook v. Mayor &c.*, 54 Ga. 468; *Harris v. City of Atlanta*, 62 Ga. 290; *McElroy v. City Council &c.*, 65 Ga. 387; *Attaway v. Mayor &c.*, 68 Ga. 740; 2 *Dillon Munic. Corp.* (4th ed.), § 975; *Cooley Torts*, *620 et seq.; *Shear. & Redf. Neg.* (4th ed.), §§ 253, 260; 15 *Am. & Eng. Encyc. of Law*, 1141 et seq. In *Davis v. Knoxville*, 90 Tenn. 599; s. c. 18 S. W. 254, the rule as to liability for torts on the part of municipal corporations was given as follows:—“When such corporation exists by virtue of a charter, general or special, limiting its powers and prescribing its duties, it implicitly contracts to carry out the prescribed purposes of its creation; and if its agents or servants are guilty of negligence while in the discharge of corporate duties which are for the peculiar benefit of the corporation in its local or special interest, an action will lie against the municipality, the maxim of respondeat superior applying: *Mayor &c. v. Lasser*, 9 *Humph.* (Tenn.) 757; *Mayor &c. v. Brown*, 9 *Heisk.* (Tenn.) 6; *Mayor &c. v. Kimbrough*, 12 *Heisk.* (Tenn.) 133. But in so far as purely governmental powers are concerned and in respect to the general administration of the general law of the state, and in respect to all duties which are essentially public, and not local and special, they are deemed to be agencies of the sovereign power and not subject to be sued for the torts of their

agents or officers, unless by statute an action is given.” See *Pesterfield v. Vickers*, 3 *Coldw.* (Tenn.) 205; *Pollock v. Louisville*, 13 *Bush* (Ky.) 221; s. c. 26 *Am. R.* 260; *Trammell v. Town of Russellville*, 34 *Ark.* 105; *Dargan v. Mayor &c.*, 31 *Ala.* 469; *City of Richmond v. Long*, 17 *Gratt.* (Va.) 375. In *Davis v. Knoxville*, supra, the court held the city not liable for an assault upon one prisoner by a fellow prisoner in the city jail, and thus spoke of its duty in respect to jails:—“The preservation of order, the maintenance of sobriety, the arrest and detention of violators of the general law of the state, is not for the local and private benefit of the corporation. It draws no private emolument from the enforcement of an ordinance carrying out the general policy of the state, and in the exercise of the powers incident to all these matters it is but an agency of the state and its officers; in effect, officers of the state. Its discretion as to the character of its jail can not be controlled by judgments holding it liable for negligence, if in the opinion of a jury it is not sufficiently commodious or properly arranged.”

¹⁰³ *Morris v. Board &c.*, 131 *Ind.* 285; s. c. 31 *N. E.* 77, an action for damages on account of impairment of health of one confined in the jail by reason of its bad condition. The court said:—“Counties and townships are created to give effect to and enable the citizens to exercise the right of local self-government: *State v. Denny*, 118 *Ind.* 449; s. c.

it is held that quasi-corporations, such as counties, towns, school districts and the like, are not liable for damages in actions of this character, is that they are involuntary territorial and political divisions of the state, created for governmental purposes, and that they give no assent to their creation, whereas municipal corporations proper are either specially chartered, or voluntarily organized under general acts of the legislature."¹⁰⁴

21 N. E. 274. Such subdivisions are instrumentalities of government, and execute authority delegated by the state, and act for the state. As the state is not liable for the acts or omissions of its officers, neither should a political subdivision of the state be liable for the acts or omissions of its officers as relating to political powers. Prisons are constructed and maintained as one of the instruments of and as a means for the purpose of carrying out the police power of the state, and the duty of constructing and maintaining them is imposed upon the counties by the state." The court in this case followed *White v. Board &c.*, 129 Ind. 396; s. c. 28 N. E. 846, in which case the court said:—"In caring for prisons a county exercises part of this great power by virtue of its delegation by the legislature." See also, *Board &c. v. Boswell*, 4 Ind. App. 133; s. c. 30 N. E. 534, holding the same doctrine; *Summers v. Board &c.*, 103 Ind. 262; s. c. 2 N. E. 725, where it was held that counties are instrumentalities of government, and are not liable for injuries caused by the negligence of the commissioner in the selection of an unskilful physician for the poor; *Abbett v. Board &c.*, 114 Ind. 61; s. c. 16 N. E. 127; *Park v. Board &c.*, 3 Ind. App. 536; s. c. 30 N. E. 147; *Union Civil Tp. v. Berryman*, 3 Ind. App. 344; s. c. 28 N. E. 774; *Town of Laurel v. Blue*, 1 Ind. App. 128; s. c. 27 N. E. 301;

Cooley Const. Lim. 256, 257; 1 *Shear. & R. Neg.*, § 253; *Calwell v. City of Boone*, 51 Iowa 687; s. c. 2 N. W. 614; *President &c. v. Schroeder*, 58 Ill. 353; *Hollenbeck v. Winnebago Co.*, 95 Ill. 148; *Pfefferle v. Board &c.*, 39 Kan. 432; s. c. 18 Pac. 506; *Buttrick v. City of Lowell*, 1 Allen (Mass.) 172; *Watkins v. County Court*, 30 W. Va. 657; s. c. 5 S. E. 654; *Maxmilian v. Mayor &c.*, 62 N. Y. 160; *Manuel v. Board &c.*, 98 N. C. 9; s. c. 3 S. E. 829. In *Lindley v. Polk Co.*, 84 Iowa 308; s. c. 50 N. W. 975, it was held that a person confined in the jail of the county could not recover from the county for injuries to his health by failure of the board of supervisors to keep the jail in a healthy condition.

¹⁰⁴ *Kincaid v. Hardin Co.*, 53 Iowa 430; s. c. 5 N. W. 589. See as to same principle, *Board &c. v. Mighels*, 7 Ohio St. 109; *Eastman v. Meredith*, 36 N. H. 284; *Bigelow v. Inhabitants &c.*, 14 Gray (Mass.) 541 (where the court said:—"It [this rule] is applied in the case of towns, only to the neglect of or omission of a town to perform those duties which are imposed upon all towns without their corporate assent, and exclusively for public purposes, and not to the neglect of those obligations which a town incurs when a special duty is imposed upon it with its consent, expressed or implied, or a special authority is conferred on it at its request"); *Green v. Harrison Co.*, 61 Iowa 311; s. c. 16 N. W. 136.

CHAPTER XXV.

PUBLIC HEALTH—BOARDS OF HEALTH AND QUARANTINE.¹

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SECTION

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¹ See § 1675, post.

§ 1052. Municipal regulations for the promotion of public health.—One of the most important functions of those controlling the government of our various municipal corporations is in the matter of assuring good health to the people composing these communities. There is a power expressly, or by implication, conferred upon all municipal governing boards, as a part of the police power of the states, delegated to them by the legislature, to pass ordinances and to enforce them, which will guarantee to the public healthful food, by regulations for inspection of food and preventing the sale of articles improper to be eaten to the public, and, by the supervision of the vocations of individuals and their mode of conducting their business within the limits of the corporation, protect the inhabitants against all noxious odors which tend to taint and render impure the air which they breathe. The only restriction upon the boards controlling in such legislation is that the ordinances and regulations must be consistent with the constitution and laws of the state, and reasonable in so far as they affect the general public or individual rights.^{1a}

§ 1053. Power of the state legislature.—In affirming the validity of a municipal ordinance enacted under a general power in a charter to make such ordinances as might be deemed necessary and proper for the protection of the health of the citizens, the supreme court of Connecticut stated the rule broadly as follows: "Of absolute necessity this power inheres in every organized community; otherwise there would be only organized suicide. It takes unwritten precedence of all provisions for the protection of rights of property, and includes the right to require as much of the services or property of each as may be necessary to the preservation of the lives of all, without provision for payment therefor. The people of this state have not by the constitution parted with any portion of this power which was in them, nor have they put any limitation upon themselves as to the exercise of it. It is now as fully in the legislature as at the beginning it was in the people."²

^{1a} See following chapter, on Suppression of Nuisances, and chapter on Express Powers, ante, vol. 1; also § 1675, post.

² State v. Wordin, 56 Conn. 216; s. c. 14 Atl. 801. Applying this doctrine, the court there held that an ordinance is constitutional which required a physician, upon his discov-

ering that a patient of his is suffering from a contagious disease, to report the same forthwith to any official of the corporation named, with full particulars, under penalty. See also, Robinson v. Hamilton. 60 Iowa 134; s. c. 14 N. W. 202; Parker and Worthington on Public Health and Safety, § 43.

§ 1054. Declaring nuisances is not an exercise of judicial functions.—It was urged in a California case that the legislature could not pass nor authorize a municipal board to pass an ordinance—one prohibiting the establishing or maintaining slaughter-houses, etc., within the limits of the corporation—for the reason that the enactment involved an exercise of judicial power. The supreme court held that the order in question did no more than lay down a rule for the future guidance of all men, irrespective of calling, which was within the power of the legislative department. It was not an exercise of judicial power. Further, the fact that the legislature in the enabling statute empowered the municipal board to determine what should be necessary “for the preservation of the public health and the prevention of contagious diseases,” etc., and the fact that the board acting within the scope of its authority determined the characteristics and injurious tendencies of the several acts forbidden in the order, did not stamp a judicial character upon either the statute or order.³

§ 1055. Extent of authority illustrated.—Under the extensive police powers of the state the legislature may limit the area of soil to be cultivated, when in its judgment the public health so demands, and may delegate this same power to a municipality to be exercised within its corporate limits.⁴ The governing authority of a municipal corporation authorized by statute “to remove or confine persons having infectious or pestilential diseases” may rent buildings in which to confine such persons. The principle upon which this rule is based is that although such a corporation can only exercise such powers as are conferred upon it, either expressly or by necessary implication, by the law under which it is incorporated, yet where the power to do an act is conferred upon the corporation and the law is silent as to the manner of doing such act, the corporate authorities are necessarily clothed with a reasonable discretion to determine the manner in which it shall be done.⁵

³ *Ex parte Shrader*, 33 Cal. 279. See also, *Ex parte Heilbron*, 65 Cal. 609; s. c. 4 Pac. 648; and as to the constitutionality of such ordinances, *Ex parte Andrews*, 18 Cal. 678; *Coates v. Mayor &c.*, 7 Cowen (N. Y.) 585; *Vanderbilt v. Adams*, 7 Cowen (N. Y.) 349; *Van Wormer v. Mayor &c.*, 15 Wend. (N. Y.) 263; *Cooper v. Schultz*, 32 How. Pr. (N. Y.) 107; *Ex parte Smith*, 38 Cal. 702; *Johnson v. Simonton*, 43 Cal. 242.

⁴ *Town Council &c. v. Pressley*, 33 S. C. 56; s. c. 11 S. E. 545.

⁵ *City of Anderson v. O'Conner*, 98 Ind. 168. See also, *Intendant of Livingston v. Pippin*, 31 Ala. 542; *Mayor &c. v. Cabot*, 28 Ga. 50; *Harrison v. Mayor &c.*, 1 Gill (Md.) 264. In *City of Hannibal v. Richards*, 82 Mo. 330, it was held that the city could not recover the cost of filling up the lots of defendant, which the council had ordered him to fill up and he had failed to do so.

§ 1056. **The same subject continued.**—The extraordinary powers of a board of health in exercising authority to examine into nuisances and sources of filth and cause the same to be removed were vigorously expounded by the supreme court of Connecticut. It was held that the members of a board of health were not liable for an error of judgment in causing the removal as a nuisance of property which they believed to be the cause of the prevalence of a malignant disease; that there was no redress in such a case for a mere error of judgment. In answer to the contention that the statute was unconstitutional the court said: "The property was not taken for public use within the meaning of the constitution. It was destroyed for the protection of the public health." Again: "If life may be protected by destroying life when apparently necessary, but not so in fact, may not life be protected by destroying property when apparently necessary, though afterwards discovered not so in fact? * * * The justification of the board of health in the destruction of the property must come in *seemingly* extreme cases where there is a reasonable ground to believe that immediate action is necessary for the preservation of the life and health of the inhabitants, and where there is reasonable ground to believe the supposed nuisance to be one in fact."⁶

§ 1057. **Regulation of occupations.**—There is in the various state constitutions or statutes authority for the governing bodies of municipal corporations to regulate vocations of their citizens in the interest of good morals, good health and public safety. And the courts have usually upheld ordinances, orders or resolutions of such bodies, treating them in such instances as prohibiting the conduct of the business in a manner beyond the limitations imposed in the municipal legislative acts.⁷

The ground upon which the decision rested was that the city having by its action created the nuisance, it could not compel the owner to abate it. See also, *Weeks v. City of Milwaukee*, 10 Wis. 242, 269.

⁶ *Raymond v. Fish*, 51 Conn. 80. But the court, approving *City of Salem v. Eastern R. Co.*, 98 Mass. 431, expressly refrained from deciding how far the board might go in this direction, where the destruction of property may not seem to require such summary action. See the comments on this case in *Parker and Worthington on Public Health and*

Safety, § 173, n. 1, and the criticism of *Salem v. Eastern R. Co.*, *supra*, in *Miller v. Horton*, 152 Mass. 545; s. c. 26 N. E. 100.

⁷ In *In re Linehan*, 72 Cal. 114; s. c. 13 Pac. 170, an ordinance of a city prohibiting the keeping of more than two cows within certain portions of the city limits was treated by the court as one prohibiting the herding of cattle, and was held to be valid and within the power of the council, under the state constitutional provision that "any county, city, town or township may make and enforce, within its limits, all

§ 1058. **Powers conferred on boards of health not exclusive.**—The establishment of general and local boards of health by the legislature is not to be regarded as detracting from the general powers of municipal governments, unless the legislative intent clearly appears. Though the health laws may bring within the cognizance of their constituted boards offenses prohibited by town ordinances because they injure the public health, yet they are not necessarily antagonistic to the exercise by the municipality of power to regulate and repress noxious and offensive creations, within the statute.⁸ A municipal corporation may determine what, in its nature and use, it deems a nuisance, and may direct its removal or discontinuance under the penalties which it is, by legislative authority, authorized to impose or inflict.⁹

such local, police, sanitary and other regulations as are not in conflict with general laws," and a statute authorizing the board of supervisors of the city to regulate or exclude occupations detrimental to good morals or contrary to order or dangerous to the public safety. In *Ex parte Shrader*, 33 Cal. 279, an order of the board of supervisors of the same city prohibiting the establishing or maintaining slaughter-houses, herding swine, keeping or curing hides, slaughtering cattle, pursuing, maintaining or carrying on any other business or occupation offensive to the senses or prejudicial to the public health and comfort, in any part of the corporation, was held to be within their power and a proper exercise of it. In *Ex parte Casinello*, 62 Cal. 538, an ordinance of the same board prohibiting the throwing into or depositing upon the public streets, etc., except in such places as might be designated, any glass, broken ware, dirt, rubbish, garbage or filth, was held to be valid. *Morrison, C. J.*, said:—"The objections that the order is oppressive, unjust and unreasonable are, in my opinion, not well taken. That dirt, rubbish, garbage and filth are in their nature nuisances is too plain to admit of controversy; and

that glass and broken ware can be very easily converted into nuisances if thrown about promiscuously is equally plain." Again:—"The regulation in this case, instead of being arbitrary, unreasonable or unjust, was a wise and salutary one, calculated to promote the welfare and best interests of the city, and was in its nature and purpose a salutary police regulation, designed to protect the safety and health of the inhabitants of the city."

⁸ *State v. Lowery*, 49 N. J. L. 391; s. c. 8 Atl. 513, in which the court held that the proper control of the time and mode of cleaning sinks, cesspools, etc., was not only a legitimate subject of municipal concern, but was imperatively demanded by a just regard for the comfort and health of the citizens.

⁹ *Mayor &c. v. Gerspach*, 33 La. An. 1011, sustaining an ordinance requiring the filling up of certain vaults, sinks or privies. See also, *Kennedy v. Phelps*, 10 La. An. 227, where the court said:—"The power to abate nuisances is a portion of police authority, necessarily vested in the corporations of all populous towns." In *Hart v. Mayor &c.*, 3 Paige (N. Y.) 213, 218, the chancellor said:—"The question of nuisance or no nuisance, however, is al-

§ 1059. **Power to control manufactures.**—The preservation of health is one of the paramount objects of government which belongs to the police power, subject to the proper exercise of which either by the state legislature, or by public corporations to which the legislature may delegate it, every citizen holds his property.¹⁰ All rights are held subject to the police power of the state; and if the public safety or the public morals require the discontinuance of any manufacture or traffic, the legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience. And as the police power of a state extends to the protection of the lives, health and property of her citizens, the maintenance of good order, and the preservation of the public morals, the legislature can not by any contract divest itself of the power to provide for these objects.¹¹

§ 1060. **Limitations of police power over occupations.**—It was said by Judge Sawyer, in a case in the United States circuit court: "To make an occupation indispensable to the health and comfort of civilized man, and the use of the property necessary to carry it on, a nuisance, by a mere arbitrary declaration in a city ordinance, and suppress it as such, is simply to confiscate the property and deprive its owner of it without due process of law. It also abridges the liberty of the owner to select his own occupation and his own methods in the pursuit of happiness, and thereby prevents him from enjoying his rights, privileges and immunities, and deprives him of equal protection of the laws secured to every person by the constitution of the United States."¹² In another case the same judge said: "The police

ways a question of fact, in relation to which the opinions of individuals will necessarily differ. It therefore becomes necessary, in all populous towns, to regulate such matters by police ordinances; and public policy requires that the corporations of the place should not be disturbed in the exercise of their powers, unless they have clearly transcended their authority."

¹⁰ *Wilson v. Board &c.*, 133 Ill. 443; s. c. 27 N. E. 203; *Dillon Munic. Corp.*, §§ 93, 96; *Cooley on Taxation* (1st ed.), 101.

¹¹ *Beer Co. v. Massachusetts*, 97 U. S. 25. The court said:—"They [these objects] belong emphatically to that class of objects which de-

mand the application of the maxim, *Salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." See also, *Boyd v. Alabama*, 94 U. S. 645.

¹² In re *Sam Kee*, 31 Fed. 680. An ordinance of a city declaring it a nuisance, and making it an offense to keep a laundry, wherein clothes are cleaned for hire, within the limits of the larger part of a city, without regard to the character of the structure or the appliances used for the purpose, or the manner in which the occupation is carried on, was

power only extends to the regulation of the necessary pursuits of man, so that they shall not become, in their mode of exercise, unhealthy, noisome, dangerous, or otherwise destructive or injurious to the common interests of the community. It does not extend to the destruction or driving to inconvenient and unprofitable localities of necessary or useful occupations carried on in such manner as to be harmless."¹³

§ 1061. Establishment of sanitary districts.—In some instances it has been the policy of the legislature to organize different political divisions into a sanitary district,—as, for instance, in New York, the metropolitan district was organized by legislation from the counties of New York, Kings, Westchester and Richmond, with jurisdiction over the four counties. It was urged that this statute was in violation of the provision of the state constitution that the election of county, city, town and village officers should be by the electors therein instead of being appointed. The court disposed of this objection by holding that the legislature had authority to create new civil divisions of the states, embracing more than one county, for purposes of temporary or permanent civil government, not impairing, however, the county organization, and that officers over such newly-created districts, could legally be appointed by the governor and senate.¹⁴ To the objection that it violated the constitutional provision that "the trial by jury in all cases in which it has heretofore been used shall remain inviolate," the court said that in matters relating to public health, where the public interests require action to be taken, juries had not been called in.¹⁵ Nor do proceedings by removal of matter "dangerous to the public health," and regulations "for the preservation of public health," take away any man's property. The power of boards of health to be exercised upon these subjects is administrative rather than judicial in its character.¹⁶

§ 1062. The same subject continued.—The legislature may create a corporation including both city and county, and invest it with

held to be unconstitutional and void; following *Re Tie Loy*, 26 Fed. 611; *Yick Wo v. Hopkins*, 118 U. S. 356; s. c. 6 S. Ct. 1064.

¹³ *Re Tie Loy*, 26 Fed. 611.

¹⁴ *Metropolitan Board &c. v. Heister*, 37 N. Y. 661. See also, *People v. Draper*, 15 N. Y. 532; *People v. Raymond*, 37 N. Y. 428; *People v. Metropolitan Police*, 19 N. Y. 188; s. c. 26 N. Y. 316; *People v. Pinck-*

ney, 32 N. Y. 377; *Metropolitan Board &c. v. Barrie*, 34 N. Y. 657.

¹⁵ *Metropolitan Board &c. v. Heister*, 37 N. Y. 661.

¹⁶ *Metropolitan Board &c. v. Heister*, 37 N. Y. 661. See also, *Van Wormer v. Mayor &c.*, 15 Wend. (N. Y.) 262; *Darlington v. Mayor &c.*, 31 N. Y. 164; *People v. Kerr*, 27 N. Y. 188.

power to secure the public health by means of sewers and channels or drains. It was held in Illinois that there are no constitutional restrictions as to the boundary lines of public or municipal corporations within which new corporations may be formed, except as to counties. And it is unnecessary that the corporate authorities of a new corporation should be also the corporate authorities of some specific pre-existing corporation.¹⁷

§ 1063. Reasonableness of ordinances.—The question of the reasonableness of an ordinance is a question of law for the court, and in determining it the court should not substitute its discretion for that of the municipal legislature. And the power of the court should not be hastily or incautiously exercised.¹⁸

¹⁷ *Wilson v. Board &c.*, 133 Ill. 443; s. c. 27 N. E. 203, in which the creation of such a district and vesting it with powers of taxation for sanitary purposes, co-extensive with the territory to be controlled, was sustained, the court holding that the propriety of its creation belonged alone to the general assembly and not to the courts. See also, *Shaw v. Dennis*, 5 Gilm. (Ill.) 405; *Dennis v. Maynard*, 15 Ill. 477; *People v. Salomon*, 51 Ill. 37; *Dunham v. People*, 96 Ill. 331; *Greeley v. People*, 60 Ill. 19; *People v. Harper*, 91 Ill. 357; *Butz v. Kerr*, 123 Ill. 659; s. c. 14 N. E. 671; *Owners of Lands v. People*, 113 Ill. 296. As to shifting the burdens of government, see *People &c. v. Power*, 25 Ill. 169, 187; *Board &c. v. City of Springfield*, 63 Ill. 66; *Board &c. v. City of Lincoln*, 81 Ill. 156; *Seagraves v. City of Alton*, 13 Ill. 366; *Town of Fox v. Town of Kendall*, 97 Ill. 72; *Board &c. v. People*, 110 Ill. 511. As to the power of the legislature to create, annul and change municipal corporations, see *People v. Wren*, 4 Scam. (Ill.) 269; *Rock Island Co. v. Sage*, 88 Ill. 582; *Richland Co. v. Lawrence Co.*, 12 Ill. 1; *Trustees &c. v. Tatman*, 13 Ill. 27; *Harris v. Board &c.*, 105 Ill. 445; *Wetherell v. Devine*, 116 Ill. 631; s. c. 6 N. E. 24. As to the propriety

of such organization of corporations being in the sole discretion and judgment of the legislature, see *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 333; *Thompson v. Treasurer of Wood Co.*, 11 Ohio St. 678; *Anderson v. Kern's Drain Co.*, 14 Ind. 199; *O'Reilly v. Kankakee Drain Co.*, 32 Ind. 169; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Woodruff v. Fisher*, 17 Barb. (N. Y.) 224; *Hartwell v. Armstrong*, 19 Barb. (N. Y.) 166; *New Orleans Drainage Co. Cases*, 11 La. An. 338; *Dean v. Davis*, 51 Cal. 406; *Donnelly v. Decker*, 58 Wis. 461; s. c. 17 N. W. 389; *State v. Stewart*, 74 Wis. 620; s. c. 43 N. W. 947.

¹⁸ *Fisher v. Harrisburg*, 2 Grant Cas. (Pa.) 291; *Commonwealth v. Robertson*, 5 Cush. (Mass.) 438; *City of St. Louis v. Weber*, 44 Mo. 547. In *People v. Detroit White Lead Works*, 82 Mich. 471; s. c. 46 N. W. 735, the supreme court of Michigan sustained the conviction of a corporation and its officers under an ordinance of a city prohibiting owners or occupants of any grocery, etc., from allowing any nuisance to exist or remain on his or her premises, and any person or corporation operating, owning, etc., any premises whatever creating or maintaining any nuisance thereon, the proof be-

§ 1064. Regulating removal of garbage.—A by-law of a city prohibiting any person not duly licensed by its authorities from removing the house dirt and offal from the city is not in restraint of trade, but reasonable and valid, on the ground that in the interest of the public health a city is justified in providing for some general system for removing offensive substances from its streets by persons engaged by the city and responsible for the work at such times as they are directed to attend to it.¹⁹

ing that the operation of their business produced odors, smoke and soot of such a noxious character and to such an extent as to produce headache, nausea, vomiting and other pains and aches injurious to health, and to taint the food of the inhabitants. The court held that such ordinance was not invalid or unconstitutional because the general statutes of the state provided for the conviction and punishment of those guilty of the like offense. See also, *People v. Hanrahan*, 75 Mich. 611; s. c. 42 N. W. 1124; *Cooley Const. Lim.* 199; *State v. Ludwig*, 21 Minn. 202; *Shafer v. Mumma*, 17 Md. 331; *City of St. Louis v. Bentz*, 11 Mo. 61; *City of St. Louis v. Cafferata*, 24 Mo. 94; *Blatchley v. Moser*, 15 Wend. (N. Y.) 215; *Levy v. State*, 6 Ind. 281. In *Brophy v. Hyatt*, 10 Colo. 223; s. c. 15 Pac. 399, the supreme court of Colorado sustained the validity of an ordinance requiring the village marshal to take up, impound and sell stock found running at large within the corporate limits of a town as within the power to enact given to the town authorities by the statute "to declare what shall be a nuisance and to abate the same, and to impose fines upon parties who may create, continue or suffer a nuisance to exist," and another giving them power to "authorize the impounding and summary sale of horses, cattle, sheep, goats, swine and geese running at large within such city or town contrary to any ordinance thereof." The

court further held that the ordinance did not work a forfeiture of the impounded animals, and was not in conflict with the provision of the constitution that "no person shall be deprived of life, liberty or property without due process of law." See also, 1 *Dillon Munic. Corp.*, §§ 150, 348; *Gosselink v. Campbell*, 4 Iowa 296; *Roberts v. Ogle*, 30 Ill. 459; *Hart v. Mayor &c.*, 9 Wend. (N. Y.) 571; *Grover v. Huckins*, 26 Mich. 476; *Mayor &c. v. Lanham*, 67 Ga. 753; *Mayor &c. v. King*, 7 Lea (Tenn.) 441; *Campau v. Langley*, 39 Mich. 451; *Campbell v. Evans*, 45 N. Y. 356.

¹⁹ *Vandrice's Petition*, 6 Pick. (Mass.) 187. In *Commonwealth v. Patch*, 97 Mass. 221, an ordinance of the city prohibiting the keeping of swine within particular districts of the city was held to be valid and its enactment within the power of the city authorities, who by default in the appointment of a board of health were endowed with the power to make such regulations as they judged necessary for the public health and safety respecting public nuisances, sources of filth and causes of sickness. It was also urged that it was an unauthorized ordinance in that it applied only to a part of the city. The court held that that fact was not material if that part of the city was so situated as to require peculiar and exceptional provisions in the way of sanitary regulations to promote the comfort and health of the inhabitants. Upon the same

§ 1065. Regulating burials and burial permits.—Power to regulate burial permits may properly be conferred on municipal corporations. Such a corporation authorized to make police regulations or to pass by-laws respecting the health, good government and welfare of the place is thereby authorized to regulate burials.²⁰ And in exercising its power to preserve the health of the community, the municipal authorities may make reasonable rules as to the places and mode in which interments may be made in the cemeteries provided for the burial of the dead.²¹ The supreme court of Massachusetts has held as to a provision in an ordinance of a town “that no person should, without leave in writing signed by a majority of the selectmen, bring into the town any dead body or convey through the streets any dead body so brought into the town; or bury any dead body so brought into the town on any part of his own premises or elsewhere within the town,” that the first clause was not authorized by the statute authorizing the establishment of a board of health, and authorizing the selectmen of the town to appoint and locate places for the burial of the dead, make police regulations for the same, and regulations for funerals and the interment of the dead, and was therefore void; and that the latter clause was not a regulation but a prohibition, and, if it were not a prohibition, yet, except when applied to a very populous part of the town, an unreasonable regulation, and therefore void.²²

principles as in the foregoing case, the supreme court of Iowa, in *State v. Holcomb*, 68 Iowa 107; s. c. 26 N. W. 33, held a regulation adopted by the board of health of a city and enforced by an ordinance providing a penalty for its violation, prohibiting hog pens, not void for unreasonableness. In *Boehm v. Mayor &c.*, 61 Md. 259, it was held that the city, under the power to preserve the health and safety of its inhabitants, had the undoubted right to pass ordinances creating boards of health, appointing health commissioners with other subordinate officers, regulating the removal of house dirt, night soil, refuse, offal and filth by persons licensed to perform such work, and providing for the prohibition, abatement and suppression of whatever was intrinsically and inevitably a nuisance. And the supreme court held that ordinances as to “privies,” placing them under the

supervision and control of the board of health with certain regulations, were a lawful and proper exercise of the power “to preserve the health of the city, and to prevent and remove nuisances.”

²⁰ *Graves v. City of Bloomington*, 17 Ill. App. 476.

²¹ *City of New Orleans v. Wardens &c.*, 11 La. An. 244; *Musgrove v. St. Louis Church*, 10 La. An. 431; *Kincaid's Appeal*, 66 Pa. St. 411; s. c. 5 Am. R. 377; *Bogert v. City of Indianapolis*, 13 Ind. 134; *City Council v. Baptist Church*, 4 Strobb. (S. C.) 306; *Coates v. Mayor &c.*, 7 Cowen (N. Y.) 585; *Brick Presby. Church v. Mayor &c.*, 5 Cowen (N. Y.) 538; *Commonwealth v. Fahey*, 5 Cush. (Mass.) 408; *Commonwealth v. Goodrich*, 13 Allen (Mass.) 546; *Ex parte Keeney*, 84 Cal. 304; s. c. 24 Pac. 34.

²² *Austin v. Murray*, 16 Pick. (Mass.) 121. It seems further that

§ 1066. Boards of health generally.—For the protection of the health of the public, we have now, in the most of our states, state boards of health, in addition to a national board of health; but we will treat simply of local boards of health and their powers. Boards of health in municipalities of all classes are provided for by statutes in our different states very generally. Where there may not be regular so-styled boards of health, the powers usually conferred upon such boards are by statute reposed in the governing authorities of such communities. The powers given to such boards are in their nature almost absolute, and in a sense arbitrary, because of necessity. They are intrusted with the care of the health of the community, and in guarding it must act with great promptitude in emergencies when delay is dangerous. These powers, in the matter of quarantine and regulations as to persons or places afflicted with contagious or infectious diseases, have so often been exercised, and the right to exercise the same questioned in courts of law, and adjudicated universally to be properly and constitutionally conferred upon the boards by the legislature, that they are now universally conceded.

§ 1067. Powers of town trustees in Iowa as boards of health.—Township trustees are by the code of Iowa constituted a board of health, and have charge of all cemeteries within the limits of their township dedicated to public use, and not controlled by trustees or other corporate bodies. Under the provision which empowers them to make regulations for the protection of the public health, and respecting nuisances, sources of filth and causes of sickness in their respective townships, they can lawfully sell lands purchased for cemetery purposes, but deemed by them unsuitable for the purpose, subject to a condition that they shall not be used for cemetery purposes, private or public.²³

this regulation was intended to interfere with the right of the Catholic bishop of a near-by city to have the dead of his church in the city interred in a cemetery provided for the purpose located in the town. The court said as to this:—"It is a clear and direct infringement of the right of property without any compensating advantages, and not a police regulation made in good faith for the preservation of health. It interdicts or in its operation necessarily intercepts the sacred use to which the Catholic burying ground

was appropriated and consecrated according to the form of the Catholic religion, and such an interference, we are constrained to say, is wholly unauthorized and most unreasonable:" *Austin v. Murray*, 16 Pick. (Mass.) 121.

²³ *Bushnel v. Whitlock*, 77 Iowa 285; s. c. 42 N. W. 186, in which an injunction to restrain such a sale was refused. In *Christy v. Whitmore*, 67 Iowa 60; s. c. 24 N. W. 593, involving the power of the same board of trustees as health boards, it was held that although they had

§ 1068. Power of boards of health as to employment of physicians.—A township board of health can not delegate its statutory power to employ a physician to a committee, none of whom are members of the board; nor can the members of a board, by their separate acts and declarations, ratify the employment of a physician by such a committee.²⁴

§ 1069. Owner of property condemned as a nuisance entitled to a hearing.—The police powers invested in municipal bodies by which the public health is secured or protected is not only respected but maintained by the courts, which as a matter of public policy will not interfere with or disturb municipal bodies in the legitimate exercise of this power. It is only when those bodies transcend their limits in that respect that the aid of the courts can be successfully invoked

purchased this land for a cemetery, they had discretion as to its use, and that they could not be compelled by mandamus to devote it to that purpose, if for any reason they deemed it unsuitable. In *Bushnel v. Whitlock*, supra, the court said:—"The law invests them [the trustees] with a discretion as to what is deleterious to public health, and the power to cause its abatement. . . . A reason for not using it [this land] as a cemetery in the minds of the trustees may be that as such it would impair the health of a community, and the purpose of the sale would be to effect a change in location; and if sold without the restriction the entire purpose of the sale would be defeated."

²⁴ *Young v. Blackhawk Co.*, 66 Iowa 460; s. c. 23 N. W. 923, where the court held that a physician's charges for attention to patients quarantined in a village suffering from small-pox could not be recovered from the township, although a committee under orders of the trustees of the township, who constituted the board of health, had engaged him to do so, and notwithstanding the trustees had individually approved his doing so. See also, *Herrington v. District Tp. of Liston*, 47 Iowa 11. A board

must act as a unit and in the manner prescribed by statute establishing such board. The determination of members individually is not the determination of the board: *McCullough v. Moss*, 5 Denio (N. Y.) 567, 573; *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 573; *Rice v. Plymouth Co.*, 43 Iowa 136; *Taylor v. District Tp. of Wayne*, 25 Iowa 447. In *Wilkinson v. Long Rapids Tp.*, 74 Mich. 63; s. c. 41 N. W. 861, however, it was held that a physician employed by the agent of a township board of health to treat scarlet fever patients under a resolution of the board authorizing such agent to quarantine the patients until the danger of communicating the disease had passed, and, during such time, to provide for their wants, was entitled to recover from the township the reasonable value of his services rendered under such employment. The court said:—"The board of health has power, and it is its duty, in such cases, if necessary, to employ a physician, and the township is primarily liable in the premises; another physician so employed is not bound to look anywhere else for payment;" citing *Rae v. Mayor &c.*, 51 Mich. 526; s. c. 16 N. W. 887; *Elliott v. Supervisors*, 58 Mich. 452; s. c. 25 N. W. 461.

to restrain them or to visit upon them the injurious consequences of their acts.²⁵ A person can not be deprived of the use of his property for the purpose of his lawful business by force of an adjudication of a board of health under its powers over the matter of nuisances, made without notice to him, and without giving him an opportunity to be heard in his defense.²⁶

§ 1070. **The same subject continued.**—A law authorizing boards of health to receive complaints concerning nuisances, to enter and examine premises on which nuisances are believed to exist, requiring them to furnish the owners or occupants a written statement of their conclusion, and empowering them to suppress nuisances, was held to be constitutional as against the contention that it violated the provision that no person should be deprived of life, liberty or property without due process of law.²⁷ “Had it declared,” said the court, “that such a proceeding could be maintained without notice to the parties most interested therein, then the question of its constitutionality would have fairly arisen and been easily decided.” The implication that notice was intended was deduced from the terms of the act.²⁸

²⁵ *Weil v. Ricord*, 24 N. J. Eq. 169, in which it was held that the board of health of a city in the legitimate exercise of its powers could not absolutely prohibit the carrying on of a lawful business not necessarily a nuisance, but which might be conducted without injury or danger to the public health and without public inconvenience; and that the board of health would be confined in their interference with the lawful business of any individual to such interruptions as might be reasonably necessary to enable them to abate any nuisance the individual might create in conducting it.

²⁶ *Weil v. Ricord*, 24 N. J. Eq. 169. See also, *City of Salem v. Eastern R. Co.*, 98 Mass. 431; *Belcher v. Far- rar*, 8 Allen (Mass.) 325, in which the supreme court of Massachusetts said:—“It would violate one of the fundamental principles of justice to deprive a party absolutely of the free use and enjoyment of his es-

tate under an allegation that the purpose to which it was appropriated, or the mode of its occupation, was injurious to the health and comfort of others and created a nuisance, without giving the owner an opportunity to appear and disprove the allegation and protect his property from the restraint to which it was proposed to subject it.”

²⁷ *People v. Board &c.*, 35 N. Y. St. 411; s. c. 12 N. Y. S. 561.

²⁸ *People v. Board &c.*, 35 N. Y. St. 411; s. c. 12 N. Y. S. 561. “No proper inquiry leading to a final order affecting private rights can be made without hearing both sides. . . . So firmly is this fundamental principle embedded in our judicature that it is not necessary even in acts in derogation of the common law, to prescribe in words that notice of the hearing to a party proceeded against shall be given. . . . While it is true that the board of health may, and in certain instances it should,

§ 1071. **Conclusiveness of determination by board of health.**—As to the powers of boards of health in dealing with nuisances, the supreme court of Massachusetts said: “The authority of the board of health in respect to particular nuisances stands upon a similar ground [that is, that of police regulations]. Their action is intended to be prompt and summary. They are clothed with extraordinary powers for the protection of the community from noxious influences affecting life and health, and it is important that their proceedings should be embarrassed and delayed as little as possible by the necessary observance of formalities. * * * There are many cases in which powers of determination and action of a quasi-judicial character are given to officers intrusted with duties of local or municipal administration by which not only the property but the lives of individuals may be affected. Of this class are the authority of fire-wardens or other officers to direct buildings to be demolished to prevent the spreading of fires; of magistrates to require aid and to use force, armed or otherwise, to suppress tumults; of the mayor or other officers to call out the military force for the like purposes. * * * We think these principles apply to the proceedings of a board of health. Their determination of questions of discretion and judgment in the discharge of their duties is undoubtedly in the nature of a judicial decision; and within the scope of powers conferred and for the purposes for which the determination is required to be made, it is conclusive. It is not to be impeached or set aside for error or mistake of judgment, nor to be reviewed in the light of new or additional facts. The officers or board to whom such determination is confided, and all those employed to carry it into effect or who may have occasion to act upon it, are protected by it, and may safely rely upon its validity for their defense. It is in this sense that such adjudications are often said to be conclusive against all the world; and they are so, so far as the res is concerned.”²⁹ The powers and duties of inspectors, as, for instance, of fish offered for sale in a city, and to destroy all such as are unwholesome and unsuitable to be eaten, are judicial in their nature; and such an official can not be held liable for the careless, improper or erroneous performance of such duties.³⁰

in the discharge of its public duties, make *ex parte* examinations, yet, before a final determination is made which will put the accused person to expense, or which will deprive him of his right to carry on his business, he should be apprised of the substance of the charge and thus en-

abled to defend himself before final judgment.”

²⁹ *City of Salem v. Eastern R. Co.*, 98 Mass. 431.

³⁰ *Fath v. Koeppel*, 72 Wis. 289; s. c. 39 N. W. 539. The supreme court of Wisconsin thought the principle of non-responsibility of judicial offi-

§ 1072. Power of board of health as a corporation—New Jersey decisions.—Boards of health are quasi-corporations, and as to their acts the same principles ordinarily applicable to municipal bodies apply. They must follow the mode prescribed by the legislature for doing any act. Where an ordinance of the board is required by statute they must pass an ordinance for it to be effective; but where the statute which confers upon it its powers does not expressly prescribe that there shall be an ordinance, these boards may act by a simple resolution.³¹ It was urged in another case that a board of health had exceeded its powers in granting a license for scavenging, and especially in designing a place where night-soil could be collected and deposited, admitting the authority of the board to prohibit and remove. To this the supreme court said: "The legislative language was employed with respect to quasi-corporations, which it was the object of the legislature to create and to endow with such powers as were essential and necessary to enable them to carry out the purposes of their creation. When the scope of their powers has been defined, and the general manner of their exercise indicated, it is a presumption of law that the corporation possesses likewise all those powers necessarily and fairly implied in or incidental to the powers expressly granted."³²

§ 1073. The same subject continued.—Under the power of a board of health under the statute of New Jersey and a sanitary code adopted by its authority by a board as to regulation and control of cesspools and privies, the board has power to designate how, when and where night-soil shall be collected, conveyed and deposited, provided the board does not, in the execution of the power thus reposed in it, create a nuisance of which a private prosecutor may complain.³³

cers in actions for damages should especially protect an inspector of meats and fruits acting in the interest of the public health. See also, *Raymond v. Fish*, 51 Conn. 80, applying it to a board of health; *Seaman v. Patten*, 2 Caines (N. Y.) 312, applying it to an inspector of provisions; *Downer v. Lent*, 6 Cal. 94, applying it to a board of pilot commissioners.

³¹ *State v. Board &c.*, 54 N. J. L. 325; s. c. 23 Atl. 949, in which, on certiorari to review the action of the board of health of a New Jersey city, the court held under the statutes of that state, an ordinance hav-

ing been passed to declare the general purpose of a board as to disposing of night soil, etc., and providing for a license to persons or corporations to do the business of scavenging, that the board was empowered to license any one by a resolution. See also, *Green v. City of Cape May*, 41 N. J. L. 45; *City of Burlington v. Dennison*, 42 N. J. L. 165; *Butler v. City of Passaic*, 44 N. J. L. 171.

³² *State v. Board &c.*, 54 N. J. L. 325; s. c. 23 Atl. 949; *Green v. City of Cape May*, 41 N. J. L. 45.

³³ *State v. Board &c.*, 54 N. J. L. 325; s. c. 23 Atl. 949. The court

And a court of law can not, upon a mere apprehension of individuals that the lawful action of the board of health in ordering a deposit of night-soil in a particular place will result injuriously to these individuals, annul an ordinance passed with that object in view. The principles which govern a court of law as to annulling the action of a board of health are the same as given in equitable actions to restrain and enjoin as a nuisance the doing of something by a municipal board which would amount to a nuisance per se.³⁴

§ 1074. Injunction upon application of board of health in New Jersey.—The board of health of a city, as a relator in the name of the state of New Jersey, may file a bill to enjoin as a nuisance and as hazardous to the public health the emptying of filth from drains of a building into a stream running through the city.³⁵

said:—"The power to remove any and all offensive matters from any and all public and private places would be nugatory if the board were powerless to provide a place or places to which, and to prescribe the conditions under which, a removal and deposit of such matters might be had. The power 'to regulate and control the method and manner of emptying cesspools and privies' has likewise inherent in it the power of both prohibiting and directing where the contents may be deposited. Indeed, the more closely the legislation is studied the more clearly will it appear that one of the most important duties committed to these boards is the regulation of cesspools and the control of the final disposition of their contents."

³⁴ *State v. Board &c.*, 54 N. J. L. 325; s. c. 23 Atl. 949. Garrison, J., said:—"To seek out and employ new methods of disposing of this common bane is not only within the authority of the municipal board whose action is now under review, but is their chief and most responsible duty; and where the record shows the adoption by such board of a method looking to this, and upon the recommendation of a committee

appointed to investigate its feasibility, and by resolution which provides for the revocation of the permit upon the occurrence of any element of nuisance, this court would not, in my opinion, be justified in declaring such action null and void at the suggestion of private prosecutors who apprehend that the process adopted will not prove to be successful." See also, *Newark Aqueduct Board v. City of Passaic*, 45 N. J. Eq. 393; s. c. 18 Atl. 106; *Newark Aqueduct Board v. City of Passaic*, 46 N. J. Eq. 552; s. c. 20 Atl. 54; 22 Atl. 55.

³⁵ *State v. Hutchinson*, 39 N. J. Eq. 218. In this case there was an objection that the board of health was organized with some irregularities, which was overruled. It was urged also by way of defense that the owners of the building—a hotel—were licensed by the city council by an ordinance to insert in their building and under ground the pipes and conduits with the privilege of conveying the filth complained of into the stream, and that this license amounted to a contract on the part of the city which could not be repealed. Upon this defense the chancellor ruled that there was no power in the legislature to au-

§ 1075. Abatement of nuisances under general authority to promote health.—The power to abate nuisances is usually expressly conferred upon legislative bodies, but if not, it would result from the general powers conferred upon municipal authorities to do all acts and by ordinance to enact such laws as will tend to preserve and protect the public health.³⁶ Such a power is necessarily vested in the municipal authorities of all populous towns.³⁷ While in the power of legislatures to invest municipal corporations with the power to determine what is a nuisance,³⁸ in the absence of such a power expressly conferred, the adjudications of the courts have been in the direction of restricting such power as far as it is derived from the general powers with reference to health regulations or as a police power. They can not arbitrarily declare a thing a nuisance or destroy what has been lawfully erected when not a nuisance per se, until it is judicially determined to be a nuisance.³⁹

§ 1076. Power to forbid the exercise of an offensive trade.—The supreme court of Massachusetts, in a well-considered case involving the power of a board of health of a city, have established satisfactory rules as to the power of such a board and its exercise of those powers under the Massachusetts statutes. The statute empowered the board of health of a city to forbid the exercise within the limits of the city, or in any particular locality thereof, of "any trade or employment which is a nuisance or hurtful to the inhabitants, or dangerous to the public health, or the exercise of which is attended by noisome and

thorize such a license; and that if there was, the power of the board of health to abate or enjoin, as they proposed to do here, through a bill in chancery, a nuisance, was complete whether it was licensed or unlicensed. The only question was, Is it hazardous to the public health? These rulings were affirmed on appeal by the court of errors and appeals of the state and the nuisance perpetually enjoined in *Hutchinson v. State*, 39 N. J. Eq. 569.

³⁶ *Baker v. City of Boston*, 12 Pick. (Mass.) 184; s. c. 22 Am. D. 421.

³⁷ *Kennedy v. Phelps*, 10 La. An. 227; *State v. Heidenhain*, 42 La. An. 483; s. c. 7 So. 621, in which it was held that an ordinance prohibiting smoking in the street cars under the

penalty of fine and imprisonment was in the power of the city council under the authority given in its charter to maintain the public health and to suppress all nuisances; *Louisville City R. Co. v. City of Louisville*, 8 Bush (Ky.) 415; *Heleen v. Noe*, 3 Ired. L. (N. C.) 493.

³⁸ *City of St. Louis v. Stern*, 3 Mo. App. 48.

³⁹ *State v. Mayor &c.*, 29 N. J. L. 170; *Clark v. Mayor &c.*, 13 Barb. (N. Y.) 32; *City of Chicago v. Lafflin*, 49 Ill. 172; *Babcock v. City of Buffalo*, 56 N. Y. 268; *Wreford v. People*, 14 Mich. 41; *Pieri v. Mayor &c.*, 42 Miss. 493; *Ward v. City of Little Rock*, 41 Ark. 526; s. c. 8 Am. & Eng. Corp. Cas. 397. Cf. *City Council &c. v. Hutchinson*, 13 Ala. 573.

injurious odors, or is otherwise injurious to their estates." An order of the board of health forbidding "the exercise of the trade or employment of preparing tripe, in manufacturing neat's-foot oil, tallow and glue stock," etc., was sustained as a valid exercise of its power under the statute. The court said: "But [the] order * * * is not in the nature of an adjudication of a particular case, but of a general regulation of the trade or employment. * * * It is not to be construed with technical strictness, but with the same liberality as all votes and proceedings of municipal bodies or officers who are not presumed to be versed in forms of law; and every reasonable presumption is to be made in its favor."⁴⁰ It need not state in direct terms that the trade which it prohibits is a nuisance. It is sufficient if the order clearly shows that in the opinion of the board of health the exercise of such trade will be hurtful to the inhabitants or injurious to the public health, or be attended by noisome and injurious odors." It was held that in a suit in equity brought by the board of health in the name of the city to enjoin the exercise of the offensive trade forbidden by its order, it was not competent for the defendant to prove that the trade was not a nuisance, upon the ground that the order by the board of health was a quasi-judicial act and could be reviewed only in the manner provided in the statutes. The constitutionality of the statute giving the power was also sustained.⁴¹

§ 1077. Actions by town boards of health to suppress nuisances by injunction.—A town board of health in New York can lawfully make an order for the suppression and removal of a nuisance consisting of the discharge of sewerage on lands of the town by a city, and can

⁴⁰ Citing *Commonwealth v. Patch*, 97 Mass. 221.

⁴¹ *City of Taunton v. Taylor*, 116 Mass. 254. The court said:—"The authority of the legislature to confer powers of this character for the protection of the public health and the suppression of nuisances upon municipal boards or officers is well settled. Such powers must be summarily exercised in order to accomplish their object. To allow the offensive trade to be carried on until it had been decided by a jury to be a nuisance, and the questions of law arising upon such trial had been determined by the court, would defeat the purpose of the statutes. It is a

case in which private rights must be held subordinate to the public welfare, and falls within the strict interpretation of the maxim, *Salus populi suprema lex*. The rights of any person to be affected by the order of prohibition are reasonably secured by requiring the order to be served upon him or the person in charge of his business, and by allowing him an appeal to a jury to be impaneled immediately, without waiting for a regular term of court, and by whose verdict the order may be altered, annulled or affirmed;" citing *Belcher v. Farran*, 8 Allen (Mass.) 325.

maintain an action to enjoin its violation by the city. It is given by the statute which creates boards of health in towns with power to hear complaints concerning nuisances and to make and enforce orders.⁴² An action by a board of health for a penalty imposed by a board organized under this law for the maintenance of a nuisance may be brought in the name of the board without naming the individual members thereof.⁴³

§ 1078. Expenditures incurred by board of health, to what municipal corporation chargeable.—When the compensation of a secretary, who is the health officer under the Indiana statute which provides that the secretary of local boards of health shall be the health officer, and shall be allowed such compensation as the board electing him may determine, has been determined by a board of health, the county commissioners should cause it to be paid by an auditor's warrant on the county treasurer.⁴⁴

⁴² *Bell v. City of Rochester*, 33 N. Y. St. 739; s. c. 11 N. Y. St. 305; following *Gould v. City of Rochester*, 105 N. Y. 46; s. c. 12 N. E. 275, which discusses very fully cases upon rights of action in cases of this kind.

⁴³ *Board &c. v. Valentine*, 32 N. Y. St. 919; s. c. 11 N. Y. S. 112. See also, *Board &c. v. Casey*, 18 N. Y. St. 251; s. c. 3 N. Y. S. 399, in which case it was further held that a landlord was responsible for maintaining the nuisance. As to liability of owners for defective construction and dangerous condition of premises, see *Moody v. Mayor*, 43 Barb. (N. Y.) 282; *Cheetham v. Hampson*, 4 T. R. 318; *Rosewell v. Prior*, 2 Salk. 460; s. c. 1 Ld. Raym. 713; *Moak's Underhill Torts*, 253-255; *Wood Nuisances*, 76-80; *Owings v. Jones*, 9 Md. 108; *Ahern v. Steele*, 115 N. Y. 203; s. c. 26 N. Y. St. 295; 22 N. E. 193; *Pennruddock's Case*, 5 Coke 100b; *Pierson v. Glean*, 14 N. J. L. 36; *Plumer v. Harper*, 3 N. H. 88; *Woodman v. Tufts*, 9 N. H. 88; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 146; *Carlton v. Redington*, 21 N. H. 291; *Johnson v. Lewis*, 13 Conn. 303; *Noyes v. Stillman*, 24 Conn. 15; *Pillsbury v. Moore*, 44 Maine 154;

Beavers v. Trimmer, 25 N. J. L. 97; *McDonough v. Gilman*, 3 Allen (Mass.) 264; *Hubbard v. Russell*, 24 Barb. (N. Y.) 404.

⁴⁴ *Waller v. Wood*, 101 Ind. 138, holding that the amount of compensation of this officer is a matter of discretion with the board of health and no appeal will lie from it; citing *Sims v. Board &c.*, 39 Ind. 40; *Moffitt v. State*, 40 Ind. 217; *Grusenmeyer v. City of Logansport*, 76 Ind. 549. As to the determination of salary by board of health, see *Kissell v. Anderson*, 73 Ind. 485; *Coulter v. Coulter*, 81 Ind. 542; *Peck v. Board*, 87 Ind. 221. In *Town of Montgomery v. Le Sueur County*, 32 Minn. 532; s. c. 21 N. W. 718, it was held that the liability and duty of the county to pay for "nurses, medical attendance and other necessary expenses" provided by a town in which smallpox had appeared, through the action of its board of health, made a proper charge in favor of towns against the county in which they are situate, by statute, did not at all depend upon the town's having paid or issued its orders for them. The fact that the town had provided them was all that was nec-

§ 1079. **No corporate liability for torts of health officers.**—A board of health legally organized under the statutes of the state, or by the terms of the charter of a municipal corporation, in the discharge of its duties acts under the powers by statute granted to it, and as an independent body, not under direction of the corporation through its governing authorities. It acts in the performance of the duty imposed upon it by the legislature. It is bound to discharge its official duty, not by virtue of its responsibility to the municipality, but for the general welfare of the community. The duties discharged are public and governmental. As a result no action will lie against a municipality for the acts of the board unless given by statute.⁴⁵ And it is not material whether the members of a board of health derive their appointment directly from the state or are appointed or designated by the municipal government in pursuance of its charter.⁴⁶

§ 1080. **The same subject continued.**—The reason why a city should not come within the rule in which the maxim respondeat superior applies was stated in a New York case as follows: "In the first place the board of health is elected by the common council of the city; they hold their position during the pleasure of the common council. The common council can hold them responsible for the manner in which they discharge their trust by removing them in case of failure to discharge it properly. So far they are also brought within the rule, but the council must also be able to control them in the discharge of their duties, and those duties must relate to the exercise of corporate powers and for the peculiar benefit of a corporation in

essary to entitle it to present its claim to the county for allowance and payment. In *People v. Board &c.*, 34 Hun (N. Y.) 336, it was held that the town must pay, irrespective of any action of the county supervisors, whose duties respecting registration are independent of those of the board of health, the expense incurred under the New York statute which imposed on town boards of health the duty of supervising and making complete the registration of births, marriages and deaths, and made the expense a town charge.

⁴⁵ *Bryant v. City of St. Paul*, 33 Minn. 289; s. c. 23 N. W. 220; 8 Am. & Eng. Corp. Cas. 340, in which it was sought to charge the city for the misfeasance or negligence of its board of health or its agents in

leaving a vault upon private premises exposed and open after removing its contents, in consequence of which plaintiff had, by falling into the vault, sustained personal injuries. See also, *Fisher v. City of Boston*, 104 Mass. 87; *Hayes v. City of Oshkosh*, 33 Wis. 314; *City of Richmond v. Long*, 17 Gratt. (Va.) 375; *Maxmilian v. Mayor*, 62 N. Y. 160; *Ogg v. City of Lansing*, 35 Iowa 495; *Welsh v. Village of Rutland*, 56 Vt. 228; *Tindley v. City of Salem*, 137 Mass. 171; *Condict v. Mayor*, 46 N. J. L. 157; s. c. 19 Cent. L. J. 213; *Brown v. Inhabitants &c.*, 65 Maine 402.

⁴⁶ *Bryant v. City of St. Paul*, 33 Minn. 289; s. c. 23 N. W. 220; 8 Am. & Eng. Corp. Cas. 340.

its local or special interest. In the first place the council has not power to control them in the discharge of their duties, for a portion of those duties at least are prescribed by the general statutes of the state. In the second place the duties devolving upon the board of health do not relate to the exercise of corporate powers, neither are their duties for the benefit of the corporation in its local or special interest. Their duties relate to the preservation of the health of the public; the individuals residing in the city may be benefited by the faithful discharge of the duties of officers; so may the public at large. The duties of such officers are, therefore, public in their nature, and they should be regarded as the servants and agents of the public instead of the corporation."⁴⁷

§ 1081. Personal liability of members of board of health for negligence.—In Texas an action was brought against the individuals composing the board of health and the mayor and marshal of a city for causing the death of another under the statutes of that state by reason of the negligent manner in which they caused to be removed to a pest-house a child suffering from small-pox. The court of appeals reversed a judgment in the court below in favor of the defendants and remanded the case for a new trial. While upholding the rights of a city council acting under legislative authority to enact and enforce an ordinance providing for the removal from the city limits of persons afflicted with contagious diseases, the court held that in removing such persons, when their continuance in the city was incompatible with the safety of the inhabitants, the city and those to whom she intrusted this duty were bound to make every reasonable provision for the safety of the diseased persons. And if city authorities cause the removal of a person afflicted with contagious disease, and in doing so fail to exercise the care and precaution the circumstances demand, and death results, they are responsible, even though acting under a city ordinance.⁴⁸

⁴⁷ Haight, J., in *Bamber v. City of Rochester*, 63 How. Pr. (N. Y.) 103. See also, *O'Meara v. Mayor &c.*, 1 Daly (N. Y.) 425; *Smith v. City of Rochester*, 76 N. Y. 506; *Jewett v. City of New Haven*, 38 Conn. 368; s. c. 9 Am. R. 382, 391; *Hafford v. City of New Bedford*, 16 Gray (Mass.) 297; *Ham v. Mayor &c.*, 70 N. Y. 459; *Mead v. City of New Haven*, 40 Conn. 72; *McKay v. City of Buffalo*, 9 Hun (N. Y.) 401; *McKay v. City of Buffalo*, 74 N. Y. 619; *Lorillard v.*

Town of Monroe, 11 N. Y. 392; *Pollock v. Louisville*, 13 Bush (Ky.) 221; *Mitchell v. City of Rockland*, 52 Maine 118.

⁴⁸ *Aaron v. Broiles*, 64 Tex. 316. The court held a charge to the jury erroneous, in which they were told that the board of health, while acting under the city ordinances in devising plans to protect the city against disease, were acting in a judicial capacity and were not responsible for errors and mistakes of

§ 1082. **The same subject continued.**—In a Connecticut case, the supreme court of that state construed the statute providing that the board of health in every town shall have “all the power necessary and proper for preserving the public health and preventing the spread of malignant diseases,” and that it shall be their duty “to examine into all nuisances and sources of filth injurious to the public health, and cause to be removed all filth found within the town which in their judgment shall endanger the health of the inhabitants.” Their ruling was that the members of a board of health, acting in good faith and with reasonable caution, were not liable for an error in judgment in causing the removal as a nuisance of property which they believed to be the cause of the prevalence of a malignant disease. The board had the right to remove such property as a nuisance injurious to public health, though not of the character of filth. Nor did it make any difference that the board at the time of the actual removal was composed of different members from those who composed it when the order was issued for its removal. The action of the board in deferring the removal to a winter month, when the disease had ceased to be prevalent, though ordered in a summer month, did not make its removal illegal, as its earlier removal would have been attended with danger of an increase of its noxious influence, and the removal when made being regarded as necessary to prevent a recurrence of the disease in the following summer.⁴⁹

§ 1083. **Quarantine regulations generally.**—The question has been made in courts of our states as to the power of municipal corporations to pass laws known as quarantine laws, intended to prevent the introduction of infectious or contagious diseases into our communities. The result of the adjudications has been to assert the undoubted power of the state to guard and protect the health and lives of its citizens by such legislation as it may deem proper and suitable for that purpose. This power the state may delegate to the municipal

judgment. They said:—“There was nothing judicial in the act of removing this woman and child, and the question is not whether the policy was wise or unwise, but whether there was a wrong done in one of the details of its execution.”

⁴⁹ *Raymond v. Fish*, 51 Conn. 80, an action to recover of defendants damages for having removed brush with oysters growing upon it from a stream within the town, which was defended on the ground that

the removal was under an order of the board of health of the town, the brush having been condemned as a nuisance, and that in removing it they did nothing that was not necessary to do to remove the nuisance. The board of health had acted upon their judgment and the advice of the state board of health, because of the presence of scarlet fever and diphtheria which they attributed to the noxious influences of an oyster bed.

corporations which have been created by the legislature proper, or by the general laws enacted for the incorporation of such bodies. Under the powers thus delegated to the various municipalities they may adopt such regulations as to vessels coming into their ports, or as to trains running upon the various railways entering their borders, or persons coming from infected districts, which will result in the temporary control of the property involved, or the detention and quasi-imprisonment or restraint of the persons affected, without infringing upon any of the property or personal rights which are guaranteed by constitutional provisions.⁵⁰

§ 1084. Extent of power of municipal authorities.—The governing authorities of a city empowered by its charter to pass all laws and ordinances necessary to preserve the health of the city, prevent and remove nuisances, and prevent the introduction of contagious diseases within the city and within a limited distance of the same, are within those limits clothed with all the legislative power which the legislature could exert. These authorities are the exclusive judges of the degree of necessity of municipal legislation to secure the objects named; and the means and manner contributing to preserving the health of the city and preventing infectious or contagious diseases being brought within the limits prescribed in the statute are entirely within their discretion. In establishing a quarantine they may impose penalties, or cause a vessel and all persons on board to be taken possession of and controlled until their disinfection is effected, and impose on the captain, owner or consignee reimbursement of all expenses incurred, or they may adopt at the same time both of these remedies. If the health officer of a city, on whom the duty of disinfection is imposed by the ordinances of the city or the statutes of the state, in causing expenses to be incurred acts bona fide within the limits of a sound discretion and with reasonable skill and judgment in the discharge of his official duties in this respect, the reasonable expenses thus incurred by him must be paid by the captain, owner or consignee of the disinfected vessel, as declared by the ordinances or statutes on the subject.⁵¹

⁵⁰ *Metcalf v. City of St. Louis*, 11 Mo. 102; *City of St. Louis v. McCoy*, 18 Mo. 238, holding such acts were not repugnant to the constitutional provision as to commerce between the states; *City of St. Louis v. Boffinger*, 19 Mo. 13; *Mitchell v. City of Rockland*, 41 Maine 363; s. c. 45 Maine 496.

⁵¹ *Harrison v. Mayor &c.*, 1 Gill (Md.) 264, in which the court of appeals held that the court below properly refused a prayer of defendant to instruct the jury that the recovery of the city "must be limited to the amount of expenses absolutely necessary to preserve the health of the city, or to prevent the intro-

§ 1085. Liability of owner of vessel for quarantine expenses.—

A health officer in his disposition of persons on board of an infected ship under the ordinances of a city or the statutes must send the persons laboring under the infectious disease to the hospital, and may also send those on board the same vessel liable to be affected by it to the hospital, if in his opinion such course is necessary to prevent the spread of the disease. And the health officer, as long as he acts with reasonable skill and judgment, and with a sound and honest discretion in relation to persons not apparently afflicted with the disease, renders the owner, master or consignee of a vessel also liable for the reasonable expenses incurred in case of those sent to the hospital.⁵²

§ 1086. Power and duty of board of health under Florida quarantine laws.—The statutes of Florida relating to quarantine have been construed not to establish of themselves a quarantine at any place or in any county, but to leave it to the boards of health to establish the same, when in their judgment it is expedient for the public welfare to do so. And the quarantine regulations which the act of 1885, ch. 3603, authorizes a board of health to make are not operative, nor to be obeyed as such, except during the existence of a quarantine duly established by a board of health in accordance with the statutes; and whenever either of the statutes which control in these matters has regulated any matter of quarantine, any regulation inconsistent therewith made by a board of health is of no effect.⁵³

duction of smallpox," on the ground that the right of the city to recover was neither dependent on any such occurrences nor confined to any such restrictions.

⁵² *Harrison v. Mayor &c.*, 1 Gill (Md.) 264, an action by the city authorities against the consignee of a vessel for expenses incurred by the city's representatives during the quarantine of the vessel. The court of appeals of Maryland held an instruction to the jury "that if they find the expenses incurred and claimed in this action were not necessary to preserve the health of the city, and not necessary to prevent the introduction of the smallpox by or through the instrumentality of the vessel, the persons, baggage or articles on board her," then the

plaintiff can not recover; and then adding, "that the recovery must be limited to such amount of expenses as in the opinion of the health officer was necessary to disinfect the vessel, cargo and passengers of said disease and to prevent their propagating the same," erroneous because difficult to reconcile the two parts of the instruction so given, or to discover what was the instruction the court designed to give. See also, *Inhabitants &c. v. Smith*, 120 Mass. 96; *Train v. Boston Disinfecting Co.*, 144 Mass. 523; s. c. 11 N. E. 929. Cf. *City of New Orleans v. Ship Windermere*, 12 La. An. 84.

⁵³ *Ex parte O'Donovan*, 24 Fla. 281; s. c. sub nom. *O'Donovan v. Wilkins*, 4 So. 789, holding invalid a regulation of the board of health purport-

§ 1087. Charges against vessels in quarantine.—The Florida act of 1885, ch. 3603, taken by itself alone, does not, by virtue of the general powers it confers on county boards of health, authorize charges to be made against a vessel for quarantine purposes. But construing this act with the former ones which are in *pari materia*, and having in view one object, the county boards of health are authorized to make charges against a vessel for quarantine services if, under the authority given by the statute which has reference to inspection of vessels by the port inspector and fumigation and disinfection of vessels, he deems it necessary, and they have made proper provisions for such disinfection.⁵⁴

§ 1088. A limitation upon quarantine regulations.—The supreme court of Mississippi has defined the powers of a town under its charter authorizing it to establish and enforce quarantine as follows:

ing to be operative notwithstanding the absence of the establishment of quarantine by the board, and assuming to regulate in a different manner from that prescribed in the statute the detention of vessels in the matter of their examination as to whether they are subject to quarantine. In this case of *habeas corpus* the relator, an inspector of customs who had boarded a vessel to see her manifest as ordered by his superior, and who had been committed to jail under charges for violating quarantine regulations, was ordered discharged. The court said as to the duty of boards of health in establishing quarantine:—"The authority implies the duty; and the duty to establish, when it is expedient for the public welfare, implies the corresponding one not to establish and to abrogate one already established when the public welfare does not require any."

⁵⁴*Ferrari v. Board &c.*, 24 Fla. 390; s. c. 5 So. 1, in which the court held a reasonable charge according to tonnage of the material for the use of a crib erected by the board of health for receiving ballast to be proper where the discharge of the ballast was for the purpose of disin-

fection, but that it was not proper to base any charge on the tonnage of the vessel. - - - Vessel not subject to quarantine, demanding fees from for disinfection,—see *Forbes v. Board of Health*, 28 Fla. 26; s. c. 9 So. 862. See also, as to charge being illegal when not authorized by statute directly, or through power given to the board of health by statute to make them, *Wright v. City of Chicago*, 20 Ill. 252; *Corporation of Columbia v. Hunt*, 5 Rich. L. (S. C.) 550; *Mayor &c. v. Harwood*, 32 Md. 471. As to the tonnage tax being in violation of the constitution of the United States, see *State Tonnage Cases*, 12 Wall. 204; *Peete v. Morgan*, 19 Wall. 581; *Cannon v. New Orleans*, 20 Wall. 577; *Inman Steamship Co. v. Tinker*, 94 U. S. 238. As to charges, so far as made for compulsory service,—as for fumigation,—being authorized by law, in that the system of quarantine laws established by the statute of a state is a rightful exercise of the police power for the protection of health, not forbidden by the constitution of the United States, see *Morgan Steamship Co. v. Louisiana Board &c.*, 118 U. S. 455; s. c. 6 S. Ct. 1114.

“The town may quarantine in cases demanding that extraordinary measure, in seasons of epidemic, in the interest of public health; but to justify the exercise of this power there must be apparent necessity for so doing. In such cases regulations unpleasantly or injuriously affecting the individual may be properly employed to accomplish the general safety. But in the absence of any epidemic apparently requiring the use of quarantine regulations and regulations restraining trade temporarily, the exercise of such power may become unreasonable and oppressive.”⁵⁵

⁵⁵ *Town of Kosciusko v. Slomberg*, 68 Miss. 469; s. c. 9 So. 297, in which, upon the principles of the text, the court held an ordinance of the town prohibiting the bringing of second-hand clothing into the town, or exposing it for sale therein, with-
out furnishing proof to the mayor that it did not come from an infected district, was an invalid exercise of the town's power in such matters, and an unreasonable restraint of trade.

CHAPTER XXVI.

SUPPRESSION OF NUISANCES.

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- 1091. What are nuisances.
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SECTION

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§ 1089. **Nuisance defined.**—It is not possible to give an accurate definition of a nuisance. In general terms it may be stated that whatever is injurious to health, indecent or offensive to the senses, injurious to public morals, or interferes with free use and enjoyment

of property of others, is a nuisance.¹ No person can make an unreasonable, unwarrantable or unlawful use of his own property in such a way as to produce material annoyance, inconvenience or discomfort to his neighbor.² The great difficulty grows out of the fact that what may be a nuisance, either to a person or his property, or the public, in one locality, may not be so in another. The injury to another, in order to constitute a nuisance, must be such as to produce a tangible and appreciable result either as to neighboring property, or render its enjoyment specially uncomfortable or inconvenient.³

§ 1090. Not protected by constitution.—It has been contended that where a corporation was chartered for engaging in a certain business at a designated place the charter forms a contract within the meaning of the contract clause of the constitution of the United States, and that, by reason thereof, it received an irrevocable legislative sanction to become or maintain a nuisance of the most pronounced type, producing an intolerable stench resulting in nausea and discomfort, if not sickness, to the people. This contention was apparently seriously made both in the supreme court of Illinois and the supreme court of the United States, and, if sustained, would have been an unjustifiable extension of a doctrine, never sound in reason, inconsistent with our theory of government, and which has been criticised, explained away and judicially limited, as well as annulled by legislative enactment. Upon this contention the supreme court of the United States say: "That a nuisance of a flagrant character existed, as found by the court below, is not controverted. We can not doubt that the police power of the state was applicable and adequate to give an effectual remedy. That power belonged to the states when the federal constitution was adopted. They did not surrender it and they have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall use his own as not to wrong or injure another. To regulate and abate nuisances is one of its ordinary functions. * * * 'Every right from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. Though at the time it be remote

¹ *State v. Taylor*, 29 Ind. 517; *State v. Purse*, 4 McCord (S. C.) 472; *Nolan v. Mayor*, 4 Yerg. (Tenn.) 163.

² *Butterfield v. Klaber*, 52 How. Pr. (N. Y.), 255.

³ *Campbell v. Seaman*, 63 N. Y. 568; *Sparhawk v. Union R. Co.*, 54 Pa. St. 401; *Wahle v. Reinbeck*, 76 Ill. 322.

and inoffensive, the purchaser is bound to know at his peril that it may become otherwise by the residence of many people in its vicinity, and that it must yield to by-laws and other regular remedies for the suppression of nuisances.'"⁴ The police power to impose police regulations operates upon all alike, and this is a fundamental principle lying at the very foundation of organized society. It is yielded by each member when he enters society for the good of the entire community; it is incident to and a part of government itself and need not be expressly reserved when it grants rights or property to individuals or to corporate bodies, as they take subject to this right.⁵

§ 1091. **What are nuisances.**—It is impossible to enumerate the things which courts have held to be public nuisances, but a few are given by way of illustration: A permanent encroachment upon a public street for a private use is a purpresture and is, in law, a nuisance;⁶ a livery stable in close proximity to a residence may be injurious to the comfort and even health of the occupants, and be a nuisance;⁷ and so the beating of a drum or tambourine on the street without permission;⁸ dogs running at large;⁹ a show case on the sidewalk without permission;¹⁰ a common scold;¹¹ a powder magazine in a populous part of the street;¹² a filthy house negligently kept, endangering the public health;¹³ publication of obscene newspapers;¹⁴ urinating in a public spring;¹⁵ bawdy houses and houses of ill fame;¹⁶ a disorderly house;¹⁷ a tippling house;¹⁸ and generally any act of-

⁴ *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Coates v. Mayor &c.*, 7 Cow. (N. Y.) 585.

⁵ *Northwestern Fertilizing Co. v. Village of Hyde Park*, 70 Ill. 634; *Galena &c. R. Co. v. Appleby*, 28 Ill. 283; *Dingman v. People*, 51 Ill. 278.

⁶ *Snyder v. City of Mt. Pulaski*, 176 Ill. 397; s. c. 52 N. E. 62; *Driggs v. Phillips*, 103 N. Y. 77; s. c. 8 N. E. 514; *Smith v. State*, 23 N. J. L. 712; *Attorney-Gen. v. Heishon*, 18 N. J. Eq. 410; *State v. Woodward*, 23 Vt. 92; *Chamberlain v. Enfield*, 43 N. H. 356; *Commonwealth v. King*, 13 Metc. (Mass.) 115; *Hibbard v. City of Chicago*, 173 Ill. 91; s. c. 50 N. E. 256.

⁷ *City of Chicago v. Stratton*, 162 Ill. 494; s. c. 44 N. E. 853; *Shiras v. Olinger*, 50 Iowa 571.

⁸ *People v. Garabed*, 45 N. Y. S. 827; s. c. 20 Misc. (N. Y.) 127.

⁹ *City of Hagerstown v. Witmer*, 86 Md. 293; s. c. 37 Atl. 965.

¹⁰ *Wells v. City of Brooklyn*, 41 N. Y. S. 143; s. c. 9 App. Div. (N. Y.) 61.

¹¹ *Commonwealth v. Mohn*, 52 Pa. St. 243.

¹² *Cheatham v. Shearon*, 1 Swan (Tenn.) 213.

¹³ *State v. Purse*, 4 McCord (S. C.) 472.

¹⁴ *State v. Hanson*, 23 Tex. 232.

¹⁵ *State v. Taylor*, 29 Ind. 517.

¹⁶ *Clementine v. State*, 14 Mo. 112.

¹⁷ *State v. Williams*, 30 N. J. L. 102.

¹⁸ *State v. Stevens*, 40 Maine 559.

fensive to the public morals;¹⁹ or that injuriously affects the public health;²⁰ obstructions of public highway, or encroachments thereon.²¹

§ 1092. Prescriptive right to maintain a nuisance.—From some loose dicta both in this country and in England it has been supposed that a right to maintain a public nuisance may be acquired by prescription, but no such right should exist in reason, and the great weight of authority is against it. There can be no sound rule of law that will protect any man in thus depriving others of the substantial use and enjoyment of their property.²²

§ 1093. The city can not commit or maintain a nuisance.—A city can not by ordinance grant the use of a public street to a private corporation for such purpose as will constitute a private nuisance which results in a special injury to the owners of abutting property except on making compensation for such injury.²³ Authority given by law to construct sewers is not authority to discharge sewage on an individual's property or in such place that it flows on his lands and pollutes a watercourse thereon;²⁴ and the city is liable for sewage directed to be thrown into a stream and carried down and thrown thence on the premises of an owner of property from which damage results.²⁵ Under New Jersey laws, 1868, authorizing a city to discharge its sewage into a river according to a map showing sewer outlets, the city has no right to create a nuisance by discharging

¹⁹ *Boom v. City of Utica*, 2 Barb. (N. Y.) 104.

²⁰ *Commonwealth v. Holmes*, 17 Mass. 336.

²¹ *Mayor &c. v. Mayor &c.*, 30 Ga. 506. And see further enumeration, 4 *Wait Actions & Defenses* 726; and 1 *Wood Nuisances*, ch. 2.

²² 2 *Wood Nuisances* (3d ed.) 914 et seq., § 727; citing *Taylor v. People*, 6 Park. Cr. (N. Y.) 536, and cases cited; *People v. Cunningham*, 1 Denio (N. Y.) 524, 536; s. c. 43 Am. D. 709; *Mills v. Hall*, 9 Wend. (N. Y.) 316; s. c. 24 Am. D. 160; *Commonwealth v. Upton*, 6 Gray (Mass.) 473; *Knox v. Chaloner*, 42 Maine 150; *Franklin Wharf Co. v. City of Portland*, 67 Maine 46; *City of Philadelphia v. Philadelphia &c. R. Co.*, 58 Pa. St. 253; *Milhau v. Sharp*, 27 N. Y. 611; s. c. 84 Am. D. 314; *St. Vincent Orphan Asylum v. City of*

Troy, 76 N. Y. 108; *Smith v. State*, 23 N. J. L. 712; *State v. Common Council &c.*, 36 N. J. L. 198, 201; *Humphreys v. Woodstown*, 48 N. J. L. 588; s. c. 7 Atl. 301; *State v. Froth*, 34 N. J. L. 377, 379; *Cross v. Mayor &c.*, 18 N. J. Eq. 305, 311; *Tainter v. Mayor &c.*, 19 N. J. Eq. 46, 59; *Commonwealth v. Blaisdell*, 107 Mass. 234; *Commonwealth v. Moorehead*, 118 Pa. St. 344; s. c. 12 Atl. 424; 4 Am. St. 599; *Childs v. Nelson*, 69 Wis. 125; s. c. 33 N. W. 587; *City of Big Rapids v. Comstock*, 65 Mich. 78; s. c. 31 N. W. 811.

²³ *Chicago &c. R. Co. v. First Methodist Episcopal Church &c.*, 102 Fed. 85; s. c. 42 C. C. A. 178.

²⁴ *Carmichael v. City of Texarkana*, 94 Fed. 561.

²⁵ *Owens v. City of Lancaster*, 182 Pa. St. 257; s. c. 37 Atl. 858.

such quantities of sewage as to pollute the river.²⁶ A nuisance may be created by a city in cleaning a street and depositing the garbage in such a way as to violate a private right.²⁷ The cutting of a street through a hill and not grading the entire width of the street does not make it a nuisance though it damages the property and interferes with the enjoyment of an adjoining owner.²⁸ Whether a prescriptive right to maintain a private nuisance can be acquired is not fully settled in this country, but the weight of authority, as well as reason, is probably against it. It is certain, however, that a municipality is not permitted to maintain a nuisance under a prescriptive right.²⁹

§ 1094. Abatement of.—Where a nuisance exists within the corporate limits which is detrimental to the public health of the people it may be abated by the municipality. Usually express or implied power exists for this purpose, but where this does not exist, if the act or thing complained of would be a nuisance at common law, it may be abated, though perhaps not as a municipal act.³⁰ As to the methods to be resorted to in the abatement of nuisances there is no doubt as to the right through a court of equity under a bill filed by the municipality, as an agency of the state. There are many cases where the remedy by injunction would be much more efficacious than by enforcing the penalties of an ordinance.³¹

§ 1095. Public nuisance.—A public nuisance is one which affects citizens, generally, in the rights which every one is entitled to. It acts upon the public at large and subjects them to inconvenience or annoyance. Instances of this character are public gaming houses, lotteries, obscene newspapers, bawdy houses, assignation houses, disorderly public places, and generally anything offensive to public morals, or affecting the public health. The manufacture of many things in common use, such as soap, and gunpowder and other explosives,

²⁶ *Grey v. Mayor &c.*, 58 N. J. Eq. 1; s. c. 42 Atl. 749.

²⁷ *City of New Albany v. Slider*, 21 Ind. App. 392; s. c. 52 N. E. 626.

²⁸ *City of Omaha v. Flood*, 57 Neb. 124; s. c. 77 N. W. 379.

²⁹ *City of Litchfield v. Whitenack*, 78 Ill. App. 364; *City of Bloomington v. Costello*, 65 Ill. App. 407.

³⁰ *Manhattan Co. v. Van Keuren*, 23 N. J. Eq. 251, 255. In this case it is said: Any citizen acting either as an individual or as a public offi-

cial under the orders of local or municipal authorities, whether such offices be or be not in pursuance of special legislation or chartered provisions, may abate what the common law deemed a public nuisance; citing *Coe v. Schultz*, 47 Barb. (N. Y.) 64.

³¹ *Village of Pine City v. Munch*, 42 Minn. 342; s. c. 44 N. W. 197; 6 L. R. A. 763; *Carleton v. Rugg*, 149 Mass. 550; s. c. 22 N. E. 55; 5 L. R. A. 193.

may become unlawful, if carried on in a locality where the life and property of others are endangered.³² From what has been said it will be seen that a business which is lawful in itself may be conducted in such a way, or under such surroundings, as to be a nuisance.³³

§ 1096. **Private nuisance.**—A private nuisance is one which injuriously affects one, or a few persons, and generally has reference to property rights, though not necessarily so, and may not be in violation of any positive law. Nuisances of this character are generally in violation of some law, and are not legalized by long-continued existence, or by others permitted to exist, or by the fact that the public may derive some benefit therefrom.

§ 1097. **Legalized nuisance.**—There is a species of nuisance which has been inaptly termed a legalized nuisance, which amounts to the same thing as saying a nuisance is not a nuisance. What is meant by the expression is that the legislature, in the exercise of its legislative functions, may authorize a person or a corporation to do an act whereby the public may be more or less injuriously affected, and the person or corporation, acting within the scope of power granted, not be subject to liability for committing or maintaining a nuisance. But it must be understood in this connection that the injury arises from the natural and probable result of the act authorized and may be said to have been in the legislative contemplation, when the grant or license was made. And if the power may be exercised in a way not to seriously injure the public, but is exercised in a way regardless of the public interest, there will be no legislative protection. The grant of power is in all cases to be exercised in such manner as to least interfere with public rights and interests, and by construction the grant or license is construed in favor of the public. Besides there is a high degree of care to be exercised in carrying out the grant of power in such cases.³⁴ This class of cases usually arises in the

³² Wier's Appeal, 74 Pa. St. 230; Allen v. State, 34 Tex. 230.

³³ Norcross v. Thoms, 51 Maine 503.

³⁴ People v. President &c., 64 Barb. (N. Y.) 55; Carhart v. Auburn G. L. Co., 22 Barb. (N. Y.) 297; Davis v. Mayor, 14 N. Y. 506; Clark v. Hannibal &c. R. Co., 36 Mo. 202; Tuebner v. California &c. St. R. Co., 66 Cal. 171; s. c. 4 Pac. 1162; Taylor v. Baltimore &c. R. Co., 33 W. Va. 39; s. c. 10 S. E. 29; Village of Pine City v.

Munch, 42 Minn. 342; s. c. 44 N. W. 197; Worster v. Forty-Second St. R. Co., 50 N. Y. 203; Town of Hamden v. New Hampshire R. Co., 27 Conn. 158; Pittsburgh &c. R. Co. v. Gilleland, 56 Pa. St. 445; Terre Haute &c. R. Co. v. McKinley, 33 Ind. 274; Slatten v. Des Moines &c. R. Co., 29 Iowa 148, 154; Taylor v. Grand Trunk R. Co., 48 N. H. 304. And see 2 Wood Nuisances (3d ed.), § 754, and n.

construction of railroads, canals, and other quasi-public works, across navigable waters, and the erection and maintenance of improvements, such as gas-works, water-works, etc., wherein the public are beneficially interested. The doctrine may be clearly illustrated by the operation of a railroad in a public street. The noise occasioned by the running of trains, the escaping of smoke and the jarring occasioned, are embraced under the head of *damnum absque injuria*, but the excessive ringing of the bell or blowing of the whistle, the use of defective machinery and appliances, whereby the public are injured or endangered, render the company liable for maintaining a nuisance.³⁵ A nuisance can not be legalized in the absence of legislative sanction.³⁶ A bill in equity to abate a public nuisance may be filed by a person who has sustained special damages.³⁷ An individual may maintain a suit in a court of equity to abate a nuisance caused by the construction of a sewer system whereby plaintiff was specially injured by sewage deposited on his land or near his residence.³⁸ Where the charter powers are adequate nuisances may also be abated by an ordinance through the instrumentality of penalties.³⁹ But it will be observed in this connection that under a general grant of power over nuisances municipalities have no power to pass an ordinance declaring a thing a nuisance which in fact is clearly not one. If, however, a thing may or may not be a nuisance, depending on a variety of circumstances requiring judgment and discretion on the part of the municipalities in the exercise of legislative functions, under a general delegation of power, their action under such circum-

³⁵ 2 Wood Nuisances (3d ed.), § 755; citing the following cases: *Gandy v. Chicago &c. R. Co.*, 30 Iowa 420; *Jackson v. Chicago &c. R. Co.*, 31 Iowa 176; s. c. 7 Am. R. 120; *Kellogg v. Chicago &c. R. Co.*, 26 Wis. 223; s. c. 7 Am. R. 69; *Bedell v. Long Island R. Co.*, 44 N. Y. 367; s. c. 4 Am. R. 688; *Bedford v. Hannibal &c. R. Co.*, 46 Mo. 456; *King v. Morris &c. R. Co.*, 18 N. J. Eq. 397; *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449; *First Baptist Church Soc. v. Railroad Co.*, 5 Barb. (N. Y.) 79; *Pennsylvania R. Co. v. Lippincott*, 116 Pa. St. 472; s. c. 9 Atl. 871; *Chicago &c. R. Co. v. Quaintance*, 58 Ill. 389; *Spaulding v. Chicago &c. R. Co.*, 30 Wis. 110; *Louisville &c. R.*

Co. v. Commonwealth, 13 Bush (Ky.) 388; *State v. Parrott*, 71 N. C. 311.

³⁶ *State v. Lucas*, 9 Houst. (Del.) 396; s. c. 32 Atl. 1076.

³⁷ *Mississippi &c. R. Co. v. Ward*, 67 U. S. 485.

³⁸ *Carmichael v. City of Texarkana*, 94 Fed. 561; *Trustees &c. v. Cowen*, 4 Paige (N. Y.) 510; *Williams v. Smith*, 22 Wis. 594, 600; *Inhabitants &c. v. Easton &c. R. Co.*, 24 N. J. Eq. 217, 221; *Town of Burlington v. Schwarzman*, 52 Conn. 181; *City of New Haven v. Sargent*, 38 Conn. 50; *Town of Derby v. Alling*, 40 Conn. 410.

³⁹ *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659.

stances would be conclusive of the question.⁴⁰ Power to prevent and remove nuisances, and to make ordinances and enforce them, is a grant of power to impose fines and imprisonments for violations of an ordinance relating to nuisances.⁴¹ Where a city is granted power to declare what shall be a nuisance in the street, and the power of removal, the power must be exercised in the manner prescribed.⁴² Certain trades and callings, as that of a physician, druggist, etc., courts acting on their own experience and knowledge of human affairs will say, as a matter of law, are not nuisances, while on the other hand, there are many things which courts, without proof, will, on the same principle, declare nuisances, such as digging a pit or the erection of a house in a public street. In such case an ordinance declaring such a thing a nuisance is valid on its face, and a conviction under it may be had without any extrinsic proof to show that the act complained of was in fact a nuisance.⁴³ The fact that a particular use of property is declared a nuisance by an ordinance does not make it so unless it is in fact so, and is a common law nuisance.⁴⁴ A city may also in a summary way tear down and destroy a wooden structure which is erected within the fire limits where it is dangerous to the public on account of fires.⁴⁵ The summary destruction of property must be exercised with extreme caution, and only where there is great public emergency and of such a nature as to justify extraordinary measures, based upon paramount necessity, or where the nuisance is beyond a doubt.⁴⁶ The city may lawfully remove, as a nuisance, a building, left in the street by the owner, who refuses to remove it on notice, and may recover the expense of removal.⁴⁷

§ 1098. **License of nuisance.**—It has been seen that a city is not authorized to create a nuisance. Nor has it power to license one.⁴⁸

⁴⁰ *North Chicago City R. Co. v. Town of Lake View*, 105 Ill. 207.

⁴¹ *City of Burlington v. Stockwell*, 5 Kan. App. 569; s. c. 47 Pac. 988.

⁴² *Mayor &c. v. Holland Tr. Co.*, 20 N. J. L. J. 214; s. c. 35 Atl. 344.

⁴³ *North Chicago City R. Co. v. Town of Lake View*, 105 Ill. 207.

⁴⁴ *City of Salem v. Eastern Railroad Co.*, 98 Mass. 431; s. c. 96 Am. D. 650; *State v. Mayor &c.*, 29 N. J. L. 170; *Yates v. Milwaukee*, 10 Wall. 497; *City of Chicago v. Laffin*, 49 Ill. 172; *Babcock v. City of Buffalo*, 56 N. Y. 268. As to what ordinances a city may legally pass in relation

to nuisances and their suppression, see 2 *Wood Nuisances* 981.

⁴⁵ *Baumgartner v. Hasty*, 100 Ind. 575; s. c. 50 Am. R. 830; *North Chicago City R. Co. v. Town of Lake View*, 105 Ill. 207; s. c. 44 Am. R. 788; *Mayor &c. v. Gerspach*, 33 La. An. 1011; *Mayor &c. v. Hoffman*, 29 La. An. 651; *First Municipality of New Orleans v. Blineau*, 3 La. An. 688.

⁴⁶ *Babcock v. City of Buffalo*, 56 N. Y. 268; *Underwood v. Greene*, 42 N. Y. 140.

⁴⁷ *Concord v. Burleigh*, 67 N. H. 106; s. c. 36 Atl. 606.

⁴⁸ *Cohen v. Mayor &c.*, 113 N. Y.

The effect of a license will not be to protect the licensee from damages to a person who is injured by a nuisance, which is such in fact, though it may amount to a protection against indictment or other public prosecutions.⁴⁹ The power to license is given as a means of exercising restraint and control over doubtful pursuits as to those noxious in nature or becoming so by carelessness, and it is not the design of a license to grant a right to create what would be a public offense. No inference can be drawn from a license that the licensee is authorized to inflict an injury upon the public by the mode of conducting a business.⁵⁰

§ 1099. Damages.—The amount of damages in some cases may be capable of exact measurement, but usually rests largely in the discretion of the jury under all the circumstances of the case shown by the evidence.⁵¹ Exemplary damages are permissible after a nuisance has been established at law, which are allowed for the purpose of securing an abatement of the nuisance.⁵² In such case the injury must be wanton and wilful, or the result of a reckless disregard of the rights of others, or such damages may be allowed when the acts result in great hardship and oppression.⁵³ A municipality is liable for the erection of a water tank in the center of a street occupying one half the width thereof, and the erection and operation of a steam-engine in connection therewith even for the purpose of supplying the city and its residents with water. In such case there must be some special injury shown by plaintiffs, and this injury measures the damages.⁵⁴ The city has no right to permit the use of the streets for other purposes than public thoroughfares and can not obstruct them in such a way as to deprive the public and adjacent property owners of their use as streets.⁵⁵ Unless some special damage is shown the public alone can complain.⁵⁶ In all cases it must appear in or-

532; s. c. 21 N. E. 700; 10 Am. R. 506; *Speir v. Brooklyn*, 19 N. Y. S. 665; s. c. 46 N. Y. St. 561; *Ryan v. Copes*, 11 Rich. (S. C.) 217; s. c. 73 Am. D. 706; *Lutterloh v. Cedar Keys*, 15 Fla. 306.

⁴⁹ *Demby v. City of Kingston*, 14 N. Y. S. 601; s. c. 38 N. Y. St. 42. But see *Garrett v. State*, 49 N. J. L. (94) 693; s. c. 7 Atl. 29; 60 Am. R. 592; 2 Wood Nuisances 1003.

⁵⁰ *Garrett v. State*, *supra*.

⁵¹ *Frank v. Steamship & Co.*, 20 La. An. 25; *O'Mara v. Railroad Co.*, 38 N. Y. 445. And see *Baltimore & Co.*

R. Co. v. Fifth Baptist Church, 137 U. S. 568; s. c. 11 S. Ct. 185.

⁵² *Bradley v. Amis*, 2 Hayw. (N. C.) 399; *New Orleans & Co. R. Co. v. Stratham*, 42 Miss. 607; s. c. 97 Am. D. 478.

⁵³ 2 Wood Nuisances 1319; *Nagle v. Mullison*, 34 Pa. St. 48; *Dorsey v. Manlove*, 14 Cal. 553; *Best v. Allen*, 30 Ill. 30; s. c. 81 Am. D. 338.

⁵⁴ *City of Morrison v. Hinkson*, 87 Ill. 587.

⁵⁵ *Ligare v. City of Chicago*, 139 Ill. 46; s. c. 28 N. E. 934; *Shack v. City of St. Louis*, 85 Ill. 377.

⁵⁶ *Barrows v. City of Sycamore*,

der to warrant a recovery that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.⁵⁷ The special injury is the gist of the action and must be alleged and proved.⁵⁸ Where a municipality permits its streets to remain out of repair, or neglects to abate a nuisance injurious to the health of its citizens, which it has power to remove, or permits a public nuisance to exist on its property, it may be indicted and punished the same as an individual,⁵⁹ and it is liable, also, for all injuries resulting from the wrongful act.⁶⁰ If an obstruction is permanently, or even habitually, in the highway it is a nuisance.⁶¹ It is not necessary that the nuisance complained of be the act of municipal agents, if the municipality has notice.⁶² A city is not liable in damages for a failure to prevent the erection of a wooden building in violation of its ordinance.⁶³ Nor for a failure to enforce police regulations in relation to abatement of nuisances.⁶⁴ It is not necessary in estimating damages for a nuisance that witnesses shall express an opinion as to the amount. From the facts appearing in the evidence the jury themselves fix the damage and may take into consideration their own knowledge, observation and experience in the business affairs of life.⁶⁵

150 Ill. 588; s. c. 37 N. E. 1096; *McDonald v. English*, 85 Ill. 232.

⁵⁷ *Barrows v. City of Sycamore*, supra; *Ottawa Gaslight &c. Co. v. Thompson*, 39 Ill. 598.

⁵⁸ *McDonald v. English*, 85 Ill. 232; *Francis v. Schoellkopf*, 53 N. Y. 152, 155; *Pierce v. Dart*, 7 Cow. (N. Y.) 609.

⁵⁹ 2 *Wood Nuisances* 1005; citing *Davis v. City of Bangor*, 42 Maine 522; *Phillips v. Commonwealth*, 44 Pa. St. 197; *State v. Inhabitants &c.*, 30 N. J. L. 137; *Baker v. City of Boston*, 12 Pick. (Mass.) 184.

⁶⁰ *Parker v. Mayor &c.*, 39 Ga. 725; s. c. 99 Am. D. 486; *Thurston v. City of St. Joseph*, 51 Mo. 510; s. c. 11 Am. R. 463; *Kelsey v. Glover*, 15 Vt. 708, 715; *Phinizy v. City Council &c.*, 47 Ga. 260, 263; *Chamberlain v. Enfield*, 43 N. H. 356; *City of Pittsburgh v. Grier*, 22 Pa. St. 54; *City of Philadelphia v. Gilmartin*, 71 Pa.

St. 140; *Wilson v. City of New Bedford*, 108 Mass. 261; s. c. 11 Am. R. 352; *Oliver v. City of Worcester*, 102 Mass. 490; s. c. 3 Am. R. 485.

⁶¹ *Cohen v. Mayor &c.*, 113 N. Y. 532; s. c. 21 N. E. 700; 10 Am. R. 506.

⁶² *Morse v. Town of Richmond*, 41 Vt. 435; s. c. 98 Am. D. 600; *Griffin v. Mayor &c.*, 9 N. Y. 456; *St. John v. Mayor &c.*, 3 Bosw. (N. Y.) 483; *Harper v. City of Milwaukee*, 30 Wis. 365; *Hamilton v. Mayor &c.*, 52 Ga. 435; *Boston Rolling Mills v. City of Cambridge*, 117 Mass. 396; *Clark v. Peckham*, 10 R. I. 35; s. c. 14 Am. R. 654.

⁶³ *Harman v. City of St. Louis*, 137 Mo. 494; s. c. 38 S. W. 1102.

⁶⁴ *Butz v. Cavanagh*, 137 Mo. 503; s. c. 38 S. W. 1104.

⁶⁵ *City of Litchfield v. Whitenack*, 78 Ill. App. 364.

§ 1100. Liability for public and private acts.—Where the municipality does an act which is private in its nature, and for which it receives a compensation, it is liable precisely as an individual, but where the act complained of is a public act, such as an improvement of its streets, or the erection of public works, or works designed to improve the sanitation of the municipality, it is liable only for careless or negligent acts. The general rule is that where a municipality has a public work under its control it is bound to repair it; and the force of the obligation is still further increased when it derives a revenue therefrom, as in case of wharves, canals, bridges and other highways. The liability in such case does not depend upon an ordinance or neglect to enforce it, but a violation of a public duty.⁶⁶

§ 1101. Nature of the power of public authorities to suppress nuisances.—The power to abate or suppress nuisances has been generally conceded to the governing authorities of municipal corporations in the discharge of the function of caring for and guarding the public health. Sometimes it has been contended that the rule of the common law, that a private person has the right to abate a private nuisance that does him harm without resort to the courts for redress, but that in such case he abates it at his peril, should govern in cases where municipal authorities summarily abate a nuisance. These authorities are, however, under statutes which confer upon them powers to that end, and there would be but little protection to communities threatened by malignant diseases if they were left to their rights at common law. As to the exercise of this power, the Connecticut supreme court, in considering a case involving the right of a local board of health to remove a nuisance which it deemed to be the cause of a malignant type of disease in the community, and sustaining the statute which it was urged was unconstitutional in that it took away the right of trial by jury, deprived the owner of his property without due process of law, besides conferring judicial powers upon a tribunal not warranted by the constitution, and took private property for pub-

⁶⁶ *City of Pittsburgh v. Grier*, 22 Pa. St. 54; s. c. 60 Am. D. 65; *Eastman v. Meredith*, 36 N. H. 284, 296. The court, in *Oliver v. City of Worcester*, 102 Mass. 489, say: "The distinction is well established between the responsibility of towns and cities for acts done in their public capacity, in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be

called their private character, in the management of property or rights voluntarily held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately, to the benefit of the public:" citing *Thayer v. City of Boston*, 19 Pick. (Mass.) 511; *Bailey v. Mayor &c.*, 3 Hill (N. Y.) 531; *Eastman v. Meredith*, 36 N. H. 284, 295.

lic use without compensation, expressed well the reason for such powers being given to those boards. "By the common law a party has the right to defend himself from any assailant, even to the taking of life when necessary, and even to the taking of life when not necessary in fact but apparently so. If life may be protected by destroying life when apparently necessary but not so in fact, may not life be protected by destroying property when apparently necessary, though afterwards discovered not so in fact? But it may be said that this right of self-defense comes when the assailed party seems to be driven to the last extremity. So here, the justification of the board of health in the destruction of property must come in *seemingly* extreme cases, where there is reasonable ground to believe that immediate action is necessary for the preservation of the life and health of the inhabitants, and where there is reasonable ground to believe the supposed nuisance to be one in fact."⁶⁷

§ 1102. **The same subject continued—A police power.**—To regulate and abate nuisances is one of the ordinary functions of the police power of the state.⁶⁸

§ 1103. **Abatement of nuisances by destruction of property.**—The legislature may confer the power upon municipalities to condemn as

⁶⁷ Raymond v. Fish, 51 Conn. 80, 99.

⁶⁸ Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, in which the United States supreme court on writ of error affirmed the holding of the state supreme court of Illinois, that it was in the power of the village, the charter of which expressly authorized its trustees to "define or abate nuisances which are or may be injurious to the public health," with still other large powers looking to the same object, to ordain that this manufacturing company should not transport its offal through the streets of the village under penalties for violation of the ordinance, and the refusal of the court to enjoin the further prosecution of the employees of the company for such violations. See also, Coates v. Mayor &c., 7 Cow. (N. Y.) 585, a suit to recover a penalty for interment of a dead body in Trinity churchyard, in which the court sustained the validity of an ordinance of the city of New York, passed to prevent the interment of

dead bodies within the city, holding that "the act under which it was passed was not unconstitutional, either as impairing the obligation of contracts or taking property for public use without compensation, but stands on the police power to make regulations in respect to nuisances." They further said:—"Every right, from absolute ownership in property down to a mere covenant, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. Though at the time it be remote and inoffensive, the purchaser is bound to know at his peril that it may become otherwise by the residence of many people in its vicinity, and that it must yield to by-laws and other regular remedies for the suppression of nuisances;" citing Brady v. Weeks, 3 Barb. (N. Y.) 157; Russel v. Mayor &c., 2 Denio (N. Y.) 461; American Print Works v. Lawrence, 23 N. J. L. 390.

nuisances all buildings, cisterns, wells, privies and other erections within their limits which, on inspection, shall be found to be unhealthful, and cause the same to be abated. Such legislation is not inhibited by constitutional provisions that no man's property shall be taken or applied to public use without the consent of his representatives, or without just compensation being made therefor. Such inhibitions have no application as a limitation of the exercise of those police powers which are necessary to the safety and tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments.⁶⁹ It is not the delegation of a new or an extraordinary power to authorize municipal corporations to abate nuisances by removing or destroying the things which create them. Without a special grant of authority public corporations may, as a common-law power, cause the abatement of nuisances, and if the nuisance can not otherwise be abated may destroy the thing which creates it.⁷⁰

§ 1104. Same subject continued—Constitutional limitation.—The constitutional rights of property owners as against the summary proceedings of boards of health and similar bodies was illustrated in a recent case in Massachusetts where it was held that under a statute which authorized the summary killing of animals having the farcy or glanders, upon condemnation by the cattle commissioners, with no provision for compensation to the owner, the adjudication by the board was not conclusive; and an order issued by them for killing an animal

⁶⁹ *Theilan v. Porter*, 14 Lea (Tenn.) 622; s. c. 52 Am. R. 173, an action of trespass against a taxing district and its legislative council and officers for damages for destroying the dwelling-house of plaintiff, which was successfully defended on the ground of its rotten and tumble-down condition, and that it was unsatisfactory by reason of its filthiness and rotten condition, and therefore a nuisance to be abated. See also, *Sedgwick Const. Law*, 434-5; note on pp. 435-6; *Sedgwick Stat. & Const. Law*, 438-9; *Shaw, C. J.*, in *Commonwealth v. Alger*, 7 Cush. (Mass.) 53, 84, 85, 86.

⁷⁰ *Baumgartner v. Hasty*, 100 Ind. 575; s. c. 50 Am. R. 830, holding that a city might summarily tear down a

wooden structure erected within prohibited fire limits, and dangerous on account of fires. See also, *Lodie v. Arnold*, 2 Salk. 458; *Hart v. Mayor*, 9 Wend. (N. Y.) 571; s. c. 24 Am. D. 165; *Viner Abridg.*, tit. Nuisance; 1 *Hawkins P. C.*, ch. 32, § 12; 3 *Black. Com.* 5; *Broom Com.* 222; *Cooley Torts*, 46; *Northrop v. Burrows*, 10 Abb. Pr. (N. Y.) 365; *Jones v. Williams*, 11 M. & W. 176; *Lanfear v. Mayor*, 4 La. 97; s. c. 23 Am. D. 477; *Harvey v. De Woody*, 18 Ark. 252; *Ferguson v. City of Selma*, 43 Ala. 398; *People v. Vanderbilt*, 28 N. Y. 396; *State v. Flannagan*, 67 Ind. 140; *City of Indianapolis v. Miller*, 27 Ind. 394; *Grove v. City of Fort Wayne*, 45 Ind. 429; s. c. 15 Am. R. 262; *Wood Law of Nuisance*, § 109.

not in fact infected was held to be no defense to those executing the order in a subsequent action by the owner for compensation.⁷¹

§ 1105. Discretion of municipal bodies in regulating and abating nuisances.—One of the chief functions of the police power is to regulate and abate nuisances. This power belongs primarily to the state, but may be, and is, in our states, in large part delegated to municipalities. Its exercise extends to the entire property and business interests within their jurisdiction. In the language of Judge Dillon:—"Much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with unless they are manifestly unreasonable and oppressive, or unwarrantably invade private rights, or clearly transcend the powers granted to them."⁷²

§ 1106. The power of municipal corporations as to declaring what is a nuisance.—The supreme court of Colorado has construed the language of a charter of a city empowering it "to make regulations to secure the general health of the inhabitants, to declare what shall be

⁷¹ *Miller v. Horton*, 152 Mass. 540; s. c. 26 N. E. 100 (by a divided court):—"Within limits it [the legislature] may enlarge or diminish the number of things to be deemed nuisances by the law, and the courts can not inquire why it includes certain property, and whether the motive was to avoid investigation. But wherever it draws the line, an owner has a right to a hearing on the question whether his property falls within it. . . . It would seem doubtful, at least, whether actual necessity ought not to be the limit when the question arises under the constitution between the public and an individual;" commenting on *City of Salem v. Eastern R. Co.*, 98 Mass. 431; and distinguishing *Train v. Boston Disinfecting Co.*, 144 Mass. 523; s. c. 11 N. E. 929.

⁷² *Dillon Munic. Corp.*, § 379. In *Dunham v. City of New Britain*, 55 Conn. 378; s. c. 11 Atl. 354, the supreme court of Connecticut held an ordinance of the city council, passed under power given it by statute to

better protect and preserve the waters of a lake, the source of its water supply, prohibiting sailing of boats upon its surface and fishing therein, to be a proper and valid exercise of the police power of the state; and this notwithstanding the grantors of the property to the water commissioners had in the grant a reservation to themselves of a right to sail upon and fish in the lake. In *Philadelphia v. Providence Trust Co.*, 132 Pa. St. 224; s. c. 18 Atl. 1114, the supreme court of Pennsylvania held that under the power of the board of health of the city, given by statute, "to remove the cause of all nuisances that now exist or may be hereafter created," the board could require privy wells to be cleaned and purified; but they had no power to demand the construction of water-closets and connections, and, on failure of the owners to comply, to construct such for the city and charge the cost to the owners of the premises. See also, *Kennedy v. Board &c.*, 2 Pa. St. 366.

nuisances and to prevent and remove the same," to clothe the city "with authority to declare, by general ordinance, what shall constitute a nuisance. That is to say, the city may by such ordinance define, classify and enact what things or classes of things, and under what conditions and circumstances, such specified things are to constitute and be deemed nuisances. For instance, the city might under such authority declare by ordinance that slaughter-houses within the limits of the city, carcasses of dead animals left lying within the city, goods, boxes and the like piled up or remaining for a certain length of time on the sidewalks, or other things injurious to the health, or causing obstructions or danger to the public in the use of the streets and sidewalks, should be deemed nuisances; not that the city council may, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination."⁷³ Under power to declare what is a nuisance a city may prohibit slaughter-houses and prohibit the erection thereof in the city,⁷⁴ and may prohibit the keeping of a stallion for service, within one-half mile of the public square.⁷⁵

§ 1107. The extent of the power to abate nuisances.—If municipal authorities are clothed with power under charter of the corporation upon a report of its board of health to abate nuisances, they may abate a nuisance summarily. But when proceeding thus summarily they do so at their peril, and if the owner can establish the fact that the property destroyed was not a nuisance, he may recover from the municipality any damages he may have sustained.⁷⁶

⁷³ *City of Denver v. Mullen*, 7 Colo. 345, 353; s. c. 3 Pac. 693. See also, *Everett v. City of Council Bluffs*, 46 Iowa 66; *Yates v. Milwaukee*, 10 Wall. 497. In *Chicago & C. R. Co. v. City of Joliet*, 79 Ill. 25, an action by the city to enjoin a railroad company from running its trains through the public streets and over certain "public grounds" of the city, which the city council by ordinance had declared to be a nuisance, the supreme court of Illinois reversed the court below, which had granted an injunction, and remanded the case with directions to dismiss the bill, declaring that they would regard the ordinance as without effect upon the case, although the charter

conferred upon the common council the power to abate and remove nuisances and to punish the authors thereof, and to define and declare what shall be deemed nuisances, upon the authority of *Yates v. Milwaukee*, supra, and *State v. Mayor & C.*, 29 N. J. L. 170.

⁷⁴ *Harmison v. City of Lewistown*, 153 Ill. 313; s. c. 38 N. E. 628.

⁷⁵ *Hoops v. Village of Ipava*, 55 Ill. App. 94.

⁷⁶ *Mayor & C. v. Mitchell*, 79 Ga. 807; s. c. 5 S. E. 201, in which it was further held that it was error to grant an injunction to restrain the city authorities from destroying a dam within the limits of the city which had already been washed

§ 1108. **Abatement of decayed and noisome tenement houses.**—A city charter provided that its “city council shall have power to prevent and cause the removal of all nuisances within said city, such as all decayed and dilapidated houses or structures calculated to produce disease of any kind, or unfit for use or habitation, and things producing noxious smells in frequented parts of the city, and things producing unhealthy exhalations and prejudicial to the health of the city, and things calculated seriously to impair the comfort and convenience of the inhabitants of the city.” The supreme court of Alabama construed this provision of the charter to clothe the corporate authorities of the city with the amplest powers to protect the “health” and peace and “comfort” of its inhabitants—an authority well conferred upon it by the legislature. But even without such special authority, those powers are incident to all incorporated towns and cities, as a means of discharging the duty to abate all nuisances which hurt, inconvenience or damage its inhabitants, or any particular portion of them.⁷⁷ The court sustained the chancellor in refusing an injunction to restrain the city authorities from removing tenements which the proof showed to be two old and almost worthless houses, filthy and crowded with filthy tenants, and that they were injurious to the health and comfort of the neighborhood, and had been occupied by patients afflicted with the small-pox, and that they were in an improving and flourishing part of the city, and that the owner was able to repair and improve them, but failed to do so.⁷⁸

§ 1109. **Removal of occupants—Express authority or extraordinary peril.**—The power of the board of health to abate nuisances and the causes of them and to enforce sanitary regulations is very great, and the courts never interfere with the legitimate use of their power, but excuse an excessive exercise of the power when there is great peril of the public health. When, however, they claim to remove citizens

away by floods and where the pond which the authorities prepared to abate as a nuisance had been destroyed. In *State v. Franklin*, 40 Kan. 410; s. c. 19 Pac. 801, it was held that under the provision of the laws of Kansas as to cities which gives the city councils authority to “purchase or condemn and hold for the city within or outside the city limits, within five miles therefrom, all necessary lands for hospital purposes and water-works,” and “that the police jurisdiction of the city

shall extend over such lands and property to the same extent as over public cemeteries,” the words “such lands” refer only to those proper and necessary for hospital purposes and water-works, and there is no power in the city to abate a nuisance within five miles of its limits except it be upon those of particular lands.

⁷⁷ *Ferguson v. City of Selma*, 43 Ala. 398; *Ex parte Burnett*, 30 Ala. 461, 465.

⁷⁸ *Ferguson v. City of Selma*, 43 Ala. 398.

from their homes, and close up their houses, they must have either the sanction of law for it, or they must be justified by great public necessity, which demands such action—upon the same principle that buildings may be blown up to prevent the spread of a great conflagration. “The law looks with too jealous an eye upon the right of every man to the peaceful possession of his house, his castle, the dwelling place of himself and family, to permit him to be ejected from it, except in a clear case of right.”⁷⁹

§ 1110. Power to define nuisances not absolute.—Though a city may have the power under its charter to abate nuisances, and also the extraordinary power to define and declare what is a nuisance, which is broader than its general authority to abate, neither will justify a wanton declaration that an act or vocation is a nuisance which unquestionably is not, or an unwarrantable invasion of private rights.⁸⁰

§ 1111. The same subject continued.—While the legislature in the exercise of the police power may prohibit in particular localities such use of property as is injurious to public health, it has no authority to declare or to authorize municipal authorities to declare the building of a private residence on one’s land to be a nuisance because the same may have a tendency to depreciate the value of adjoining property by shutting out the breeze from a body of water and obstructing the view to the sea, as it would virtually deprive the owner of the use of his property without compensation.⁸¹

⁷⁹ *Eddy v. Board &c.*, 10 Phila. (Pa.) 94, where the court holds, in effect, that except in extraordinary emergencies there is no constitutional right to enter dwelling-houses to search for nuisances, without a search-warrant therefor.

⁸⁰ *City of Kansas v. McAleer*, 31 Mo. App. 433, in which case the appellate court reversed the criminal court below and sustained the validity of an ordinance of the city declaring it a nuisance and prohibiting “the running or operating of a rock-crushing machine in any block or square wherein there are three or more residences or dwellings occupied.” Among other things the appellate court held that the fact that the machine was in operation at the place charged before the passage of

the ordinance was of no avail as a defense. On this point see also, *Hayden v. Tucker*, 37 Mo. 214; *Campbell v. Seaman*, 63 N. Y. 568; *Wier’s Appeal*, 74 Pa. St. 230; *Coates v. Mayor &c.*, 7 Cow. (N. Y.) 585. Nor would the fact that the most modern appliances were made use of and that the offensiveness and annoying character of the machine were thereby reduced to the minimum be a defense: *State v. Boll*, 59 Mo. 321.

⁸¹ *Quintini v. Board &c.*, 64 Miss. 483; s. c. 1 So. 625, in which case it was also held that, where a particular use of property is declared by a municipal ordinance to be a nuisance and also a crime, the chancery court still has jurisdiction to grant the owner an injunction against a sup-

§ 1112. **Limitation of power to define nuisances further illustrated.**—While authority to prevent and abate nuisances may be constitutionally conferred on a municipal corporation, such power, conferred in general terms, can not be taken to authorize extrajudicial condemnation of that as a nuisance which, in its nature or use, is not such.⁸²

pression of the alleged nuisance, although its effect be to protect the owner from a criminal prosecution under such ordinance. In *Ex parte O'Leary*, 65 Miss. 80; s. c. 3 So. 144, the supreme court of Mississippi held an ordinance of a municipality declaring it a nuisance "to erect hog-pens within any inclosure in the city limits, or to permit hogs to run at large within any lot or inclosed place in the city," except at certain designated places, and directing that all such lots and pens be abated as nuisances, to be invalid as being too broad and sweeping. See *Wood Nuisances*, § 518. So in *Town of Arkadelphia v. Clark*, 52 Ark. 23; s. c. 11 S. W. 957, an ordinance of the town prohibiting the owning, keeping or raising of bees within the corporate limits was held by the Arkansas supreme court to be too broad, and therefore invalid. The court said:—"Neither the keeping, owning or raising of bees is in itself a nuisance. Bees may become a nuisance in a city, but whether they are so or not is a question to be judicially determined in each case. The ordinance under consideration undertakes to make each of the acts named a nuisance without regard to the fact whether it is so or not, or whether bees in general have become a nuisance in the city."

⁸² *Poyer v. Village of Des Plaines*, 18 Ill. App. 225; adhered to in *Village of Des Plaines v. Poyer*, 22 Ill. App. 574, in which an ordinance of the village declaring all picnics to be nuisances regardless of their character was held to be invalid

upon the principle announced in the text. In *People v. Gordon*, 81 Mich. 306; s. c. 45 N. W. 658, the supreme court of Michigan held a requirement by the common council of a city that garbage shall be removed through and out of the city in watertight, closed carts or wagons, marked "garbage," to be a reasonable regulation. In *City of St. Paul v. Gillfillan*, 36 Minn. 298; s. c. 31 N. W. 49, the supreme court of Minnesota held an ordinance of the city declaring the emission of dense smoke from the smoke-stack of any boat or locomotive, or from any chimney, anywhere in the city, a public nuisance, void and unauthorized, as the charter of the city nowhere gave it power to declare what acts or omissions shall constitute a nuisance. The court distinguished *Harmon v. City of Chicago*, 110 Ill. 400, 411, which sustained a prosecution under a similar ordinance of that city, in that the city council there were expressly authorized by the legislature "to declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue or suffer nuisances to exist." The Minnesota court further said:—"It will not be assumed that the legislature may authorize that to be declared a nuisance which, from the nature of the case, is not and can not become such. But the matter prohibited by this ordinance may become a nuisance, and may therefore be the proper subject for regulation or restraint by the city council under legislative sanction." See *North Chicago City R. Co. v.*

§ 1113. **Municipality confined to mode prescribed in the charter or statute.**—In Iowa, where the statute empowers cities to prohibit the erection within certain limits of wooden buildings on petition of the owners of two-thirds of the ground embraced within those limits, this petition is a necessary prerequisite to legalize such a prohibition.⁸³ The reason is, as expressed by the supreme court of Iowa in another case, that “when a thing is directed to be done through certain means, or in a particular manner, there is implied an inhibition upon doing it through other means or in a different manner.”⁸⁴ The rule is well settled that a municipal corporation has the power to treat as a nuisance a thing that from its character, location and surroundings may and does become such. The supreme court of Illinois, discussing this general subject, said:—“But in doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general grant of power like the one we are considering, their action under such circumstances would be conclusive of the question.”⁸⁵

§ 1114. **The same subject continued.**—The United States supreme court, in discussing the limits of power, said:—“It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws, either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities.”⁸⁶

Town of Lake View, 105 Ill. 207; s. c. 44 Am. R. 788.

⁸³ City of Des Moines v. Gilchrist, 67 Iowa 210; s. c. 25 N. W. 136.

⁸⁴ City of Keokuk v. Scroggs, 39 Iowa 447.

⁸⁵ North Chicago City R. Co. v. Town of Lake View, 105 Ill. 207; s. c. 44 Am. R. 788.

⁸⁶ Yates v. Milwaukee, 10 Wall. 505. See also, Hart v. Mayor &c., 3 Paige (N. Y.) 213; Mayor &c. v. Gerspach, 33 La. An. 1011; Baker v. City of Boston, 12 Pick. (Mass.) 184; First Municipality v. Blinneau, 3 La. An. 688; Kennedy v. Phelps, 10 La. An.

227; Mayor &c. v. Hoffman, 29 La. An. 651. As to ordinances providing for the summary destruction of wooden buildings, see Brady v. Northwestern Ins. Co., 11 Mich. 425; Wadleigh v. Gilman, 12 Maine 403; 2 Bacon Abridg. 147; Clark v. City of South Bend, 85 Ind. 276; s. c. 44 Am. R. 13; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 669; 2 Kent Com. 339; Fields v. Stokley, 99 Pa. St. 306; s. c. 44 Am. R. 109; Respublica v. Duquet, 2 Yeates (Pa.) 493; Corporation of Knoxville v. Bird, 12 Lea (Tenn.) 121; City of Salem v. Maynes, 123

§ 1115. **Abatement of structures endangering public safety.**—A municipality may abate a public or common nuisance which endangers either the health or the safety of its citizens.⁸⁷ But a railway track laid upon a city street in good faith under a corporate charter granted for the purpose, but not endangering the health or safety of the inhabitants, can not be classed among the nuisances which the city authorities may abate summarily without resort to the processes of the law, even though by reason of the manner of its construction it may obstruct the street to such a degree as to amount to a nuisance.⁸⁸

§ 1116. **Person charged with maintaining a nuisance entitled to notice or hearing.**—The question of nuisance can be conclusively decided, for all legal uses, by the established courts of law or equity alone, and the resolutions of officers, or of boards organized by force

Mass. 372; *Field v. City of Des Moines*, 39 Iowa 575; s. c. 18 Am. R. 46. In *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397, it was held lawful for an officer acting under a board of health to tear down a tenement house cut up into small apartments and calculated to breed disease.

⁸⁷ *Klingler v. Bickel*, 117 Pa. St. 326; 11 Atl. 555, in which the supreme court of Pennsylvania held that the high constable and his posse of a borough were not liable in damages for the demolition under orders of the town council of the borough of a frame wooden building which was in the course of construction contrary to the provisions of an ordinance of the borough which prohibited the erection of such buildings within the limits in which it was being erected. Another ordinance provided that persons violating the one above referred to "shall be compelled to remove the structure or pay the cost of removal by council with the addition of twenty per centum, and also pay a penalty of fifty dollars for every day the same shall remain standing within the limits prescribed in this ordinance," etc. The town

council ordered its officers with a posse to destroy and remove the structure proposed to be erected. The supreme court said:—"Every frame building erected in a closely built up portion of a town in violation of a lawful ordinance prohibiting it may be said to be a nuisance, owing to the danger from fire; but it is not such a nuisance per se as would justify a private person in abating it. But when it comes to a question of the power of council to abate it and enforce its ordinance, we have an entirely different question before us."

⁸⁸ *Easton &c. R. Co. v. City of Easton*, 133 Pa. St. 505; s. c. 19 Atl. 486; 19 Am. St. 658, holding that where the authorities of a city have declared such a track to be in violation of a municipal ordinance and a public nuisance, and have summarily undertaken to remove it by force, and the railway prays for an injunction against such removal, the city not applying by cross-bill or otherwise for a legal adjustment of the differences between the company and itself, an injunction should be granted without regard to the merits of the controversy.

of municipal charters, can not to any degree control such decision.⁸⁹ The power given to the board of health of a town, under the statute of New York which gives to the board of health power "to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances," etc., by necessary implication requires such a board to give a reasonable notice to the person charged with maintaining a nuisance that complaint has been made or that such fact exists, to afford him an opportunity to be heard in refutation of the charge.⁹⁰

§ 1117. Construction of statutes requiring notice to owners to remove nuisances.—The statute of New York requires the board of health to serve an order for the removal of a special nuisance on the occupant and the owner of the premises where the nuisance exists, and, in case of disobedience on their part, authorizes a removal of the nuisance, and makes the expense of the removal of the nuisance by the board a charge on the occupant of the premises. An order to remove such a nuisance, directed to one having an interest in the premises on which it exists, and served on his agent, who is in occupancy of the premises, does not impose upon the agent the duty of removing the nuisance.⁹¹ A statute of Pennsylvania authorizes the board of health of a municipal corporation, after giving notice to the owner of property that from something connected with its construction, or some

⁸⁹ *Hutton v. City of Camden*, 39 N. J. L. 122, in which case the action of a board of health, finding that a nuisance existed on a person's property, in the absence of such person, and without notice to him, was void, even when it came collaterally in question. *Tiedeman Limitations of Police Powers* 427. See also, *City of Salem v. Eastern R. Co.*, 98 Mass. 431, an action to recover the expenses of an abatement of a nuisance made by the city under the adjudication of a board of health. In this case the supreme court of Massachusetts said:—"But the court are of opinion that in a suit to recover expenses incurred in removing a nuisance, when prosecuted against a party on the ground that he caused the same, but who was not heard, and who had no opportunity of being heard before the board of health, such party is not concluded by the findings or adjudications of that

board, and may contest all the facts upon which his liability is sought to be established."

⁹⁰ *People v. Board &c.*, 58 Hun (N. Y.) 595; s. c. 35 N. Y. St. 411; 12 N. Y. S. 561, holding the proceedings in this case fatally defective because of the omission to give notice reasonable in point of time to the relator, a railroad company of which complaint was made. This results from the duties of a board in such matters being of a quasi-judicial nature, and the persons complained of having a right of hearing before a final judgment at common law and under the state constitution. - - - If an ordinance declares a thing a nuisance an investigation before attempting to execute is not required: *Waters Pierce Oil Co. v. Mayor &c.*, 47 La. An. 863; s. c. 17 So. 343.

⁹¹ *Lydecker v. Eells*, 3 N. Y. S. 323; s. c. 20 N. Y. St. 886.

use of it, it is a nuisance, to remove it or take such action as will cause the nuisance to cease, to have it removed or make such alterations in the property as may be needed to prevent the nuisance. For the expense of this there is given by the statute a right of action on what is styled a municipal claim for lien. In a proceeding to enforce such a claim, it is necessary to aver that notice to remove the nuisance or take the other steps required to abate it was made to the rightful owner.⁹²

§ 1118. Proceedings in equity for abatement of nuisances—New Jersey decisions.—When a board of health proceeds by bill in chancery for an injunction to prohibit the continuance of a nuisance as allowed by the New Jersey statute, a notice is not necessary, as where the boards proceed by summary process to abate nuisances; for in cases of that kind the statute provides that the boards shall give notice of their intention to abate to the owners of the property or those engaged in the business alleged to be a nuisance.⁹³ Under this New Jersey statute only such a nuisance as is hazardous to public health can be abated, and where it simply renders home uncomfortable or depreciates the value of property, or amounts only to an annoyance to individuals or communities, relief must be sought by the individual or the community.⁹⁴ The New Jersey statute has been construed not to

⁹² *Philadelphia City v. Dungan*, 124 Pa. St. 52; s. c. 16. Atl. 524; 23 W. N. C. (Pa.) 243. In *Connellsville Borough v. Gilmore*, 15 W. N. C. (Pa.) 343, such a proceeding, the court said:—"A municipal claim being the creature of statute and unknown to the common law must conform to the law of its creation. This claim is radically defective. The act of 1851 only empowers the borough to file such a claim after the default of the owner or occupier to remove the obstruction and after a demand upon him by the borough authorities to do so. Such demand, being a prerequisite, should have been averred in the claim." See also, *Simons v. Kern*, 92 Pa. St. 455; *Gans v. City of Philadelphia*, 102 Pa. St. 97. In this last case, Trunkey, Justice, said:—"Notice to the owner being a prerequisite, the claim should be filed against the property in the name of the person upon whom notice was served.

The law requires the return and registry of the owners of every lot of ground upon the plans of the city, and if so registered the lot shall not be sold for taxes or other municipal claims, except in the name of the owner as returned. Although the proceeding is in rem, it is contemplated that the owner's name shall appear in the claim and proceedings thereon."

⁹³ *State v. Neidt* (N. J. Eq.), 19 Atl. 318.

⁹⁴ *State v. Neidt* (N. J. Eq.), 19 Atl. 318, in which case the nuisance complained of was a fat-rendering factory, and the proofs were that more than a dozen persons living in the vicinity were made sick at their stomachs or nauseated by the odors. One was sick for two days, another lost his appetite and on several occasions was unable to eat his meals. One man felt so bad that he was obliged to quit his work. Others refused to work because of the

clothe the boards of health with the functions of the attorney-general in cases of public nuisances, but to authorize them in their own names to secure for individuals that protection which equity would afford to those persons upon their own suit. The statute requires, also, that the fact that there exists a special injury which would enable an individual to sue shall appear by the pleadings.⁹⁵

§ 1119. **The same subject continued—Minnesota decisions.**—In Minnesota it has been held that a municipal corporation, clothed by its charter with power “to remove and abate any nuisance injurious to the public health,” and “to do all acts and make all regulations which may be necessary and expedient for the preservation of health or the suppression of disease,” may, at its election, in cases falling within some recognized head of equity jurisdiction, resort to a court of equity to aid it in enforcing its public duties to preserve the public health of its inhabitants and maintain in its own name an action to abate a public nuisance within its corporate limits affecting the public health of the municipality.⁹⁶ A town in Minnesota may, in its own name, maintain a civil action to abate a public nuisance constituting an obstruction to a highway, and to enjoin its maintenance, as under the statutes of that state the care and maintenance of highways are vested in the towns in their corporate capacity, the supervisors being merely their officers and agents.⁹⁷ Upon the right of a town to

stench. Two were made to vomit, while in others retching was the only effect. A number of families were obliged to stay indoors and close their windows to protect themselves from the odors. The chancellor ordered an abatement of the nuisance so far as it was hazardous to the public health; following *Butterfoss v. State*, 40 N. J. Eq. 325.

⁹⁵ *Board &c. v. New York Horse Manure Co.*, 47 N. J. Eq. 1; s. c. 19 Atl. 1098, in which the chancellor dismissed the bill because the pleadings did not show such a case.

⁹⁶ *Village of Pine City v. Munch*, 42 Minn. 342; s. c. 44 N. W. 197, an action to enjoin the defendants from so operating a dam as to draw off the water of a pond and lay bare the submerged lands at such seasons as to affect injuriously the public health of the village. It was further

held that the fact that this dam was erected by authority of law would be no defense to the action if the injury to the public health of the village as a result flowed from the manner of construction or operation of the dam. See also, as bearing somewhat upon this doctrine, 3 *Pomerooy Eq. Jur.*, § 1314; *Mayor &c. v. Bolt*, 5 Ves. Jr. 129; *City of Rochester v. Erickson*, 46 Barb. (N. Y.) 92; *Inhabitants &c. v. Farrar*, 11 Allen (Mass.) 398; *Inhabitants &c. v. Mayo*, 109 Mass. 315; *City of Taunton v. Taylor*, 116 Mass. 254, 262; *Remarks of Bacon, V. C.*, in *Nuneaton Local Board v. Sewage Co.*, L. R. 20 Eq. 127; *Mayor &c. v. Marriott*, 9 Md. 160, 174.

⁹⁷ *Hutchinson Tp. v. Filk*, 44 Minn. 536; s. c. 47 N. W. 235; following *Woodruff v. Town of Glendale*, 23 Minn. 537; *Woodruff v. Town of*

maintain such a suit in equity the Minnesota supreme court said:—"A township is a governmental agency to which is intrusted the care and superintendence of highways within its boundaries, and upon which is imposed the duty of repairing them and keeping them in order, and removing obstructions, with power to levy and expend taxes for these purposes. In short, as to all matters pertaining to highways, a town is, to the extent of these powers and duties, the representative of the state, and if it has the power to abate such a nuisance, as it undoubtedly has, there is no apparent reason why it may not, in a proper case, resort to a court of equity to aid it by injunction or other appropriate remedy in the performance of its public duties as a governmental agent of the state."⁹⁸

§ 1120. The same subject continued—The rule in other states.—It has been held that a municipal corporation can not maintain an action in equity under the Iowa code to enjoin and abate a nuisance on the ground of injury to its citizens. The mode in which it can exercise the "power to prevent injury or annoyance from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated," given it by the general statutes of the state, is by making and publishing ordinances on the subject.⁹⁹ But an action of this kind may be maintained under the statutes of Massachusetts by a municipal corporation.¹⁰⁰

Glendale, 26 Minn. 78; s. c. 1 N. W. 581; *Peters v. Town of Fergus Falls*, 35 Minn. 549; s. c. 29 N. W. 586; *Blakely Tp. v. Devine*, 36 Minn. 53; s. c. 29 N. W. 342. As to the equitable remedy in such a case, see *Angell & D. Highways*, § 280 and notes.

⁹⁸ *Hutchinson Tp. v. Filk*, 44 Minn. 536; s. c. 47 N. W. 255. See also, *Village of Pine City v. Munch*, 42 Minn. 342; s. c. 44 N. W. 197.

⁹⁹ *City of Ottumwa v. Chinn*, 75 Iowa 405; s. c. 39 N. W. 670, an ac-

tion by the city to enjoin the carrying on of the business of defendants, who were conducting a slaughterhouse.

¹⁰⁰ *City of Taunton v. Taylor*, 116 Mass. 254, which was a bill in equity brought in the name of the city by its board of health to restrain the exercise of an offensive trade or employment which the board of health prohibited under the powers given it by the Massachusetts statutes.

CHAPTER XXVII.

PUBLIC IMPROVEMENTS.

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- 1216. Liability of corporation for consequential injuries.
- 1217. Flowage of surface water from streets.
- 1218. The same subject continued.
- 1219. Flowage of water by construction of a levee.
- 1220. Damages for change of grade.
- 1221. The same subject continued—Connecticut rule.
- 1222. The same subject continued—"Damage" clause in constitutions.
- 1223. The same subject continued—Measure of damages.
- 1224. Damages by change of grade further considered.
- 1225. The same subject continued—Common-law action.
- 1226. Estoppel of landowner.
- 1227. Actions by abutters—Pleading, etc.
- 1228. Questions for the jury.

§ 1121. **Public improvements generally.**—Municipal corporations of the different kinds in our system of government have had expressly conferred upon them by their charters, general statutes or special legislation, or there is implied as an incident to their general purposes, the power to make public improvements of a general kind or local. In a limited sense these have been discussed in previous chapters.¹ These charters or statutes usually prescribe the mode in which these improvements should be provided for by the governing authorities, and also the preliminary steps, where proper, to be taken as precedent to and fully authorizing action of the authorities in the matter. They also, as a protection to the citizens, in most instances provide a mode of letting the contracts for work upon such improvements as may be ordered by advertising for proposals for bids, etc. There will be found in a previous chapter some discussion upon this particular point, besides what may be found here.² The right to impose by statute the cost of local improvements wholly or partly upon the owners of the property benefited thereby has been questioned at various times, and there will be given here the rulings in different jurisdictions sustaining the power of the legislature. There will also be discussed the rights of property owners affected by public improvements to damages resulting from them, as well as from the unskilful manner in which public works are constructed.

§ 1122. **Necessity for public improvement.**—The necessity for a public improvement within the power of the city to provide is a matter committed by law to the judgment and discretion of the city council, and its determination as to such necessity is conclusive in the absence of fraud,³ or unless there is an abuse of that discretion.⁴ It is an abuse of discretion where the cost of an improvement exceeded the value of the property and the enhanced value of the property is much less than the cost of the improvement.⁵ Courts will not declare an ordinance for the reconstruction of a sidewalk oppressive and unreasonable,⁶ and the decision to open a street is conclusive as to the necessity and propriety.⁷ The question of the necessity for a public improvement is in the discretion of municipal authorities and

¹ See ch. 15, vol. 1, on Express Westport, 110 Mo. 502; s. c. 33 S. Corporate Powers. W. 182.

² See ch. 18, vol. 1, on Municipal Contracts.

³ City of Chicago v. Nichols, 177 Ill. 97; s. c. 52 N. E. 359.

⁴ Bacon v. Mayor &c., 105 Ga. 62; s. c. 31 S. E. 127; Morse v. City of

⁵ State v. Mayor &c., 63 N. J. L. 202; s. c. 42 Atl. 773.

⁶ City of Marionville v. Henson, 65 Mo. App. 397.

⁷ In re Folts Street &c., 46 N. Y. S. 43; s. c. 18 App. Div. (N. Y.) 568.

will not be interfered with by the courts except in cases of manifest abuse,⁸ but where the power is given by a general statute, and is general in its nature and subject to the implied limitation that it shall be reasonable, courts have power to determine the reasonableness as a question of law. Where the exercise of a grant of power may be reasonable or arbitrary, unreasonable or oppressive, it may be inquired into by the court.⁹ The necessity for the improvement of a street is not determined solely from benefits to abutting owners, but is to be determined from all the circumstances, and the use thereof by the public generally.¹⁰ The unwise exercise of the power to make improvements does not affect the validity of the proceedings.¹¹ Where the necessity is left to a board and the board acts regularly and in good faith, its decision is final.¹² The council and mayor having power to determine the necessity for an improvement their action is final.¹³ Where the corporate expenditures for any one year are limited to the provisions of the annual appropriation bill of that year except for improvements, the necessity for which is caused by casualty or accident happening after the annual appropriation is made, the determination by the council that the thing which caused the necessity was a casualty or accident is to be accepted only as *prima facie* and may or may not be conclusive. The reason for this is in the fact that the declaration of a council that that is an accident or casualty which in its very nature is not so, is an arbitrary and unreasonable exercise of legislative power and is not conclusive.¹⁴ And even where the city council is in the exercise of power expressly conferred to define and declare what shall be deemed a nuisance, it has no power to declare a thing to be a nuisance which in fact is clearly not one.¹⁵ The abutting property owners can not question the necessity of an improvement.¹⁶ Under California Statute, 1891, p. 196, § 3, the objection of a majority of the frontage owners bars further proceedings in respect to a proposed improvement for six months,

⁸ *Regenstein v. City of Atlanta*, 98 Ga. 167; s. c. 25 S. E. 428.

⁹ *Title Guarantee &c. Co. v. City of Chicago*, 162 Ill. 505; s. c. 44 N. E. 832; *Village of Hyde Park v. Carton*, 132 Ill. 100; s. c. 23 N. E. 590; *Hawes v. City of Chicago*, 158 Ill. 653; s. c. 42 N. E. 373.

¹⁰ *Dewey v. City of Des Moines*, 101 Iowa 416; s. c. 70 N. W. 605.

¹¹ *Harvey v. Benson*, 113 Cal. 314; s. c. 45 Pac. 687.

¹² *Burnett v. City of Boston*, 173 Mass. 173; s. c. 53 N. E. 379.

¹³ *Seward v. Rheiner*, 2 Kan. App. 95; s. c. 43 Pac. 423. And see *Stewart v. Neodesha*, 3 Kan. App. 330; s. c. 45 Pac. 110.

¹⁴ *City of Chicago v. Nichols*, 177 Ill. 97; s. c. 52 N. E. 359.

¹⁵ *North Chicago City R. Co. v. Town of Lake View*, 105 Ill. 207; s. c. 44 Am. R. 788.

¹⁶ *Bullitt v. Selvage*, 20 Ky. L. 599; s. c. 47 S. W. 255.

after which new preliminary proceedings may be instituted as before.¹⁷ A preliminary resolution declaring a necessity is not jurisdictional.¹⁸ Frequently the statute requires the submission of the question of making an improvement to the electors by a popular election called for the purpose.¹⁹

§ 1123. Cost of improvement.—Before steps are taken to make an improvement the statute in some states requires as a preliminary proceeding the ascertaining in some prescribed mode the cost, or at least approximate estimate of expense, of the proposed improvement, and whether so required or not it is a wise and judicious preliminary. Where there are preliminary steps required they must be complied with.²¹ The preliminary estimate of the cost of an improvement should be upon the cost for cash.²² Where a statute requires a railroad company occupying a portion of a street to pay for street improvements in proportion to the part occupied by it, the ordinance can not arbitrarily fix the proportion where abutting owners are burdened with a proportionate share of the cost. They have a right to be heard.²³ No part of the expense of an improvement of that part of a street occupied by a street railway can be assessed against

¹⁷ *City St. Imp. Co. v. Babcock*, 123 Cal. 205; s. c. 55 Pac. 762.

¹⁸ *Pittsburg &c. R. Co. v. Hays*, 17 Ind. App. 261; s. c. 44 N. E. 375; 45 N. E. 675; 46 N. E. 597.

¹⁹ What is not a proper submission to a vote of electors,—see *In re Village of Le Roy*, 55 N. Y. S. 611; s. c. 35 App. Div. (N. Y.) 177. For facts showing a necessity for a certain improvement, see *Shannon v. Portland*, 38 Or. 382; s. c. 62 Pac. 50.

²¹ *Cole v. Skrainka*, 105 Mo. 303; s. c. 16 S. W. 491, in which it is held that it must appear that there has been a fair compliance with all the conditions precedent, whether prescribed by charter or ordinance, to entitle a city or contractor to recover from the abutting property holder the expenses of paving a street or other local assessment; and, in the absence of such showing, the tax-bill would be void; citing 2 *Dillon Munic. Corp.* (4th ed.), § 811. See also, *Kiley v. Oppenheimer*, 55 Mo. 374, holding a recovery could not be had on a tax-bill when the

city engineer had let the contract for work while the publication required by the statute was being made; *Leach v. Cargill*, 60 Mo. 316, where the tax-bill was held invalid because of the failure to give the property owner an opportunity to do the work, which the ordinance provided should be done; *City of St. Joseph v. Anthony*, 30 Mo. 537, a suit to collect the cost of macadamizing a street, holding that a substantial compliance with the laws must be shown, but that an observance of all the formalities prescribed by ordinance would not be required; *Sheehan v. Owen*, 82 Mo. 458; *Kansas Town Co. v. City of Argentine*, 59 Kan. 779; s. c. 54 Pac. 1131.

²² *Construction of Ill. laws of June 14, 1897, and powers of improvement board: Village of Hammond v. Leavitt*, 181 Ill. 416; s. c. 54 N. E. 982.

²³ *City of Shreveport v. Prescott*, 51 La. An. 1895; s. c. 26 So. 664.

adjoining owners.²⁴ Where lands of a railroad company, leased for business purposes other than right of way, are benefited by an improvement, they may be assessed.²⁵ A city may properly pay its proportion of the entire cost of street paving which would be assessable against its property as an individual owner.²⁶ Pipes laid for conveying water along a street are of special benefit and constitute a local improvement and may be paid for by special levy, while a reservoir well, stand pipe, pumping works and buildings are of general utility and are paid for by general taxation.²⁷ Where an ordinance appoints three certain persons commissioners to estimate the cost of certain improvements the report must be signed by all of them and not by one and two other persons.²⁸

§ 1124. Necessary funds a prerequisite.—By statutory provisions it is sometimes required that at the time of entering into a contract it is necessary that the municipality shall have in its treasury, or in the course of collection funds necessary to meet the expenditure contemplated by the contract. By construction such statutes are not intended to apply to a contract where payments thereunder are not to become due for a considerable time—a year and a half or more—and for the reason it could not be intended that the money should be collected and hoarded for the expenses of future years.²⁹

§ 1125. Passage of ordinance.—The usual rule that the mode of procedure to be followed in the enactment of ordinances as prescribed by statute must be strictly observed applies to those providing for public improvements. Such statutory powers constitute conditions precedent, and unless the ordinance is adopted in compliance with the conditions and directions thus prescribed it will have no force.³⁰ It

²⁴ *City of Shreveport v. Prescott*, 51 La. An. 1895; s. c. 26 So. 664.

Prescott, 51 La. An. 1895; s. c. 26 So. 664.

²⁵ *Chicago Terminal &c. R. Co. v. City of Chicago*, 178 Ill. 429; s. c. 53 N. E. 361.

²⁶ *Murphy v. City of Chicago*, 186 Ill. 59; s. c. 57 N. E. 847.

²⁸ *City of Harrisburg v. Shepler*, 190 Pa. St. 374; s. c. 42 Atl. 893.

²⁷ *Defiance Water Co. v. City of Defiance*, 90 Fed. 753.

²⁹ *Hughes v. City of Mومence*, 163 Ill. 535; s. c. 45 N. E. 300. Construction of Kansas City charter in reference to an assessment as a condition precedent to order of improvement: *McQuiddy v. Smith*, 67 Mo. App. 205. Construction of act 10 of 1896, La., in reference to division and costs of improvement on streets occupied by railroads: *City of Shreveport v.*

³⁰ *State v. Mayor &c.*, 25 N. J. L. 399; *Blanchard v. Bissell*, 11 Ohio St. 96; *Trustees &c. v. Lefler*, 23 Ill. 90; *Town of Danville v. Shelton*, 76 Va. 325; *Barnett v. President &c.*, 28 Ill. 62; *Ewbanks v. President &c.*, 36 Ill. 177; *Herzo v. City of San Francisco*, 33 Cal. 134; *Welker v. Potter*, 18 Ohio St. 85; *Bloom v. City of Xenia*, 32 Ohio St. 461, 466; *State v. Bell*, 34 Ohio St. 194; *Fuller v.*

has been held that an ordinance of a municipal corporation to condemn property for the opening and extension of a street, or to improve, by grading, curbing and macadamizing, a street so opened and extended, was an ordinance of a permanent nature within the meaning of a statute which requires that ordinances of a permanent nature shall be fully and distinctly read on three different days, unless three-fourths of the members elected dispensed with the rule, and that the statute was mandatory.³¹ When a municipal corporation seeks to impose upon citizens the burden of making public improvements, and to hold the property of the individual liable therefor, the statute authorizing such improvements to be made at the expense of the citizen must be strictly pursued.³² Under a statute requiring that the resolution adopted and published should specifically designate the work declared to be necessary to be done, it has been held that property owners and the property would only be liable for the costs of such improvements as are so specifically designated in the resolution and published in the official paper. This resolution and publication thereof being the only notice required to be given property owners that the improvement is ordered made, the improvements contracted for must conform strictly to the improvements designated in the resolution adopted and published.³³

§ 1126. Petition for improvement.—In some states the making of a local improvement must be based on a petition by the legal voters owning property on the street to be improved, or affected by the improvement, and such petition is made a preliminary precedent basis for the action of the council, or other board. The statutory requisites

Heath, 89 Ill. 296; Tracey v. People, 6 Colo. 151; Lewis v. City of St. Louis, 4 Mo. App. 563; Williams v. Willard, 23 Vt. 369; Missouri Pac. R. Co. v. City of Wyandotte, 44 Kan. 32; s. c. 23 Pac. 950; McCoy v. Briant, 53 Cal. 247, 250; Smith v. City of Buffalo, 1 Sheld. (N. Y.) 493; Sank v. City of Philadelphia, 4 Brewst. (Pa.) 133; Beikman's Case, 11 Abb. Pr. (N. Y.) 164; State v. Long Branch Com'rs, 42 N. J. L. 375; Van Alstine v. People, 37 Mich. 523.

³¹ Campbell v. City of Cincinnati, 49 Ohio St. 463; s. c. 31 N. E. 606. See also, Hepburn v. City of Philadelphia, 149 Pa. St. 335; s. c. 24 Atl. 279.

³² 2 Desty Taxation, 1241; 2 Dillon Munic. Corp., § 769; 1 Blackw. Tax Titles, § 612; Merritt v. Village of Portchester, 71 N. Y. 309; Hewes v. Reis, 40 Cal. 255; McLauren v. City of Grand Forks, 6 Dak. 397; s. c. 43 N. W. 710; White v. City of Saginaw, 67 Mich. 33; s. c. 34 N. W. 255; Hoyt v. City of East Saginaw, 19 Mich. 39; Pound v. Supervisors &c., 43 Wis. 63.

³³ Mason v. City of Sioux Falls, 2 S. D. 640; s. c. 51 N. W. 770, in which the supreme court held that after a resolution of a city council had been adopted and published, a change in the work enhancing the cost would require a new ordinance.

of such petitions are numerous, and not of general importance, and are not noticed in this connection except in explanation of adjudications. The purpose of such petitions is apparent in matters of local assessment or special assessment where the burdens of the improvement fall upon property owners adjacent or contiguous to the proposed improvement, and who are more directly interested in such improvement than the public at large.³⁴ The petition, most usually, is addressed to the council or some board having jurisdiction to hear and act thereon, whose action is quasi-judicial, but not of such character as to shut out collateral attack, and its determination that the petition is signed by the requisite number of persons does not give jurisdiction in the absence of the fact.³⁵ And so where the statute as a basis of an improvement requires a petition to be signed by a majority of the property owners, the decision of the council, though in good faith, that they had jurisdiction when in fact they had not, may be inquired into in a collateral proceeding.³⁶ The action of the board, or council, is only *prima facie* evidence that the requirements of the law have been observed.³⁷ It need not affirmatively appear that the petitioners are the owners of one-half the property to be affected. The council may determine this by evidence aliunde.³⁸ The petition on its face need not show that it is signed by a majority of the frontage owners.³⁹ Under statutes so dissimilar no definite rules can be stated as to the sufficiency of the petition. It has been held that a petition for a local improvement need not describe specifically the improvement where the board of local improvement is by law required to make an itemized estimate of the cost;⁴⁰ that it

³⁴ The petition required under Ill. *Bloomington v. Reeves*, 177 Ill. 161; Laws of 1897, p. 101, §§ 4, 7, as a s. c. 52 N. E. 161.

³⁵ *Allen v. City of Portland*, 35 Or. 420; s. c. 58 Pac. 509. Cf. *Miller v. City of Amsterdam*, 149 N. Y. 288; s. c. 43 N. E. 632; *Mulligan v. Smith*, 59 Cal. 206; *Sharp v. Speir*, 4 Hill (N. Y.) 76.

³⁶ *Miller v. City of Amsterdam*, 149 N. Y. 288; s. c. 43 N. E. 632.

³⁷ *City of Bloomington v. Reeves*, 177 Ill. 161; s. c. 52 N. E. 161.

³⁸ *Allen v. City of Portland*, 35 Or. 420; s. c. 58 Pac. 509.

³⁹ *City of Kansas City v. Kimball*, 60 Kan. 224; s. c. 56 Pac. 78.

⁴⁰ *Patterson v. City of Macomb*, 179 Ill. 163; s. c. 53 N. E. 617.

is sufficient if its general terms indicate the improvement desired;⁴¹ that where the owners of abutting property are required to petition for an improvement it means the owners in fee;⁴² that where two petitions are presented for the same improvement but of different materials the council may properly act on the petition with the greatest number of signatures;⁴³ that the sufficiency of a petition in the absence of fraud will not be reviewed by the courts on application of an individual;⁴⁴ that the signing of a petition by a corporation which is the owner of property the legal title to which is in two trustees who are officers is sufficient;⁴⁵ that one who is the owner of a life estate in one-half a tract of land, and who has the sale and unrestricted management of it during the minority of a child, is to be regarded as the owner and may sign the petition;⁴⁶ that the signature to a petition "Martha M. Crowell, Adm'x Estate of C. F. Crowell" is sufficient, as the words following the name will be treated as *descriptio personæ*;⁴⁷ that the signature of an owner of an undivided two-thirds interest in a lot is sufficient;⁴⁸ that a corporation need not attach its seal to the petition;⁴⁹ that the petition of property owners signed by the secretary of a corporation is sufficient under circumstances specified;⁵⁰ that the signature of a treasurer of the name of a corporation when ratified by the board of trustees precludes objection of third persons of want of authority by the treasurer;⁵¹ that where a petition was signed by agents for property owners the authority of such agents will be presumed and may be proved by evidence *dehors* the record.⁵² And so where a petition was signed "Wardens and Vestry of the Trinity Parish, by James Laidlaw, Clerk," it was held sufficient if the clerk was duly authorized by resolution to sign the petition;⁵³ that a lessee in possession under a ninety-nine-year lease, renewable forever, may subscribe the petition;⁵⁴ but that the signature of the husband where the property belongs to the wife is not good;⁵⁵ that the signature of a tenant in common represents only his

⁴¹ *Whaples v. City of Waukegan*, 179 Ill. 310; s. c. 53 N. E. 618.

⁴² *Merritt v. City of Kewanee*, 175 Ill. 537; s. c. 51 N. E. 867.

⁴³ *Cunningham v. City of Peoria*, 157 Ill. 499; s. c. 41 N. E. 1014.

⁴⁴ *Kirchman v. West & Co. R. Co.*, 58 Ill. App. 515. But see *Miller v. City of Amsterdam*, 149 N. Y. 288; s. c. 43 N. E. 632.

⁴⁵ *Allen v. City of Portland*, 35 Or. 420; s. c. 58 Pac. 509.

⁴⁶ *Allen v. City of Portland*, *supra*.

⁴⁷ *Allen v. City of Portland*, 35 Or. 420; s. c. 58 Pac. 509.

⁴⁸ *Allen v. City of Portland*, *supra*.

⁴⁹ *Allen v. City of Portland*, *supra*.

⁵⁰ *Allen v. City of Portland*, *supra*.

⁵¹ *State v. Mayor & Co.*, 62 N. J. L. 621; s. c. 43 Atl. 578.

⁵² *Allen v. City of Portland*, *supra*.

⁵³ *Allen v. City of Portland*, *supra*.

⁵⁴ *Village of St. Bernard v. Kemper*, 60 Ohio St. 244; s. c. 54 N. E. 267.

⁵⁵ *Village of St. Bernard v. Kemper*, 60 Ohio St. 244; s. c. 54 N. E. 267.

interest in the lot.⁵⁶ Where the law requires an improvement to be made upon petition, a change in the grade after contract, differing from the petition, renders the assessment void.⁵⁷ And so where the law requires the petition of a majority of the property owners for a street pavement when a pavement has once been made, an assessment for such purpose without petition is void.⁵⁸ A city may by ordinance declare a street unsafe for public use and by reciting a failure of the property owners to put it in safe condition or to petition therefor may make the improvement without a petition.⁵⁹ Taking up a stone pavement and putting down a brick one in its stead is not an original improvement requiring a petition.⁶⁰ Oral testimony of the contents of the petition of property owners consenting to a public improvement is inadmissible in a proceeding to confirm an assessment, when the absence of the petition is unaccounted for.⁶¹ If the petition asks the court to act upon a void provision, forbidden by law, or which the court has no power to do, where jurisdiction depends on the statute, the court has no jurisdiction and the proceedings are void.⁶² Where the charter makes the certificate of a certain board conclusive as to the sufficiency of the petition filed, the certificate will not render valid a petition rendered invalid by the subsequent withdrawal of names to the petition.⁶³ In an original proceeding for mandamus in the supreme court of California to compel the supervisors of the corporation to levy a tax for the payment of bonds issued in connection with the opening of a street, the court construed the statute and made these rulings: that the signing of that petition by the owners of a majority in frontage of the property was necessary to give the board of public works jurisdiction to organize and proceed with the work; that the mayor was not charged with the duty of determining whether the petition was signed by the required majority, and that his decision to that effect did not conclude or

⁵⁶ *Village of St. Bernard v. Kemp-er*, 60 Ohio St. 244; s. c. 54 N. E. 267.

⁵⁷ *Brady v. Rogers*, 63 Mo. App. 222.

⁵⁸ *Pell v. City of New York*, 65 N. Y. S. 34; s. c. 31 Misc. (N. Y.) 664.

⁵⁹ *Boyd v. City of Milwaukee*, 92 Wis. 456; s. c. 66 N. W. 603.

⁶⁰ *Reuting v. City of Titusville*, 175 Pa. St. 512; s. c. 34 Atl. 916.

⁶¹ *Farrell v. West Chicago Park Com'rs*, 182 Ill. 250; s. c. 55 N. E. 325.

⁶² *Cummings v. West Chicago Park*

Com'rs, 181 Ill. 136; s. c. 54 N. E. 941. As to the necessity of a petition, see *Steinmuller v. City of Kansas City*, 3 Kan. App. 45; s. c. 44 Pac. 600; and generally as to petition: *Warren v. Russell*, 129 Cal. 381; s. c. 62 Pac. 75.

⁶³ *People v. City of Syracuse*, 63 N. Y. S. 878; s. c. 30 Misc. (N. Y.) 409. Construction of Syracuse City charter as amended in reference to petition for improvement: *Smith v. Syracuse Imp. Co.*, 161 N. Y. 484; s. c. 55 N. E. 1077.

estop any one from disputing and showing that in fact the petition was not signed by the required majority.⁶⁴ Under the statutes of Maryland a life tenant can not bind the property by joining in an application for an improvement along the streets of a city, and can not be counted as one upon the petition to make a majority of the front-foot owners which is required to justify the council in ordering such improvement.⁶⁵ It has been held that since the board must necessarily have passed upon the sufficiency of the petition before ordering the work done, it was properly presumed to be sufficient, and testimony to the contrary was rightly excluded.⁶⁶

⁶⁴ *Kahn v. Board &c.*, 79 Cal. 388; s. c. 21 Pac. 849; s. c. affirmed in 25 Pac. 403; approving and adhering to *Mulligan v. Smith*, 59 Cal. 206. See also, *Liebman v. City of San Francisco*, 11 Sawyer 147, where the question of the city not being estopped by action of the mayor or by judgment of the county court is ably discussed by Field and Sawyer, JJ.; *Lent v. Tillson*, 72 Cal. 404; s. c. 14 Pac. 71. The signatures to the petition of persons other than those to whom the property was assessed in the last preceding assessment roll could not be counted in order to make up the owners of a majority of the frontage. The statute was mandatory, and this is a statutory requirement which courts can not disregard. Nor could the signatures of executors, administrators and agents be counted in the absence of evidence of their authority to sign the petition. Nor could the signature of a private corporation, made by its president and secretary, be counted, in the absence of evidence that such officers were authorized to affix the signature, or that that duty appertained to their offices: *Kahn v. Board &c.*, 79 Cal. 388; s. c. 21 Pac. 849; s. c. affirmed in 25 Pac. 403.

⁶⁵ *Mayor &c. v. Boyd*, 64 Md. 10; s. c. 20 Atl. 1028, an action to enforce an assessment upon property which

was defended on the ground that a majority of front-foot owners had not petitioned for the improvement, which defense the property owner is allowed to make in Maryland. See also, *Henderson v. Mayor &c.*, 8 Md. 352. The court of appeals of Maryland, in *Mayor &c. v. Boyd*, supra, said, in their reasoning:—"It is true that in the absence, as in our state, of any special legislation on the subject, the life tenant must pay all the ordinary annual taxes levied on the property, and also keep down the interest on incumbrances out of the rents and profits; citing 2 *Desty on Taxation*, 695.

⁶⁶ *Spaulding v. North San Francisco &c. Ass'n*, 87 Cal. 40; s. c. 25 Pac. 248, the court distinguishing *Mulligan v. Smith*, 59 Cal. 206, and *Kahn v. Board &c.*, 79 Cal. 388; s. c. 21 Pac. 849, in that these cases arose upon a special statute which did not provide for an adjudication of the jurisdictional fact that a majority of the frontage of lots fronting on the work proposed to be done was represented by the owners thereof in a petition for the work, and did not provide for a hearing to any of the owners of such frontage on that issue. But the statute involved in *Spaulding v. North San Francisco &c. Ass'n*, supra, does not provide for such adjudication by and such hearing before the board of super-

§ 1127. Statutory requirements strictly construed.—The requirements of the statute with respect to the notice to owners of abutting lands must be strictly complied with; and it is essential that the notice given them of the passage of the resolution declaring the necessity of the improvement should be a written notice, served or authorized by the proper board, in order to bar property owners of their damages. In a proceeding to assess damages under the statute, if the municipal corporation makes the owner of property abutting upon the improvement, who had filed his claim for damages with the clerk of the corporation, a party to the application for the jury in the statute provided for, and submits the assessment of his damages to the determination of a jury, and a verdict is returned in his favor for the amount proven, the corporation can not in that proceeding defeat his rights to the damages so assessed him on the ground that he waived the same, and was barred from receiving damages by reason of his failure to file his claim within the time prescribed by law.⁶⁷

§ 1128. Conclusiveness of determination of council.—The supreme court of Minnesota has construed the charter of one of the principal cities of that state and held that as respects the proceedings of the board of public works in making a local assessment under the charter the determination of the board in reference to the assessment district and what property shall be included or excluded therefrom, and in the apportionment of the amount of benefit to each lot or parcel, is final, except in case of fraud or mistake. And whether a public improvement can be deemed local in its character does not depend upon its extent or cost, though these elements are to be considered (and the assessment can in no event exceed the special benefits to the property so locally affected), but must depend upon the determination of the city council and board of public works, to whose judgment

visors, and that the decision of the board that a majority of such frontage was represented in the petition was a decision which the act says "shall be final and conclusive." The rule that "whenever the jurisdiction of a court not of record depends on a fact which the court is required to ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is conclusive, and not subject to any collateral attack," stated in *Freeman on Judgments*, § 523, has been expressly applied by this court to boards of su-

pervisors in *People v. Hagar*, 52 Cal. 171, 182, which governed this case.

⁶⁷ *City of Cincinnati v. Shrike*, 47 Ohio St. 217; s. c. 25 N. E. 169. The court said:—"If the city . . . desired to controvert the right of the defendant in error to have any damages assessed him because he did not file his claim within the proper time, it should have done so by declining to file the claim out of time, or excluding it from the application for the jury, or dismissing it before submission to the jury."

the matter is committed by the legislature, to be determined largely as a question of fact. And if it be found that property in the vicinity of the improvement is so situated and related to it as to receive special benefits in the enhancement of its value beyond that of property generally, the improvement may for the purposes of a special assessment be deemed local, though the property in the city or ward is also generally benefited.⁶⁸ If, in the exercise of the large power committed to their discretion, the board of public works complies with the formal requirements of the charter, its action must necessarily be final, both as to what property is benefited and how much, except in case of fraud or palpable mistake, or unless it is made to appear that an improper rule has been followed in making an assessment.⁶⁹ If it is made clearly to appear that through fraud or mistake property has been improperly included in, or excluded from, an assessment district for a public or local improvement, the court may interfere to vacate or set aside an assessment.⁷⁰ And every reasonable intentment of good faith and regularity is to be indulged by the court in respect to the acts of such officers while acting within their jurisdiction in the discharge of such duties.⁷¹ It is not fraud in ordering the paving of a street that there are but few houses on the street where the improvement is to be made, nor that the abutting owners object to the improvement.⁷² Power vested in a council to improve streets will not be reviewed by courts except in a clear case of abuse.⁷³

§ 1129. Including several streets in one improvement.—It has been held that under the provisions of the charter the work of grading, filling and bridging on a public street, and also the grading of other streets in connection therewith, may be so connected together as to be properly carried on in common, and be prosecuted as one en-

⁶⁸ *State v. District Court &c.*, 33 Minn. 295; s. c. 23 N. W. 222. The validity and provisions of this charter are considered and upheld in *Carpenter v. City of St. Paul*, 23 Minn. 232, and *Rogers v. City of St. Paul*, 22 Minn. 494, 507, in which the court held that "the fact that the street to be improved is the most public thoroughfare in the city does not prevent the improvement from being 'local,' but the local character of the improvement depends upon the special benefit which will result to the real property adjoining or

near the locality in which the improvement is made."

⁶⁹ *State v. Board &c.*, 27 Minn. 442; s. c. 8 N. W. 161; *State v. District Court &c.*, 33 Minn. 164; s. c. 23 N. W. 295.

⁷⁰ *State v. District Court &c.*, 33 Minn. 295; s. c. 23 N. W. 222.

⁷¹ *Matter of Episcopal School*, 75 N. Y. 324.

⁷² *Dewey v. City of Des Moines*, 101 Iowa 416; s. c. 70 N. W. 605.

⁷³ *Morse v. City of Westport*, 136 Mo. 276; s. c. 33 S. W. 182.

ture improvement, for which a local assessment may be made by the board of public works on property specially benefited thereby.⁷⁴

§ 1130. Notice of proposed improvements.—Where the power of a governing board of a municipality to make public improvements is derived from a statute which provides for notices of the application and proposal for such improvements before an ordinance is passed, and requires the clerk of such board to post for a specified number of days in a number of public places a notice “stating that objections in writing to the proposed improvement may be filed with him, and of the time and place when and where the township committee will meet to consider such objections,” a failure to give such notices, or the giving of insufficient notices, will invalidate any ordinance passed for an improvement, unless the insufficiency has been effectively waived or cured.⁷⁵ Preliminary to the making of a public improvement the statute frequently requires notice, a preliminary ordinance, estimate of cost, etc., and as a rule these preliminaries are imperative and jurisdictional,⁷⁶ though the failure to give notice of the pas-

⁷⁴ *State v. District Court &c.*, 33 Minn. 295; s. c. 23 N. W. 222. See also, *Wilbur v. City of Springfield*, 123 Ill. 395; s. c. 14 N. E. 871; *Mayall v. City of St. Paul*, 30 Minn. 294; s. c. 15 N. W. 170; *Matter of Walter*, 75 N. Y. 354; *State v. District Court &c.*, 29 Minn. 62; s. c. 11 N. W. 133 (where gutters and culverts were included with grading. The improvement included an embankment, which at its base necessarily extended beyond the limits of the street. It was held competent for the legislature to provide, as it had done in a special statute, in aid of the proceedings under the charter, for the acquisition of the proper easement or license to use and occupy the adjoining lands for such purposes, saving the landowner the right to use the land abutting on the street as graded); *State v. District Court &c.*, 33 Minn. 295; s. c. 23 N. W. 222.

⁷⁵ Though persons objecting to an improvement ordered by an ordinance may have filed written objections, and did not object to the insufficiency of the notice, if it does

not appear that they attended at the place of meeting, there is no waiver of the defect in the notice and it may be considered by the clerk on certiorari: *State v. Town of West Hoboken*, 53 N. J. L. 64; s. c. 20 Atl. 737. See also, *State v. Mayor &c.*, 47 N. J. L. 15. But if objectors permit proceedings for an improvement to continue unchallenged until an assessment has been imposed upon them, their case would come within the terms of the New Jersey statute which provides that “no assessment shall be set aside or affected by reason of the mistake of the township clerk in the form, substance or manner of publishing or posting said advertisements:” *State v. Town of West Hoboken*, supra. The court did not determine the question whether a legislature could validate a deficient notice in the absence of proof of actual notice, but left it open.

⁷⁶ *White v. Harris*, 116 Cal. 470; s. c. 48 Pac. 382; *King v. Lamb*, 117 Cal. 401; s. c. 49 Pac. 561; *City of Lawrence v. Webster*, 167 Mass. 513; s. c. 46 N. E. 123; *Ives v. Irey*, 51

sage of an ordinance declaring a necessity for a public improvement has been held not to invalidate the assessment.⁷⁷ Nor is such notice essential to give the council jurisdiction.⁷⁸ In the absence of a time for required notice reasonable notice is required,⁷⁹ and the notice may include an additional improvement on other property.⁸⁰ Where the statute provides that the cost of construction, reconstruction, and repair of permanent sidewalks shall be assessed against abutting lots on petition of the owners of a majority of the frontage, but repairs may be made without notice, the taking up of a brick sidewalk, the digging of a trench, the laying of a new foundation of sand, and the use of a large number of new bricks, is held to be a reconstruction requiring a petition of a majority of the frontage owners.⁸¹ A statute requiring the posting of a notice of a street improvement along the line of improvement after it has been posted two days on the door of the city council chamber is complied with by posting on the line on the 8th where posting on the council chamber door was on the 8th of the month.⁸² Where the law requires notice of an improvement to be filed with the town clerk, notice by the town board that notice had been received was held sufficient.⁸³ The publication of notice required is not affected by a change in the name of the paper making the publication.⁸⁴ Notice may be given by the board of public works.⁸⁵

§ 1131. Consent of owners to improvement.—The statute sometimes makes as a condition precedent to the making of an improvement the consent of the property owners affected by the improvement, usually designating the required number to be secured. Where “consent” in writing to the making of an improvement is required by law,

Neb. 136; s. c. sub nom. *Ives v. City of Omaha*, 70 N. W. 961; *City of Canton v. Wagner*, 54 Ohio St. 329; s. c. 45 N. E. 953.

⁷⁷ *Lewis v. Albertson*, 23 Ind. App. 147; s. c. 53 N. E. 1071.

⁷⁸ *Willard v. Albertson*, 23 Ind. App. 164; s. c. 53 N. E. 1077; 54 N. E. 403.

⁷⁹ *Landis v. Borough of Vineland*, 60 N. J. L. 264; s. c. 37 Atl. 625.

⁸⁰ *Felker v. City of New Whatcom*, 16 Wash. 178; s. c. 47 Pac. 505.

⁸¹ *Farraker v. City of Keokuk*, 111 Iowa 310; s. c. 82 N. W. 773.

⁸² *Greenwood v. Hassett*, 128 Cal. xviii (mem.); s. c. 61 Pac. 173.

⁸³ *Hendrickson v. City of New York*, 56 N. Y. S. 580; s. c. 38 App. Div. (N. Y.) 480.

⁸⁴ *Clinton v. City of Portland*, 26 Or. 410; s. c. 38 Pac. 407.

⁸⁵ *Gleason v. Waukesha Co.*, 103 Wis. 225; s. c. 79 N. W. 249. Notice to property owners held not necessary under Seattle city charter: *Jones v. City of Seattle*, 19 Wash. 669; s. c. 53 Pac. 1105; *California Imp. Co. v. Reynolds*, 123 Cal. 88; s. c. 55 Pac. 802. Publication of intention to make public improvements held sufficient in *President &c. v. City of Buffalo*, 56 N. Y. S. 976; s. c. 39 App. Div. (N. Y.) 333.

the petition of the property owners requesting the improvement will be regarded as consent.⁸⁶ Where the law requires the consent of a certain proportion of the owners of property fronting on a street where a proposed improvement is to be made, and the city is owner of part of the property, its consent must be obtained just as any other owner, in order that the ordinance may be valid,⁸⁷ but this does not include property used exclusively for city purposes, against which no assessment can be made.⁸⁸ A resolution of necessity for an improvement is required where a statute provides for the dismissal of a petition on a remonstrance by two-thirds of the resident owners affected, and in its absence an order of dismissal will not be reviewed.⁸⁹ Objections must be specific and point out wherein the requirements of the statute have not been observed.⁹⁰ In Nebraska, in cities of the first class, before a street can be improved it is a jurisdictional prerequisite that a petition shall be signed by the owners of a majority of the frontage of the lots abutting on the portion of the street to be improved in order to charge the cost on the abutting property.⁹¹ Under the charter of the city of New Orleans the city may open and widen streets without reference to the action of the owners of property.⁹²

§ 1132. What must be specified in an ordinance.—An ordinance of a city for a local improvement to be made wholly or in part by special assessments must specify “therein the nature, character, locality and description of such improvement,” under the statute of Illinois referring to such matters. It is not sufficient, as this statute is mandatory, to refer in the ordinance to specifications on file in the city clerk’s office, as showing the nature and character of the proposed improvement, as that is not made a source of information.⁹³ It has

⁸⁶ *Jones v. Town of Tonawanda*, 158 N. Y. 438; s. c. 53 N. E. 280.

⁸⁷ *People v. City of Syracuse*, 63 N. Y. S. 878; s. c. 30 Misc. (N. Y.) 409.

⁸⁸ *Armstrong v. Ogden City*, 12 Utah 476; s. c. 43 Pac. 119.

⁸⁹ *Sauntman v. Maxwell*, 154 Ind. 114; s. c. 54 N. E. 397.

⁹⁰ *Bradford v. City of Pontiac*, 165 Ill. 612; s. c. 46 N. E. 794.

⁹¹ *Henderson v. City of South Omaha*, 60 Neb. 125; s. c. 82 N. W. 315.

⁹² *City of New Orleans v. Steinhart*, 52 La. An. 1043; s. c. 27 So. 586.

⁹³ *City of Sterling v. Galt*, 117 Ill. 11; s. c. 7 N. E. 471; *Foss v. City of Chicago*, 56 Ill. 354; *Lake Shore &c. R. Co. v. City of Chicago*, 56 Ill. 454; *Lake v. City of Decatur*, 91 Ill. 596, 600; *Jacksonville R. Co. v. City of Jacksonville*, 114 Ill. 562; s. c. 2 N. E. 478. Specifications confining the asphalt to be used in an improvement to that mined in four mines are too narrow in view of the fact that good asphalt is to be obtained from many mines: *Redersheimer v. Flower*, 52 La. An. 2089; s. c. 28 So. 299. As to plans and specifications for drainage of townships,

been urged that an ordinance of a city council providing for a public improvement, and declaring that a portion of it should be paid by a special tax upon contiguous lots, and the rest by general taxation, and empowering commissioners to determine the cost and to assess the proportions, was invalid as delegating the authority of the council, prohibited by law. Such an ordinance was sustained, however, when the data by which the several amounts could be fixed were sufficiently given.⁹⁴

§ 1133. Ordinance as a basis of improvements.—Independent of statute no considerable improvement involving an outlay of money, or imposing a burden upon taxpayers, should be made except upon ordinance, or resolution which amounts to an ordinance. But generally by express provision of the statute an ordinance is made the basis of any and all improvements permanent in their nature, and which impose a considerable expense upon the owners affected by the improvement. The action of the city concerning an improvement may be equivalent to an express ordinance ordering an improvement.⁹⁵

etc., see *Brush v. Inhabitants &c.*, 64 N. J. L. 365; s. c. 45 Atl. 791.

⁹⁴ *Kimble v. City of Peoria*, 140 Ill. 157; s. c. 29 N. E. 723. In *Gilmore v. City of Utica*, 131 N. Y. 26; s. c. 29 N. E. 841, it was held that an assessment for a street improvement would not be vacated because the resolution deciding to make the improvement according to plans to be prepared by the city surveyor, and calling for proposals, was adopted before the plans and specifications for the work were filed, where the plans were filed and approved before adopting the final ordinance providing for the improvement, on the ground that the New York statute did not require a separate approval of the plans and specifications before publishing for bids. In *Kimble v. City of Peoria*, supra, it was held that an ordinance for paving a street which provided that "the brick to be used in said pavement shall be of the best quality;" that the road-bed be excavated ten inches, the space filled with five inches of gravel, and the remaining five inches with paving brick, placed

upon the gravel after it had been well packed, sufficiently described the nature and character of the paving. The court said:—"That selection [the kind of brick to be used by the city engineer and street committee, under whose direction the ordinance provided the paving should be done], of course, would be made or determined before a bid for the work would be received, and then all uncertainty would be removed so that an intelligent bid could be made for the work;" following *City of Sterling v. Galt*, 117 Ill. 11; s. c. 7 N. E. 471, holding that when, acting under such an ordinance, the commissioners have so fixed or ascertained the amount to be thus raised in conformity with the ordinance, it is conclusive on the property owners. See also, *Enos v. City of Springfield*, 113 Ill. 65; *City of Galesburg v. Searles*, 114 Ill. 217; s. c. 29 N. E. 686; *White v. People*, 94 Ill. 604; *Crow v. Village of Tolono*, 96 Ill. 255.

⁹⁵ *Davie's Ex'rs v. City of Galveston*, 16 Tex. App. 13; s. c. 41 S. W. 145.

(a) *Necessity of ordinance*: Where cities are empowered to enact ordinances ordering public improvements the passage of an ordinance is a condition precedent to the proceedings,⁹⁶ and an improvement without an ordinance is illegal so far as property owners are concerned.⁹⁷ A special ordinance to improve a street where authority is lodged in the council is required as a preliminary to making a contract.⁹⁸ In Missouri a city of the third class is not liable for an improvement unless it was authorized by a valid ordinance though the work is done under the direction of city authorities.⁹⁹ (b) *Sufficiency of ordinance*: In an ordinance for an improvement it is essential that the ordinance itself or the specifications accompanying such ordinance accurately describe the nature and character of the improvement. Indefiniteness as to the material, dimensions, etc., will invalidate it.¹⁰⁰ It is essential that the ordinance for improvement shall indicate the grade or refer to some other ordinance, map, etc., for such purpose, so that it may be made certain,¹⁰¹ but an ordinance locating an improvement is sufficient if it is located with reference to some public building with known location.¹⁰² The description may be made definite by reference to specifications.¹⁰³ An ordinance which provides that an assessment shall be divided into seven installments, the first to be one-seventh of the assessment with fractional amounts added, and each of the others to be equal in amount and multiples of one hundred, is sufficient in its description of installments.¹⁰⁴ A village ordinance for a local improvement must prescribe whether it shall be by special assessment, special taxation

⁹⁶ *City of Waco v. Prather*, 90 Tex. 80; s. c. 37 S. W. 312; *City of Springfield &c. v. Weaver*, 137 Mo. 650; s. c. 37 S. W. 509; 39 S. W. 276.

⁹⁷ *City of Waco v. Prather* (Tex. Civ. App.), 35 S. W. 958.

⁹⁸ *Wheeler v. City of Poplar Bluff*, 149 Mo. 36; s. c. 49 S. W. 1088.

⁹⁹ *Kolkmeier v. City of Jefferson*, 75 Mo. App. 678.

¹⁰⁰ *Munsfield v. People*, 164 Ill. 611; s. c. 45 N. E. 976; *Cass v. People*, 166 Ill. 126; s. c. 46 N. E. 729; *People v. Markley*, 166 Ill. 48; s. c. 46 N. E. 742; *Walker v. People*, 166 Ill. 96; s. c. 46 N. E. 761; *O'Neil v. People*, 166 Ill. 561; s. c. 46 N. E. 1096; *People v. Hurford*, 167 Ill. 226; s. c. 47 N. E. 368; *Bradford v. City of Pontiac*, 165 Ill. 612; s. c. 46 N. E. 794;

Dickey v. City of Chicago, 164 Ill. 37; s. c. 45 N. E. 537; *Pearson v. City of Chicago*, 162 Ill. 383; s. c. 44 N. E. 739.

¹⁰¹ *Brewster v. City of Peru*, 180 Ill. 124; s. c. 54 N. E. 233. Ordinance and profile held sufficient to show grades in *City of Carlinville v. McClure*, 156 Ill. 492; s. c. 41 N. E. 169.

¹⁰² *Ewart v. Village of Western Springs*, 180 Ill. 318; s. c. 54 N. E. 478.

¹⁰³ *McChesney v. City of Chicago*, 152 Ill. 543; s. c. 38 N. E. 767.

¹⁰⁴ *Danforth v. Village of Hinsdale*, 177 Ill. 579; s. c. 52 N. E. 877; *Latham v. Village of Wilmette*, 168 Ill. 153; s. c. 48 N. E. 311.

of contiguous property or general taxation, or both, and the improvement can only be made in the mode selected.¹⁰⁵ The ordinance must specify the nature, character, locality, and description of the improvement as required by statute,¹⁰⁶ but it need not describe the improvement as within the territorial corporation limits.¹⁰⁷ An ordinance for a public improvement is not invalid because it fails to show affirmatively that the street to be improved is within the city, as it will be presumed to be within the city.¹⁰⁸ A description in an ordinance can not be made good by reference to plans in the office of the village engineer. This of course is where the plans on file are not made a part of the ordinance by reference.¹⁰⁹ Though a statute provides that before improving any street an ordinance shall be adopted by a two-thirds vote of the council of a city requiring the improvement to be made, and assessing two-thirds of the cost to the abutting lots, the ordinance itself need not specify the material to be used, the choice of which may be made without a two-thirds vote, by resolution or otherwise, as the ordinance may provide.¹¹⁰ It is not necessary that an ordinance directing the paving of a certain street, except a sixteen-foot strip in the middle thereof, should specify the width of the paving, where the recorded plat shows the width of the street, and the city ordinances show the width of the sidewalks, because the statute provides that an ordinance determining on a local improvement, to be paid for by special assessment, shall specify the "nature, character, location and description of such improvement."¹¹¹ Nor need such an ordinance specify the exact amount of paving composition which should be used to the square yard.¹¹² An ordinance providing for the construction of a sewer having forty-eight man-holes, to be located "one at each crossing and abutting street, and the remainder at such intermediate points as the engineer in

¹⁰⁵ *Dolese v. McDougall*, 78 Ill. App. 629; s. c. affirmed in 182 Ill. 486; 55 N. E. 547.

¹⁰⁶ *Board &c. v. Murray*, 99 Ky. 422; s. c. 36 S. W. 180; *City of Connersville v. Merrill*, 14 Ind. App. 303; s. c. 42 N. E. 1112; *Otis v. City of Chicago*, 161 Ill. 199; s. c. 43 N. E. 715; *Hedenberg v. City of Chicago*, 163 Ill. 129; s. c. 44 N. E. 395.

¹⁰⁷ *Andrews v. People*, 158 Ill. 477; s. c. 41 N. E. 1021; *Browning v. City of Chicago*, 155 Ill. 314; s. c. 40 N. E. 565; *West Chicago St. R. Co. v. People*, 155 Ill. 299; s. c. 40 N. E. 599; *Young v. People*, 155 Ill. 247; s. c.

40 N. E. 604; *Stanton v. City of Chicago*, 154 Ill. 23; s. c. 39 N. E. 987; *Zeigler v. People*, 156 Ill. 133; s. c. 40 N. E. 607; *Wisner v. People*, 156 Ill. 180; s. c. 40 N. E. 574.

¹⁰⁸ *Stanton v. City of Chicago*, 154 Ill. 23; s. c. 39 N. E. 987.

¹⁰⁹ *City of Alton v. Middleton's Heirs*, 158 Ill. 442; s. c. 41 N. E. 926.

¹¹⁰ *Bacon v. Mayor &c.*, 86 Ga. 301; s. c. 12 S. E. 580.

¹¹¹ *Woods v. City of Chicago*, 135 Ill. 582; s. c. 26 N. E. 608; following *Adams Co. v. City of Quincy*, 130 Ill. 566; s. c. 22 N. E. 624.

¹¹² *Woods v. City of Chicago*, supra.

charge may select," has been held sufficiently specific as to the location of the man-holes.¹¹³ The failure of an ordinance to set out the specifications for work to be done under it, where reference to them is on file in the office of the clerk of the council, will not affect its validity.¹¹⁴ The "oath" and "detailed estimate" mentioned in the statute of Kansas requiring that, "before" any kind of work or improvement shall be commenced by a municipality, "a detailed estimate of the cost thereof shall be made under oath by the city engineer and submitted to the council," are conditions precedent.¹¹⁵ An ordinance for sewers which does not describe the depth is not good.¹¹⁶ Where the sufficiency of an ordinance for a public improvement is called in question a general objection is sufficient if the city fails to require the objections to be made specific.¹¹⁷ (c) *Validity of ordinance*: Where the extent of an improvement and what shall be included rests in the legislative discretion of the city council, courts will interfere only where there is a clear abuse of that discretion.¹¹⁸ Submission of a resolution to a board of public works, as required, but a week before the ordinance was finally carried, does not invalidate the action.¹¹⁹ An ordinance for a sewer by authorizing property owners to make connection therewith, the regulation of such connection being reserved, does not grant away police power.¹²⁰ Where the title of an ordinance is for the improvement, curbing and paving,

¹¹³ *Cochran v. Village of Park Ridge*, 138 Ill. 295; s. c. 27 N. E. 939; following *City of Springfield v. Mathus*, 124 Ill. 88; s. c. 16 N. E. 92.

¹¹⁴ *Becker v. City of Washington*, 94 Mo. 375; s. c. 7 S. W. 291.

¹¹⁵ *Gilmore v. Hentig*, 33 Kan. 156; s. c. 5 Pac. 781. Ordinances held sufficient in *Newman v. City of Chicago*, 153 Ill. 469; s. c. 38 N. E. 1053; *Rich v. City of Chicago*, 152 Ill. 18; s. c. 38 N. E. 255; *City of Danville v. McAdams*, 153 Ill. 216; s. c. 38 N. E. 632; *Sargent v. City of Evanston*, 154 Ill. 268; s. c. 40 N. E. 440; *Barber v. City of Chicago*, 152 Ill. 37; s. c. 38 N. E. 253. The Ill. City and Village Act, art. 9, §§ 19, 20, requires an ordinance ordering a street improvement to specify their nature, character and description, and provides for the appointment of commissioners who shall make an estimate of cost: *Gage v. City of*

Chicago, 162 Ill. 313; s. c. 44 N. E. 729; *People v. Hurford*, 167 Ill. 226; s. c. 47 N. E. 368; *Barber Asphalt Pav. Co. v. Ullman*, 137 Mo. 543; s. c. 38 S. W. 458; *City of Springfield &c. v. Weaver*, 137 Mo. 650; s. c. 37 S. W. 509; *People v. Delaware &c. R. Co.*, 42 N. Y. S. 1011; s. c. 11 App. Div. (N. Y.) 280; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458; s. c. 41 S. W. 943.

¹¹⁶ *City of Alton v. Middleton's Heirs*, 158 Ill. 442; s. c. 41 N. E. 926.

¹¹⁷ *Davidson v. City of Chicago*, 178 Ill. 582; s. c. 53 N. E. 367.

¹¹⁸ *Church v. People*, 179 Ill. 205; s. c. 53 N. E. 554; *Davis v. City of Litchfield*, 145 Ill. 313; s. c. 33 N. E. 888.

¹¹⁹ *Hutcheson v. Storrie* (Tex. Civ. App.), 48 S. W. 785.

¹²⁰ *Gray v. Town of Cicero*, 177 Ill. 459; s. c. 53 N. E. 91.

and the ordinance relates to the same matter, it is not inconsistent.¹²¹ But where a levy is made to pay for lamps, fixtures, etc., and the ordinance only provides for lamp posts, there is a fatal variance.¹²² Where the improvement deviates from the line mentioned in the ordinance, but the deviation is slight, and the property owners are not injured, and the improvement is not less beneficial to the property, it will be sustained.¹²³ An ordinance directing the cost of an improvement to be apportioned according to the number of square feet owned by the abutting owners instead of the front foot will not make the ordinance void.¹²⁴ The declaration of members of a committee of the council that a certain improvement would not then be required of the owners of property does not affect the validity of an ordinance directing such improvement.¹²⁵ Where the ordinance describing the improvement is uncertain and contradictory the assessments will be void,¹²⁶ and so is an ordinance which makes no provision for work necessary to complete an improvement so it can be used and gives no data by which the cost can be computed.¹²⁷ If it appears that an ordinance provides for two separate and distinct improvements, the making of one of which could not reasonably be said to benefit property situated on the other, combination of the improvements would be improper.¹²⁸ A city having ample power, the passage of a large number of ordinances for the improvement of streets in anticipation of a change in the law is not of itself proof of fraud.¹²⁹ An ordinance for public improvement of intersecting streets, if void as to one street is void as to both,¹³⁰ but an ordinance for a sewer and its branches is not void as providing for more than one improvement, nor because it fails to provide an outlet.¹³¹ Where there is a continuous street through a village which is known as a boulevard part of the distance and as a street through the whole distance the ordinance will not be rendered invalid in describing it as a

¹²¹ *Chicago Terminal &c. Co. v. City of Chicago*, 178 Ill. 429; s. c. 53 N. E. 361.

¹²² *Smith v. City of Chicago*, 169 Ill. 257; s. c. 48 N. E. 445.

¹²³ *Church v. People*, 179 Ill. 205; s. c. 53 N. E. 554; *Church v. People*, 174 Ill. 366; s. c. 51 N. E. 747.

¹²⁴ *Gleason v. Barnett*, 20 Ky. L. 1694; s. c. 50 S. W. 67.

¹²⁵ *City of Chester v. Eyre*, 181 Pa. St. 642; s. c. 37 Atl. 837.

¹²⁶ *Hull v. City of Chicago*, 156 Ill. 384; s. c. 40 N. E. 937.

¹²⁷ *Title Guarantee &c. Co. v. City of Chicago*, 162 Ill. 505; s. c. 44 N. E. 832.

¹²⁸ *Church v. People*, 179 Ill. 205; s. c. 53 N. E. 554.

¹²⁹ *Morse v. City of Westport*, 136 Mo. 276; s. c. 37 S. W. 932.

¹³⁰ *City of Bloomington v. Reeves*, 177 Ill. 161; s. c. 52 N. E. 278.

¹³¹ *Payne v. Village of South Springfield*, 161 Ill. 285; s. c. 44 N. E. 105.

street.¹³² The improvement of the streets may be provided for in one ordinance or resolution.¹³³ A paving ordinance describing the stones used for bedding curbstones as "flat stones" is an insufficient description of the improvement and void for uncertainty.¹³⁴ Where three commissioners are appointed, an estimate by two is not sufficient.¹³⁵ An invalid provision in an ordinance may be rejected without destroying the validity as a whole.¹³⁶ An ordinance containing a faulty description may be valid if by rejecting the faulty description sufficient remains by reference to the annexed plan to make it definite.¹³⁷ (d) *Reasonableness of ordinance*: The question of the reasonableness or unreasonableness of an ordinance is one for the decision of the court, and in determining that question regard should be had to all the existing circumstances, or contemporaneous conditions, the objects sought to be obtained, and the necessity or want of necessity for its adoption.¹³⁸ And so where the power to legislate on a given subject is conferred on a municipal corporation, yet if the details of such legislation are not prescribed by the legislature the ordinance passed in pursuance of such power must be a reasonable exercise of such power or it will be pronounced invalid.¹³⁹ Applying this doctrine to public improvements it has been held: That a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation, in which case it would be the duty of the court to protect the citizen from robbery under color of a better name.¹⁴⁰ And if it is concluded that a city may change its pavements at pleasure, and as often as it please at the expense of the ground owner, there must be explicit legislation to authorize

¹³² *Ewart v. Village of Western Springs*, 180 Ill. 318; s. c. 54 N. E. 478.

¹³³ *Lewis v. Albertson*, 23 Ind. App. 147; s. c. 53 N. E. 1071.

¹³⁴ *Davidson v. City of Chicago*, 178 Ill. 582; s. c. 53 N. E. 367; *Lusk v. City of Chicago*, 176 Ill. 207; s. c. 52 N. E. 54.

¹³⁵ *Moore v. City of Mattoon*, 163 Ill. 622; 45 N. E. 567. Under act of June 14, 1897, Illinois, which provides that no ordinance for local improvement shall be adopted unless a majority of the property owners, etc., shall petition for the improvement, the provision is imperative and the ordinance is invalid without

it: *Village of Hammond v. Leavitt*, 181 Ill. 416; s. c. 54 N. E. 982.

¹³⁶ *Shannon v. Village of Hinsdale*, 180 Ill. 202; s. c. 54 N. E. 181.

¹³⁷ *Chytraus v. City of Chicago*, 160 Ill. 18; s. c. 43 N. E. 335.

¹³⁸ *Hawes v. City of Chicago*, 158 Ill. 653; s. c. 42 N. E. 373; *Toledo &c. R. Co. v. City of Jacksonville*, 67 Ill. 37; *City of Lake View v. Tate*, 130 Ill. 247; s. c. 22 N. E. 791.

¹³⁹ *Hawes v. City of Chicago*, supra; *City of St. Paul v. Colter*, 12 Minn. 41; *Dunham v. Trustees &c.*, 5 Cow. (N. Y.) 462; *State v. Town of Belvidere*, 44 N. J. L. 350.

¹⁴⁰ *Allen v. Drew*, 44 Vt. 174.

such taxation. If a pavement is good and stands in no need of repair, and the city may take it up, relay and charge the owner again with one excessively costly, it would be exaction—not taxation.¹⁴¹ If an ordinance is for paving a sidewalk in an uninhabited portion of the city which is disconnected with any other street or sidewalk, it is unreasonable, oppressive and subject to judicial inquiry.¹⁴² The general rule undoubtedly is that with the action of the legislature, or a city council, in so far as its action is general in its nature, affecting the public alike, courts will seldom interfere, but when the legislation is special and operates oppressively upon individuals and their property it loses its legislative aspect and assumes the aspect of ministerial action in the execution of general power. And generally if an ordinance is grossly unreasonable, unjust and oppressive, it may be shown in opposition to its enforcement.¹⁴³ (e) *Recitals in ordinance*: Where a petition is to be addressed to a specified court, council or board which has power to determine the sufficiency, the recitals contained in the ordinance as to the existence of those facts, as a rule, establish a prima facie case as to such facts. The recital in an ordinance that a petition of the owners had been delivered is prima facie evidence that a petition had existed.¹⁴⁴ (f) *Curative acts*: Where an ordinance is defective by reason of some irregularity it may be rendered valid by a curative act.¹⁴⁵ But not so where the proceedings are void.¹⁴⁶ Where an ordinance provides that work shall be completed by a certain time, a failure to do so renders all subsequent proceedings invalid.¹⁴⁷

§ 1134. **Formality and irregularity in proceedings.**—The provision in a statute that any class of proposed public improvement can be authorized only by “a majority of the voters of the city” does not

¹⁴¹ *Wistar v. City of Philadelphia*, 80 Pa. St. 505; s. c. 111 Pa. St. 604; 4 Atl. 511.

¹⁴² *Corrigan v. Gage*, 68 Mo. 541. Cf. *City of Bloomington v. Latham*, 142 Ill. 462; s. c. 32 N. E. 506; *Davis v. City of Litchfield*, 145 Ill. 313; s. c. 33 N. E. 888; *Palmer v. City of Danville*, 154 Ill. 156; s. c. 38 N. E. 1067.

¹⁴³ *City of Bloomington v. Chicago & C. R. Co.*, 134 Ill. 451; s. c. 26 N. E. 366.

¹⁴⁴ *Farrell v. West Chicago Park Com'rs*, 182 Ill. 250; s. c. 55 N. E.

325; *Cummings v. West Chicago Park Com'rs*, 181 Ill. 136; s. c. 54 N. E. 941; *McManus v. People*, 183 Ill. 391; s. c. 55 N. E. 886. But see *Thorn v. West Chicago Park Com'rs*, 130 Ill. 594; s. c. 22 N. E. 520.

¹⁴⁵ *City of Clinton v. Walliker*, 98 Iowa 655; s. c. 68 N. W. 431.

¹⁴⁶ *Busenbark v. Clements*, 22 Ind. App. 557; s. c. 53 N. E. 665. But see *Kolkmeier & Co. v. City of Jefferson*, 75 Mo. App. 678.

¹⁴⁷ *Rose v. Trestrail*, 62 Mo. App. 352.

require that the proposition shall be approved by a majority of all the voters of the city, but only by a majority of the votes cast.¹⁴⁸

§ 1135. **Improvement of streets.**—Inasmuch as streets, including the care and improvement thereof, are treated under a special chapter,¹⁴⁹ the subject is only casually noticed in this connection. The power to improve streets, open the same, is usually embraced in the charter, or elsewhere given in the statute which becomes a part of the charter. Where the method of improving is provided for, this method must be followed, the general rule being that the statutory requirements are made jurisdictional in order that the acts of the council, or governing body, may be valid. Proceedings for the improvement of streets are in invitum, and purely statutory, and afford no opportunity for invoking the principles of equity, and the validity of an assessment depends upon the exercise of a statutory power, and the party seeking to enforce the right must show that the power has been strictly complied with.¹⁵⁰ Where the statute provides that the council may have the sidewalk graded and paved, or the whole width of the street graded and paved, a resolution providing for grading with rich dirt and sodding as a part of the proposed improvement is *ultra vires*.¹⁵¹ Where the expense of the improvement is to be paid by special assessment on abutting owners the amount or aggregate becomes an important element for consideration. Town authorities can not improve a street at a cost largely in excess of the total special

¹⁴⁸ *Taylor v. McFadden*, 84 Iowa 262; s. c. 50 N. W. 1070. See also, *Dillon Munic. Corp.*, § 44; 2 *Desty Taxation*, 1152; *People v. Warfield*, 20 Ill. 160; *People v. Wiant*, 48 Ill. 263; *St. Joseph Tp. v. Rogers*, 16 Wall. 644; *Sanford v. Prentice*, 28 Wis. 358; *Yesler v. City of Seattle*, 1 Wash. 308; s. c. 25 Pac. 1014. In determining the question of whether a majority of abutting landowners have signed a petition for a change of grade of a street, it appearing that a leaf torn from a petition which preceded an ordinance for the same improvement which was afterwards set aside was attached to the one which preceded the ordinance finally passed for it, the names of those signers on the detached leaf can not be counted as signers of the last petition unless it be shown that

the signers thereof assented to its second use: *State v. Mayor &c.*, 54 N. J. L. 293; s. c. 23 Atl. 648, holding also, that the name of one signed, "per ———, Att'y," could not be counted where it appeared that the agent signing had not seen the principal, and there was no written authority for the signature filed with the petition. See as to estoppel of landowner to set up irregularities, *Prezinger v. Harness*, 114 Ind. 491; s. c. 16 N. E. 495; *Clements v. Lee*, 114 Ind. 397; s. c. 16 N. E. 799; *Martindale v. Palmer*, 52 Ind. 411; *Taber v. Ferguson*, 109 Ind. 227; s. c. 9 N. E. 723; *McGill v. Bruner*, 65 Ind. 421.

¹⁴⁹ See ch. 29, post.

¹⁵⁰ *Warren v. Chandos*, 115 Cal. 382, 386; s. c. 47 Pac. 132.

¹⁵¹ *Adams v. City of Shelbyville*, 154 Ind. 467; s. c. 57 N. E. 114.

benefits to abutting property owners.¹⁵² The street on which the improvement is placed must be wholly under the control of the municipality. A city has no power to order the improvement of a street where part of the street is owned by private parties and has never been dedicated to public use.¹⁵³ A city may improve the lateral half of a street although the charter requires the part improved to be uniform in the extent and kind of improvement per running foot.¹⁵⁴ Ordinances for street improvement need not be passed at regular meeting.¹⁵⁵ In Kentucky a town of the sixth class is not required to improve a street throughout its entire length, but may limit the improvements to the necessities at the time existing.¹⁵⁶

§ 1136. Grade of streets.—In the improvement of a street in most cases the grade of the street becomes an important element. The grade of a street must be established in the ordinance, or by reference to some other map, plat, etc., or other fixed thing.¹⁵⁷ Where the statute requires the establishing of a grade before a street is paved it does not preclude the city ordering the improvement and making a contract therefor before the grade is established if the contract is based on a proposed grade and the grade is established before any work is done.¹⁵⁸ The grade may be established by user and when changed the charter requirement must be observed.¹⁵⁹ Where author-

¹⁵² *McKee v. Town of Pendleton*, 154 Ind. 652; s. c. 57 N. E. 532; and see ch. 28, post.

¹⁵³ *Spaulding v. Wesson*, 115 Cal. 441; s. c. 47 Pac. 249.

¹⁵⁴ *Indianapolis &c. R. Co. v. Capitol Pav. &c. Co.*, 24 Ind. App. 114; s. c. 54 N. E. 1076.

¹⁵⁵ *Lewis v. Albertson*, 23 Ind. App. 147; s. c. 53 N. E. 1071. Power of city of Dubuque to improve streets under special charter declared in *Altman v. City of Dubuque*, 111 Iowa 105; s. c. 82 N. W. 461.

¹⁵⁶ *Neff v. Covington &c. Co.*, 21 Ky. L. 1454; s. c. 55 S. W. 697; *Holmes v. Covington &c. Co.*, id.; *Morton v. Covington &c. Co.*, id.; *Wallace v. Covington &c. Co.*, id. In Kentucky the charter of towns of the sixth class is not unconstitutional in allowing trustees a discretion in the mode of payment for street improvements: *Neff v. Covington &c. Co.*, 21 Ky. L. 1454; s. c. 55 S. W.

697. Power of city council under Burns Rev. St. 1901, §§ 4288, 4289, to make street improvements: *Cason v. City of Lebanon*, 153 Ind. 567; s. c. 55 N. E. 768. Construction of power of village trustees of New Rochelle to discontinue streets: *New York &c. R. Co. v. Village of New Rochelle*, 60 N. Y. S. 904.

¹⁵⁷ *Chicago &c. R. Co. v. City of Chicago*, 174 Ill. 439; s. c. 51 N. E. 596; *City of Carlinville v. McClure*, 156 Ill. 492; s. c. 41 N. E. 169; *Washington Ice Co. v. City of Chicago*, 147 Ill. 327; s. c. 35 N. E. 378; *City of Bloomington v. Pollock*, 141 Ill. 346; s. c. 31 N. E. 146; *Chicago &c. R. Co. v. City of Chicago*, 172 Ill. 66; s. c. 49 N. E. 1006.

¹⁵⁸ *Allen v. City of Davenport*, 107 Iowa 90; s. c. 77 N. W. 532.

¹⁵⁹ *Niver v. Village of Bath on Hudson*, 58 N. Y. S. 270; s. c. 27 Misc. (N. Y.) 605.

ity to change the grade is vested in the council the individual consent of the members is not sufficient. It must be the act of the council as such.¹⁶⁰ The grade of a street car track can only be established by an ordinance. A resolution or order is not sufficient,¹⁶¹ but an unauthorized change of grade by officers may be ratified by the city.¹⁶² A contract for grading a street is not illegal because the council has omitted to establish gradient lines for the street prior to the order for improvement.¹⁶³

§ 1137. **Resolution as a basis of improvements.**—A resolution is frequently made the basis of a public improvement instead of an ordinance, sometimes by provision of the statute, and sometimes where the resolution is in effect an ordinance. If the statute requires an ordinance it is doubtful if a resolution will be sufficient unless the formalities required in the adoption of the latter are similar to those in regard to an ordinance. (a) *Necessity of:* It has been held that a resolution declaring a necessity for a street improvement is not essential to the jurisdiction of the council. This of course, must depend upon the nature and requirements of the statute.¹⁶⁴ Where the law requires that the resolution of an intention to make certain improvements shall be published in a newspaper to be designated by the council the designation of such newspaper is jurisdictional,¹⁶⁵ and a resolution declaring a necessity for a public improvement must be passed with the same formality as an ordinance.¹⁶⁶ A contract for lighting under the charter of Greater New York must be based on a resolution of the board of public improvements and an ordinance of the municipal assembly.¹⁶⁷ (b) *Sufficiency of:* The rules as to the sufficiency of a resolution when it is made the basis of a public improvement are substantially the same as those applied to ordinances in the preceding section. Where the law is that the recommendation of the board of local improvements shall be prima facie evidence that all the preliminary requirements have been complied with, and that if a variance be shown on proceedings in court it shall not affect the proceedings unless the court deem the same wilful or substantial, a resolution recommending a proposed street improvement showing on its

¹⁶⁰ Denison &c. R. Co. v. James, 20 Tex. Civ. App. 358; s. c. 49 S. W. 660.

¹⁶¹ Chicago &c. R. Co. v. City of Chicago, 174 Ill. 439; s. c. 51 N. E. 596.

¹⁶² In re Grading of Shiloh Street, 165 Pa. St. 386; s. c. 30 Atl. 986.

¹⁶³ Keough v. City of St. Paul, 66 Minn. 114; s. c. 68 N. W. 843.

¹⁶⁴ Willard v. Albertson, 23 Ind. App. 164; s. c. 53 N. E. 1077.

¹⁶⁵ Chase v. City Treasurer &c., 122 Cal. 540; s. c. 55 Pac. 414.

¹⁶⁶ Wheeler v. City of Poplar Bluff, 149 Mo. 36; s. c. 49 S. W. 36.

¹⁶⁷ Blank v. Kearney, 59 N. Y. S. 645; s. c. 28 Misc. (N. Y.) 383.

face an itemized estimate of the cost had not been made for submission at a public hearing it is a substantial variance from the requirements of the statute and void.¹⁶⁸ Where the law requires as a preliminary to a public improvement the publication of a resolution by the council of its intention, and the description of the work, and the posting and publication of such notice, the notice must describe the nature of the improvements and the material.¹⁶⁹ In such case the insufficiency of the resolution is not cured by a specification of the improvements in a subsequent order.¹⁷⁰ But a charter giving power to a council to improve a street and assess a stated portion against the abutting owners does not require the resolution to state the kind of pavement.¹⁷¹ Where a preliminary resolution is required describing the improvement to be made, if defective as to part of the work the resolution is defective as to all if the bid and contract are as a whole.¹⁷² An ordinance specifying that an improvement shall conform to an established grade is sufficient,¹⁷³ and so is a resolution calling for curbing not already done,¹⁷⁴ and where land to be taken is clearly defined by boundaries and excepts such as may be held by the city and state as open ways, it is sufficient.¹⁷⁵ The height of the curb must be shown, otherwise there could be no certainty as to the cost,¹⁷⁶ but an ordinance providing that certain stones shall be removed but not stating how far is not void.¹⁷⁷ Material described as sewer brick with a block of masonry at each end means brick and is a sufficient description of material.¹⁷⁸ A general objection that the esti-

¹⁶⁸ *Clarke v. City of Chicago*, 185 Ill. 354; s. c. 57 N. E. 15. Cf. *Ives v. Irey*, 51 Neb. 136; s. c. 70 N. W. 961; *State v. Borough of Vineland*, 60 N. J. L. 264; s. c. 37 Atl. 625; *Gilmore v. Hentig*, 33 Kan. 156; s. c. 5 Pac. 781; *Hentig v. Gilmore*, 33 Kan. 234; s. c. 6 Pac. 304.

¹⁶⁹ *Schwiesau v. Mahon*, 128 Cal. 114; s. c. 60 Pac. 683.

¹⁷⁰ *Schwiesau v. Mahon*, 128 Cal. 114; s. c. 60 Pac. 683.

¹⁷¹ *City of Waco v. Chamberlain*, 92 Tex. 207; s. c. 47 S. W. 527.

¹⁷² *Fay v. Reed*, 128 Cal. 357; s. c. 60 Pac. 927.

¹⁷³ *Clafin v. City of Chicago*, 178 Ill. 549; s. c. 53 N. E. 339.

¹⁷⁴ *Edwards v. Berlin*, 123 Cal. 544; s. c. 56 Pac. 432.

¹⁷⁵ *Cohen v. City of Alameda*, 124 Cal. 504; s. c. 57 Pac. 377.

¹⁷⁶ *Dickey v. City of Chicago*, 179 Ill. 184; s. c. 53 N. E. 395; *Lingle v. City of Chicago*, 178 Ill. 628; s. c. 53 N. E. 366; *Jacobs v. City of Chicago*, 178 Ill. 560; s. c. 53 N. E. 363. Cf. *Church v. People*, 179 Ill. 205; s. c. 53 N. E. 554.

¹⁷⁷ *Shannon v. Village of Hinsdale*, 180 Ill. 202; s. c. 54 N. E. 181. "Stone" held to mean limestone in *Shannon v. Village of Hinsdale*, 180 Ill. 202; s. c. 54 N. E. 181.

¹⁷⁸ *Shannon v. Village of Hinsdale*, 180 Ill. 202; s. c. 54 N. E. 181. Statement that certain stone shall not be less than a designated length, width and thickness is good: *Shannon v. Village of Hinsdale*, 180 Ill. 202; s. c. 54 N. E. 181.

mate of cost of an improvement is void does not raise the question of a discrepancy between the ordinance and the estimate, where the estimate is *prima facie* in proper form and the variance does not go to its entire validity.¹⁷⁹ A resolution of the council directing the surveyor to make plans and specifications for a sidewalk on a certain street, and directing him to determine what part of the street the plans and specifications should cover, does not render the assessment invalid for the reason that the council may or may not adopt the plans and specifications.¹⁸⁰ Where an improvement must be based on a resolution describing the work to be done, a resolution describing the material to be of granite or artificial stone is not sufficient to give the city jurisdiction.¹⁸¹ An ordinance describing an improvement with a granite concrete combined curb and gutter to be laid in alternate blocks six feet in length and six inches in thickness is invalid where there is nothing showing the width of the blocks or height of the curb.¹⁸² And so where it provides that curbing shall be firmly bedded in "flat stones."¹⁸³ But an ordinance for curbing specifying that the top of the curb shall be at the street grade as established and referring to an ordinance establishing the grade is sufficient.¹⁸⁴ Where the statute provides that when a proposed improvement to be paid for by special assessment is to be made, the board of local improvements shall adopt a resolution describing the improvements, and fixing a time for a public hearing on the necessity and estimated cost, making the engineer's estimate a part of the record, and that at such hearing the board shall adopt a new resolution adhering to, modifying or abandoning the improvement, and if adhered to an ordinance shall be submitted to the council, and where a proposed improvement was estimated to cost \$25,500, which was embodied in the resolution, and subsequently a new resolution in regard to the same improvement, but at a cost of \$29,500, was passed, but without a special hearing on an itemized statement, the proceeding is void.¹⁸⁵ The preliminary resolution describing the work as suitable drains and inlets, at all intersecting streets, crossings, etc., is fatally defective in failing to describe the number of inlets and drains to be constructed, the size

¹⁷⁹ *Chicago &c. R. Co. v. City of Chicago*, 172 Ill. 263; s. c. Chicago, 178 Ill. 429; s. c. 53 N. E. 50 N. E. 181.

¹⁸⁰ *People v. Board &c.*, 63 N. Y. S. 111, 392; s. c. 53 N. E. 742; *Davidson v. City of Chicago*, 178 Ill. 582; s. c. 53 N. E. 367.

¹⁸¹ *San Jose Imp. Co. v. Auzerais*, 106 Cal. 498; s. c. 39 Pac. 859.

¹⁸² *Jacobs v. City of Chicago*, 178 Ill. 530; s. c. 53 N. E. 394.

¹⁸³ *Clark v. City of Chicago*, 185 Ill. 354; s. c. 57 N. E. 15.

of the drains and the material.¹⁸⁶ Where a resolution ordering the work to be done is required, it is not sufficient to pass a resolution declaring the intention of the council to improve.¹⁸⁷ A resolution instead of an ordinance is sufficient, in California.¹⁸⁸

§ 1138. Agreements to repair streets.—There is frequently a material difference in the power conferred to make permanent improvements and the power to make repairs.¹⁸⁹ An original improvement is not authorized as a repair.¹⁹⁰ An agreement to keep a pavement in repair for a period of five years after its construction is not objectionable as imposing a burden on the abutting owners which should be borne by the city, such contract being construed as an agreement to construct an improvement good in the first instance for five years.¹⁹¹

§ 1139. Railroad bridge across a street not a local improvement.—The Illinois statute which empowers cities and villages to make local improvements by special taxation does not authorize them to provide in that way for the erection of a railroad bridge across a city street.¹⁹² The action of a city council in providing for such an alleged local improvement to be paid for by special taxation is reviewable by the courts.¹⁹³ The provision in a charter forbidding the city to adopt, lay out, open, work or grade any street less than sixty feet wide has been held to refer to “streets and highways,” strictly so called, and not to “bridges.”¹⁹⁴ Within the limits that the improvements required by a town must be useful and reasonable in character, the governing authorities of the town may regulate the material to be used and the manner in which the work shall be done.¹⁹⁵ A municipal corporation may authorize the building of a public bridge, with a proviso that if a private person contribute enough to build a more convenient one, that one shall be built.¹⁹⁶ An ordinance passed by a common council to open a street will not be set aside on the ground

¹⁸⁶ *Fay v. Reed*, 128 Cal. 357; s. c. 60 Pac. 927.

¹⁸⁷ *Kline v. City of Tacoma*, 11 Wash. 193; s. c. 39 Pac. 453; *Buckley v. City of Tacoma*, 9 Wash. 253; s. c. 37 Pac. 441.

¹⁸⁸ *Santa Cruz &c. Co. v. Heaton*, 105 Cal. 162; s. c. 38 Pac. 693.

¹⁸⁹ *Santa Cruz &c. Co. v. Broderick*, 113 Cal. 628; s. c. 45 Pac. 863. See § 1316, post.

¹⁹⁰ *Barber &c. Co. v. Ullman*, 137 Mo. 543; s. c. 38 S. W. 458.

¹⁹¹ The city of New Orleans in its

discretion may improve or repair: *Schmitt v. City of New Orleans*, 48 La. An. 1440; s. c. 21 So. 24.

¹⁹² *City of Bloomington v. Chicago &c. R. Co.*, 134 Ill. 451; s. c. 26 N. E. 366.

¹⁹³ *City of Bloomington v. Chicago &c. R. Co.*, supra.

¹⁹⁴ *Langlois v. City of Cohoes*, 11 N. Y. S. 908; s. c. 58 Hun (N. Y.) 226.

¹⁹⁵ *Hood v. Trustees &c.*, 12 Ky. L. 813; s. c. 15 S. W. 516.

¹⁹⁶ *Kelley v. Kennard*, 60 N. H. 1.

that a citizen has promised to pay a part of the expense of its opening, such a promise not being opposed to public policy.¹⁹⁷ The fee of a street remaining in a city, it is not prevented from making necessary improvements in a street by special tax, by the fact that it has granted a railroad company the privilege of using the street for its tracks.¹⁹⁸

§ 1140. Rule as to repaving, etc., in Pennsylvania.—The repairing of the pavement of a street by a city council, though extensive in its nature, and of a reasonably permanent nature, made at the expense of a city and not of the abutting owners, is not an original paving, such as will prevent a future paving at the expense of the abutting owners.¹⁹⁹

§ 1141. Opening and widening streets.—The authority of a municipal corporation invested with full power to lay out and open streets is exclusive, and no other tribunal can assume jurisdiction within the corporate limits.²⁰⁰ In proceedings to open a street, where the evidence shows that the parcel of land left after opening the street would be a narrow strip which would be worthless, a jury could give as compensation the actual value of the entire lot, together with any damages arising from such use.²⁰¹ In proceedings to open a street, in order to find that the street is a public necessity it is not necessary to find that the cost of opening added to the cost of grading would not exceed the value of the benefit to the public.²⁰² The appearance of property owners before commissioners in proceedings for widening a street in response to notice will operate as a waiver of technical objections to the sufficiency of the petition.²⁰³ A street may

¹⁹⁷ *State v. City of Orange*, 54 N. J. L. 111; s. c. 22 Atl. 1004.

¹⁹⁸ *Chicago &c. R. Co. v. City of Quincy*, 139 Ill. 355; s. c. 28 N. E. 1069.

¹⁹⁹ *City of Philadelphia v. Dibeler*, 147 Pa. St. 261; s. c. 23 Atl. 567. It was urged that these owners of abutting lots were not liable to be assessed for benefits, upon the principle established in *Hammett v. Philadelphia*, 65 Pa. St. 146, that "when a street is once opened and paved, thus assimilated with the rest of the city and made part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed," and the

cost of repaving the street can not be provided for by local assessments, but must be defrayed by general taxation.

²⁰⁰ *Cherry v. Board &c.*, 52 N. J. L. 544; s. c. 20 Atl. 970.

²⁰¹ *City of Grand Rapids v. Luce*, 92 Mich. 92; s. c. 52 N. W. 635.

²⁰² *City of Grand Rapids v. Luce*, 92 Mich. 92; s. c. 52 N. W. 635.

²⁰³ In *re Widening of Washington St.*, 14 N. Y. S. 470; s. c. 60 Hun (N. Y.) 580. In *Packard v. Bergen Neck R. Co.*, 54 N. J. L. 229; s. c. 22 Atl. 227, it was held that the charter of a city, requiring that provisions for opening and grading a street must be taken by "ordinance," ap-

be ordered to be improved on both sides of a railroad track at the expense of abutting owners without requiring the space between the rails to be improved.²⁰⁴ A provision of a charter providing for opening, etc., of streets and for a survey thereof, does not apply where there is a clause also providing for the opening and establishing of streets on the site of a public highway within the city limits, where no more land is taken and no different title is acquired and no alteration in the use effected.²⁰⁵ Proceedings to lay out a street which are not in compliance with the charter may be attacked collaterally.²⁰⁶

§ 1142. Reconstruction of streets and sidewalks—Second assessment.—The supreme court of Kentucky has adopted the doctrine that power exists in the legislature to authorize reconstruction of a street by assessment of property bordering on the street, just as was done for the original improvement; and that though the amount to be expended is insufficient to improve every street, the right to improve the principal thoroughfares, or such as will prove most beneficial to a city, may nevertheless be exercised by a city council.²⁰⁷ So, when a turnpike company, under authority of the legislature, contracts with a city for a surrender of so much of its road as is within a city's limits, the city may reconstruct the road as a street when the surrender is made.²⁰⁸

§ 1143. Paving streets.—It has been held that a provision in a statute that "it may be prescribed by ordinance that paving of streets * * * shall be done at the expense of" the abutting owners, "and liens may be filed by [the] city for the same, as it is now practised

plied to the building of a draw-bridge, and the provisions therefor by "resolution" were void.

²⁰⁴ *City of Springfield &c. v. Weaver*, 137 Mo. 650; s. c. 37 S. W. 509; 39 S. W. 276.

²⁰⁵ *Huddleston v. City of Eugene*, 34 Or. 343; s. c. 55 Pac. 868.

²⁰⁶ *Keifer v. City of Bridgeport*, 63 Conn. 401; s. c. 36 Atl. 801. See *Hunt v. Gorton*, 20 R. I. 163; s. c. 37 Atl. 706.

²⁰⁷ *Cassidy v. City of Covington*, 12 Ky. L. 980; s. c. 16 S. W. 93; following *Maddux v. City of Newport*, 12 Ky. L. 657; s. c. 14 S. W. 957.

²⁰⁸ *Cassidy v. City of Covington*, 12 Ky. L. 980; s. c. 16 S. W. 93. The

power of a village council, organized under the general statute of Minnesota, as expressly conferred, as respects laying out, extending, discontinuing, grading and paving streets, is not limited by other provisions empowering it to take such action under certain circumstances, on petition of adjoining landowners, and assessing them therefor. Under the general power a council may cause a sidewalk to be constructed, purchase the material for the same, of their own motion, without such a petition, and pay for the same out of general funds: *Bradley v. Village of West Duluth*, 45 Minn. 4; s. c. 47 N. W. 166.

and allowed by law," did not restrict the discretion of the city council as to the kind of pavement to be laid, and that the fact that the sides of a street had been for many years paved with cobblestones would not preclude them from directing the paving of the center with granite.²⁰⁹ Paving a street and laying edge-stones for the sidewalk is a "local" improvement for which a special tax may be assessed on abutters under the Illinois statute.²¹⁰ An additional width to a sidewalk is a "repavement" within the meaning of that term as used in the laws relating to sidewalks in New York City.²¹¹

§ 1144. Paving and repairing distinguished.—The distinction between paving and repairing has been recognized in many cases, as, for instance, by the New York courts, where a street having a cobblestone pavement was repaved with Belgian pavement, it was held that the work was not a repair of a street and the expense chargeable to the city, but a local improvement, and therefore the subject of a local assessment.²¹² In a case where a railway company had the obligation upon it that "the space between the rail of [its] track and the street for a space of two feet on either side and along the line of said track shall be kept and maintained in good repair by [the] railway company," the street then being unpaved, the city authorities afterwards determined to pave the street with sandstone blocks to be laid upon a foundation of concrete nine inches thick, and called upon the railway company to pave in that way between the tracks. The Missouri supreme court held the railway company not liable, on the ground that an obligation to repair a street is not an obligation to construct thereon a new pavement.²¹³ That the charters of some cities give power to

²⁰⁹ *City of Philadelphia v. Evans*, 139 Pa. St. 483; s. c. 21 Atl. 200, holding also that the municipal authorities have a discretion as to the time at which the paving of streets is to be done, and it will not be interfered with merely because the work is done in a cold season of the year, and thus increases the cost over what it would have been if done at a different season.

²¹⁰ *Enos v. City of Springfield*, 113 Ill. 65.

²¹¹ *In re Smith*, 99 N. Y. 424.

²¹² *In re Fulton Street*, 29 How. Pr. (N. Y.) 429.

²¹³ *State v. Corrigan &c.*, 85 Mo. 263. The Maryland court of appeals has taken the same view in a case

where the obligation of a street-railway company was to keep its track and the space of two feet on each side of it "in thorough repair," and the improvement was to repave with Belgian pavement in place of cobblestone: *Mayor &c. v. Scharf*, 54 Md. 499, 525. With a similar obligation upon a street-railway company the Indiana supreme court has held that the company could not be compelled to pay the expense of regrading with asphalt: *Western Paving &c. Co. v. Citizens' St. R. Co.*, 128 Ind. 525; s. c. 26 N. E. 188; 28 N. E. 88, in which case it was also held that a street-railway company, the property of which is not subject to assessment for street improvements,

repave streets, as well as to pave, is not to be taken as proof that the legislature intended to deny the power to repave where nothing is said on the subject.²¹⁴

§ 1145. **Repairs of streets, etc.**—The duty of a city is quasi-judicial or discretionary when a power is conferred upon it to make public improvements, such as streets, sewers, culverts and drains; and for a failure to exercise this power or an erroneous estimate of the public needs no civil action can be maintained. But “after this quasi-judicial or discretionary power has once been exercised and the improvement made, the duty of keeping it in repair, so as to prevent it from being dangerous to the public, is ministerial, and for a negligent omission to do so an action by the party injured will lie.”²¹⁵ A town may lawfully make a contract with private persons whereby the latter are bound to raise the grade of a road to a certain level and to keep it in repair forever.²¹⁶

is not estopped to deny its liability for an assessment because it stands by without objection until the improvement is completed, if it is one which the city has authority to make. The supreme judicial court of Massachusetts have said, on the other hand, that no sound distinction can be made between needful repairs and such improvements as are required by the public good: *Middlesex R. Co. v. Wakefield*, 103 Mass. 261, 266. The supreme court of Michigan assumed in a case that a liability to keep “in good order and repair” included paving: *People v. Fort St. &c. R. Co.*, 41 Mich. 413; s. c. 2 N. W. 188. And so the Pennsylvania supreme court, where the obligation was to keep “in perpetual good repair:” *Ridge Ave. &c. R. Co. v. Philadelphia City*, 124 Pa. St. 219; s. c. 16 Atl. 741. The New York court of appeals on the same principle has held that a commissioner of highways, under the power given him to repair highways, may build a new bridge when necessary to connect the two portions of a highway interrupted by an intersecting stream, the theory of the ruling be-

ing that it was necessary in order to make the highway passable: *Hugans v. Riley*, 125 N. Y. 88; s. c. 25 N. E. 993.

²¹⁴ *State v. District Court &c.*, 78 Minn. 464; s. c. 83 N. W. 183.

²¹⁵ *Wessman v. City of Brooklyn*, 40 N. Y. St. 698; s. c. 16 N. Y. S. 97; *Mayor &c. v. Furze*, 3 Hill (N. Y.) 612; followed in *Wilson v. Mayor &c.*, 1 Denio (N. Y.) 595; *Hutson v. Mayor &c.*, 9 N. Y. 163; *Griffin v. Mayor &c.*, 9 N. Y. 456; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Barton v. City of Syracuse*, 36 N. Y. 54; *McCarthy v. City of Syracuse*, 46 N. Y. 194; *Urquhart v. City of Ogdensburg*, 67 N. Y. 71.

²¹⁶ *Inhabitants &c. v. Reed*, 152 Mass. 568; s. c. 26 N. E. 138; *Inhabitants &c. v. Cutter*, 114 Mass. 344; *City of Springfield v. Harris*, 107 Mass. 532, 540; *Bell v. City of Boston*, 101 Mass. 506; *Crockett v. Boston*, 5 Cush. (Mass.) 182; *Seymour v. Carter*, 2 Met. (Mass.) 520; *Hawks v. Inhabitants &c.*, 107 Mass. 414; *Deane v. Inhabitants &c.*, 132 Mass. 475; *Waldron v. City of Haverhill*, 143 Mass. 582; s. c. 10 N. E. 481; *Sullivan v. Holyoke*, 135 Mass. 273.

§ 1146. **Lawful improvements.**—Averments that the street commissioner of a city is about to excavate and change the grade of a street “without authority of law,” and that the mayor is “unlawfully” procuring and suffering the excavation to be done, will not establish the unlawfulness of a change of grade, in a suit to enjoin the mayor and street commissioner from changing the grade of a street, where a city is authorized by statute to change the grade of its streets.²¹⁷ Nor will allegations that a city had sold its negotiable bonds and was about to use the proceeds in purchasing a site for and in erecting a city hall sustain an action to enjoin the expenditure of the proceeds of the bonds for that purpose, where the city has authority under the general statutes of the state to purchase and hold real estate and to provide public buildings for the accommodation of its officers.²¹⁸ In case there is uncertainty as to the boundary line of a city, local improvements may be made with reference to any recognized city limits.²¹⁹

§ 1147. **Curative legislation.**—Where a public work has been done under void authority,—as, for instance, where street improvements have been made under a statute which has been declared unconstitutional, and the property owners have received the benefits of the street improvements,—the legislature has a right to legalize what it might previously have ordered, and therefore can remedy the matter by a curative act ordering the completion of such improvements.²²⁰ The legislature may ratify and confirm the acts of a city in making an improvement.²²¹

§ 1148. **Supervisors of a county ordering improvements in a town.**—Certiorari lies to review the action of a board of supervisors of a county in proceeding to improve streets and highways in a town, and directing an issue of bonds for the purpose of defraying the expense thereof, at common law, and no statutory enactment in the state of New York has taken away the office of the writ in that respect.²²² But the action of such a board in directing the improvement of high-

²¹⁷ *Kemper v. Campbell*, 45 Kan. 529; s. c. 26 Pac. 53.

²¹⁸ *City of Argentine v. State*, 46 Kan. 430; s. c. 26 Pac. 751.

²¹⁹ *Bloomington Cemetery Ass'n v. People*, 139 Ill. 16; s. c. 28 N. E. 1076.

²²⁰ *Donley v. City of Pittsburgh*, 147 Pa. St. 348; s. c. 23 Atl. 394. See also, *Satterlee v. Matthewson*, 16 Serg. & R. (Pa.) 169; *Schenley v. Commonwealth*, 36 Pa. St. 29; *Com-*

monwealth v. Marshall, 69 Pa. St. 328; *Hewitt's Appeal*, 88 Pa. St. 55; *City of Harrisburg v. McCormick*, 129 Pa. St. 213; s. c. 18 Atl. 126; *City of Chester v. Black*, 132 Pa. St. 568; s. c. 19 Atl. 276.

²²¹ *Smith v. City of Buffalo*, 35 N. Y. S. 635; s. c. 90 Hun (N. Y.) 118.

²²² *People v. Board &c.*, 42 N. Y. St. 22; s. c. 16 N. Y. S. 705.

ways and issue of bonds is not subject to review by the supreme court on the ground of the extravagance of the undertaking and appropriation.²²³ The right of a board of supervisors of a county to direct an improvement of streets and highways in a town within the county is not affected by the fact that the highways to be improved form a part of the streets of an incorporated village within the limits of the town.²²⁴

§ 1149. **Sidewalks.**—When or where they will lay sidewalks in the streets of a village in Michigan is a matter of discretion of the trustees of the village, and a court of chancery has no jurisdiction to control that discretion, the legislature having confided that matter to the trustees.²²⁵ Where such discretion of municipal officers or boards in repairing streets or sidewalks has been exercised within the scope of the powers conferred upon them by law, in the absence of fraud courts ought not to interfere with their action.²²⁶ A city has a right to build its sidewalks in its own way, after it has given a lot-owner ample opportunity to put in the sidewalk abutting his property.²²⁷ Requiring sidewalks to be built of stone is not unreasonable and void,

²²³ *People v. Board &c.*, 42 N. Y. St. 22; s. c. 16 N. Y. S. 705.

²²⁴ *People v. Board &c.*, 42 N. Y. St. 22; s. c. 16 N. Y. S. 705. See also, *People v. Board &c.*, 15 N. Y. St. 860; s. c. 1 N. Y. S. 382.

²²⁵ *Irving v. Ford*, 65 Mich. 241; s. c. 32 N. W. 601.

²²⁶ *City of Emporia v. Gilchrist*, 37 Kan. 532; s. c. 15 Pac. 532, in which case, a sidewalk having been condemned as unsafe by the authorities of the city, and the owner of the property abutting upon the sidewalk having failed to remove and rebuild it in the time given him under an ordinance of the city, after due notice that upon his failure to remove and rebuild it the city would do so at his expense, the city was held authorized to remove and rebuild it in its own way, and that an injunction should not be allowed against the city, when it began to remove the old sidewalk, for the simple reason that the material

for the new sidewalk was not then on the ground ready for use.

²²⁷ *City of Emporia v. Gilchrist*, 37 Kan. 532; s. c. 15 Pac. 532. If the public authorities of a municipality construct a sidewalk along one of its streets upon the private property of a lot-owner, the public have a right to its use, and the authorities are entitled to exercise the powers of control and supervision appropriate to public ways and walks. But if they attempt to exercise a proprietary right over the sidewalk,—as, for instance, to order it taken up and removed to another part of the municipality,—they invade the private rights of the owner of the land on which it is laid, and would be liable in an action of trespass: *Rogers v. Randall*, 29 Mich. 41. The measure of damages in such a case, where the act was done not with bad motives, but under a belief that it was right and lawful, it was held, would be the value of the walk as it was when removed.

nor is it an unlawful interference with private property,²²⁸ and where the city has control over the streets it has power to determine of what material sidewalks shall be made.²²⁹ Where no permanent grade is established a council has no power to construct a temporary sidewalk above the natural surface where the statute authorizes temporary sidewalks only on the natural surface.²³⁰ The city is not obliged to return to property owners the value of the old pavement which it replaced.²³¹

§ 1150. Contracts in restraint of right to control or improve streets.—A contract with a gas company, based on a valid consideration, allowing the company to lay pipes in the streets of a city, does not divest the municipality of power to lower the grade of its streets, and if necessary, to remove as nuisances the pipes thereby exposed to view, for the reason that a municipal corporation can not alienate the express and plenary powers to grade and improve its streets granted to it by the legislature.²³² And of the necessity and expediency of removing as nuisances gas pipes from a street where exposed to view by the change of grade, the municipal council and not the court is the judge.²³³ A city is not deprived of the power to make necessary improvements in one of its streets on which are the tracks of a railroad company by the fact that the railroad company agreed to so improve it, that vehicles might cross it in safety.²³⁴ And an ordinance for the improvement of a street is not void because of the possible injury to vested rights by its enforcement.²³⁵

§ 1151. Discretion of municipal authorities.—The decision of a city council empowered by statute "to lay out, alter, grade or otherwise improve streets," and "to construct and keep in repair bridges, viaducts and tunnels," that a viaduct extending over railroad tracks and a creek is a local improvement, to be paid for by special assessment, is, in the absence of fraud, final, if it appears that such a viaduct could not be properly constructed over the tracks without making it also cross the creek.²³⁶ In the absence of fraud, the time for com-

²²⁸ *In re O'Brien*, 119 Mich. 540; s. c. 79 N. W. 1070.

²²⁹ *In re O'Brien*, 119 Mich. 540; s. c. 79 N. W. 1070.

²³⁰ *Hartrick v. Town of Farmington*, 108 Iowa 31; s. c. 78 N. W. 794.

²³¹ *Schmitt v. City of New Orleans*, 48 La. An. 1440; s. c. 21 So. 24.

²³² *Roanoke Gas Co. v. City of Roanoke*, 88 Va. 810; s. c. 14 S. E. 665.

²³³ *Roanoke Gas Co. v. City of Roanoke*, *supra*.

²³⁴ *Chicago &c. R. Co. v. City of Quincy*, 139 Ill. 355; s. c. 28 N. E. 1069.

²³⁵ *Chicago &c. R. Co. v. City of Quincy*, 139 Ill. 355; s. c. 28 N. E. 1069.

²³⁶ *Louisville &c. R. Co. v. City of East St. Louis*, 134 Ill. 656; s. c. 25 N. E. 962.

pleting a street improvement under a contract may be extended by the common council of a city.²³⁷ The municipal authorities are empowered to determine what is a reasonable time under a statute requiring abutters to improve streets when notified "within a reasonable time."²³⁸

§ 1152. The same subject continued.—The charter of a city provided that the common council should have supervision of all streets, etc., and should cause them to be improved and repaired, and give directions therefor when necessary; also that the board of public works should have power to repair, pave, etc., all streets as the council might declare to be a necessary public improvement; and that when the council decided that any public work was a necessary improvement the board should determine the particular kind and quantity of materials to be used therefor. Under such provisions the council could order the pavement of streets with gravel and cobblestones, and the board of public works could not refuse to do the work because it deemed such materials unsuitable, its power to determine "the particular kind and quantity of materials" being restricted to matters of detail, within the general limits prescribed by the council.²³⁹

§ 1153. Streets with railways intersecting them.—Under a New Jersey statute municipal authorities may, in furtherance of the purposes of the statute, which were to provide for the better protection of citizens on account of the danger incident to railway companies running their cars into the municipalities, vacate any street or any part of a street, and change the grade upon any street or part of a street, without the consent of abutting owners. They may also construct bridges as parts of streets, to carry the public way above intersecting railroads. If an ordinance, which is intended to change the grade of a street so as to carry the way over an intersecting railroad

²³⁷ *Terre Haute &c. R. Co. v. Nelson*, 130 Ind. 258; s. c. 27 N. E. 486; following *Jenkins v. Stetler*, 118 Ind. 275; s. c. 20 N. E. 788. The city council must fix the grade of the curb of a street. The fixing of such grade may not be delegated to the city engineer: *Lippelman v. City of Cincinnati*, 4 Ohio C. C. 327.

²³⁸ *Fass v. Seehawer*, 60 Wis. 525; s. c. 19 N. W. 533. It is not essential for the continued existence of a street laid out by a city that the city shall immediately grade and

improve it. It is discretionary when further improvement shall be necessary, and a failure to improve can not be construed as an abandonment of the street so as to justify private ownership thereof: *Louisiana Ice Mfg. Co. v. City of New Orleans*, 43 La. An. 217; s. c. 9 So. 21.

²³⁹ *Common Council v. Board &c.*, 87 Mich. 113; s. c. 49 N. W. 481, in which a writ of mandamus to compel the board to proceed with the work was ordered to issue.

by means of a bridge and approaches, contains a clause vacating a part of the street upon which the approach is to rest, it thereby defeats its main object and should be set aside as unreasonable.²⁴⁰

§ 1154. **Local assessments.**—It is well settled that the power to make a public improvement on the part of a municipal corporation and to impose the burden of the same upon the owners of property benefited thereby is one which the legislature may confer upon such corporations as a part of the taxing power belonging to the state. This power of taxation and of apportioning taxation, or of assigning to each individual his share of the burden, is vested exclusively in the legislature, unless the power is limited or restrained by some constitutional provision. The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes can not be levied without apportionment; and the power of apportionment is therefore unlimited, unless it be restrained as a part of the power of taxation. There is not generally in our states any restraint upon it. It is competent for the legislature to apportion the tax generally upon all taxable persons within its jurisdiction, or within a certain district or local division; or it may apportion the tax according to the benefit which each taxpayer is supposed to receive from the object on which the tax is expended. Whether or not one mode or the other

²⁴⁰ Read v. City of Camden, 54 N. J. L. 347; s. c. 24 Atl. 549; reversing s. c. 53 N. J. L. 322; 21 Atl. 565. The court said, in reply to the contention that the bridge to be built could not be deemed a part of the street, and also because the bridge and its approaches were to occupy only one-half of the width of the street, that the work was not a "change of grade" upon the street; that "a street is only an improved public way through a town or city, and whether the way rests immediately upon the solid ground, or is supported above it like a bridge, it may still be called a 'street.' No doubt the legislature may use the terms 'street,' 'road' and 'highway' in a sense which excludes bridges in their route; but since in [the statute before the court] the power to change the grades of streets and highways was evidently conferred in order that

travel thereon might pass over or under intersecting railroads, the legislature may have intended to include bridges as a part of the streets and highways at their new grades. Nor is there anything illegal in the establishment of different grades for different longitudinal sections of a street. Sidewalks and carriage ways are common instances of such different grades, when, as here, there may be sufficient reason for great divergence; that is not illegal. It was within the discretion of the council to determine whether the embankment and bridge should occupy the whole width of the street or not." Under Iowa Code (1870) a city may establish streets over a railroad right of way: *City of Albia v. Chicago & C. R. Co.*, 102 Iowa 624; s. c. 71 N. W. 541; *In re Folts Street &c.*, 46 N. Y. S. 43; s. c. 18 App. Div. (N. Y.) 568.

is the more equitable, the legislature is the sole and exclusive judge. It is wholly a matter of legislative discretion which method shall be adopted, and it is not at all a matter for judicial inquisition or review.²⁴¹ Special assessments proceed upon the principle that certain property, peculiarly situated in reference to an improvement, is to be specially benefited in the enhancement of its value, and in levying such assessments the principle of equality in their apportionment is deemed vital, as in ordinary cases of taxation under the constitution.²⁴²

§ 1155. Local improvement defined.—A local improvement applies to opening, grading, paving and otherwise improving streets and alleys, making sidewalks, the construction of drains and sewers, and other improvements of this nature, improvements designed to be of benefit to the locality where made.²⁴³ By common usage a local improvement signifies improvements in a particular locality by which the real property adjoining or near such locality is specially benefited.²⁴⁴ A local improvement benefits the property on which the cost is assessed in a manner local in its nature and not enjoyed by the property generally in the city.²⁴⁵ A city has no arbitrary power to make an improvement local,²⁴⁶ and where a sewer is built principally for the benefit of the public it renders void a special tax therefor.²⁴⁷ It is

²⁴¹ *People v. Mayor &c.*, 4 Comst. (N. Y.) 426, 427, 432. See also, *McComb v. Bell*, 2 Minn. 295; *Stinson v. Smith*, 8 Minn. 366.

²⁴² *Noonan v. City of Stillwater*, 33 Minn. 198; s. c. 22 N. W. 444, where, upon the principles of the text, it was held that it was in accordance with the constitution of the state, which provided that "the legislature may by general law or special act authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, without regard to a cash valuation and in such manner as the legislature may prescribe," "for the charter of the city to make it the duty of all owners of land adjoining any street, lane or alley in the city, to construct, reconstruct and maintain in good repair such

sidewalk, along the side of the street, lane or alley next to the lands of such owner, respectively, as may have been heretofore constructed or shall hereafter be constructed or directed by the city council to be built;" but the further provision attempting to make the owners of such lots liable for all damages resulting from any default of theirs in keeping such sidewalk in repair was repugnant to the constitution. See ch. 28, post.

²⁴³ *City of Chicago v. Law*, 144 Ill. 569; s. c. 33 N. E. 855.

²⁴⁴ *Rogers v. City of St. Paul*, 22 Minn. 494.

²⁴⁵ *State v. Reis*, 38 Minn. 371; s. c. 38 N. W. 97.

²⁴⁶ *Illinois Cent. R. Co. v. City of Decatur*, 154 Ill. 173; s. c. 38 N. E. 626.

²⁴⁷ *Heman v. Handlan*, 59 Mo. App. 490.

a legitimate exercise of power of village trustees to remove a stone culvert and replace it with a new one to be paid for by special assessment, and also to determine the practicability of using the old material.²⁴⁸

§ 1156. Legality of assessments for local improvements.—An act that provides that an assessment by a city shall constitute a lien on the property affected and that the bonds issued shall be conclusive evidence of the validity of such lien is unconstitutional and void.²⁴⁹ An assessment for paving a highway when the entire cost of the improvement is apportioned on the abutting land according to frontage without reference to the size and value of the parcels or the special benefits accruing is in violation of the fifth and fourteenth amendments to the constitution of the United States.²⁵⁰ Where the charter provides that the expense of public improvements shall not be defrayed by the owners of the property unless a majority of the members of the council shall deem it expedient and shall give public notice in two or more newspapers for twenty days and shall then determine that the improvement shall be made, it was held void, as not giving persons assessed an opportunity to be heard.²⁵¹

²⁴⁸ *Shannon v. Village of Hinsdale*, 180 Ill. 202; s. c. 54 N. E. 181. Power of cities of first class in Kansas to pave streets and make special assessments,—see *State v. City of Kansas City*, 60 Kan. 518; s. c. 57 Pac. 118. Special assessments for sidewalks allowed in Kentucky,—see *Hackworth v. Louisville & Co.*, 20 Ky. L. 1789; s. c. 50 S. W. 33. Streets graded and paid for by special assessment or public funds in Missouri,—see *Kolkmeier v. City of Jefferson*, 75 Mo. App. 678.

²⁴⁹ *Ramish v. Hartwell*, 126 Cal. 443; s. c. 58 Pac. 920. Cf. *McCready v. Sexton*, 29 Iowa 356, 389; *Rollins v. Wright*, 93 Cal. 395; s. c. 29 Pac. 58; *Haaren v. High*, 97 Cal. 445; s. c. 32 Pac. 518; *Ensign v. Barse*, 107 N. Y. 329; s. c. 14 N. E. 400; 15 N. E. 401; *Williams v. Supervisors &c.*, 122 U. S. 154; s. c. 7 S. Ct. 1244; *Chamberlain v. Taylor*, 36 Hun (N. Y.) 24.

²⁵⁰ *Lyon v. Town of Tonawanda*, 98 Fed. 361.

²⁵¹ *City of Norfolk v. Young*, 97

Va. 728; s. c. 34 S. E. 886. Under § 9, art. 9, of the constitution of Illinois, the legislature is authorized to vest in corporate authorities of cities, towns and villages power to make local improvements by special assessment, or by special taxation of contiguous property. Pursuant to this provision the legislature adopted art. 9, ch. 24, of the Rev. St., vesting in cities and villages power to make local improvements by special assessment, or special taxation, or both, of contiguous property. Hence it is a matter within the discretion of the corporate authorities to determine for themselves the mode they may adopt to carry out the power conferred, so long as they keep within the constitutional and statutory requirements. Where special taxation is selected it is immaterial whether the special tax exceeds the benefits or not: *Enos v. City of Springfield*, 113 Ill. 65; *White v. People*, 94 Ill. 604, 607. In special taxation the benefits are determined by the municipal author-

§ 1157. **Special taxation in Illinois.**—In Illinois there is a distinction between special taxation and special assessment. The power of special taxation of contiguous property for the making of local improvements by a city does not depend upon the fact of an equivalent benefit to the property taxed. The power is given unqualifiedly by the Illinois statute, with no restriction as to the benefiting of contiguous property.²⁵² On the subject of special taxation the Illinois supreme court said in another case:—"This proceeding is in the taxation of contiguous property; and in the adoption of that mode there is no requirement of benefits received, and no respect thereto further than may be had by the city council in determining upon which particular one of the several modes of special taxation of contiguous property open to them shall be resorted to."²⁵³ A committee to estimate the cost of a local improvement may be appointed after the passage of an ordinance for constructing it and before its approval by the mayor of the city without vitiating the proceeding. It is sufficient if the ordinance is signed before the petition is filed in the county court to have the tax levied for half the estimated cost upon contiguous property.²⁵⁴

§ 1158. **Constitutionality of assessments for sidewalks.**—It has been urged that laws imposing upon the owners of lands abutting upon streets the expense of constructing sidewalks were unconstitutional in that the power to do this was referable to the power of taxation, and that statutes conferring such power upon cities to require owners of such lands to build and maintain suitable pavements or sidewalk improvements along their premises when necessary to the safety or convenience of travel, to enforce obedience by fines, and ordinances to that effect, were attempts to levy a tax in a manner not authorized by the state constitution. Judge Cooley on this subject says:—"The cases of assessment for the construction of walks by the sides of streets in cities and other populous places are more distinctly referable to the power of the police. The footwalks are not only required as a rule to be put up and kept in proper condition for use by the adjacent proprietors, but it is quite customary to confer by the municipal charters full authority on the municipalities to order the walks of a kind and quality by them prescribed, to be constructed by the owners of the adjacent lots at their own expense, within a time

ity: *Village of Western Springs v. Hill*, 177 Ill. 634; s. c. 52 N. E. 959. also, *Enos v. City of Springfield*, 113 Ill. 65.

²⁵² *City of Galesburg v. Searles*, 114 Ill. 217; s. c. 29 N. E. 686.

²⁵⁴ *City of Galesburg v. Searles*, 114 Ill. 217; s. c. 29 N. E. 686.

²⁵³ *White v. People*, 94 Ill. 604. See

limited by the order for the purpose, and that in case of their failure so to construct them, it shall be done by the public authorities and the cost collected from such owners or made a lien upon their property. When this is done the duty must be looked upon as being enjoined as a police regulation made because of the peculiar interests such owners have in the walks, and because their situation gives them peculiar fitness and ability for performing with promptness and convenience the duty of putting them in proper state, and of afterwards keeping them in a state suitable for use. Upon these grounds the authority to establish such regulations has frequently been supported."²⁵⁵

§ 1159. Fee in land condemned a part of the cost of an improvement.—Where land is to be taken for a public use, the legislature is the exclusive judge of the amount of land and of the estate therein which the public end to be subserved requires to be taken. It is therefore competent for the legislature to authorize a municipal corporation to condemn the title in fee-simple of land for public streets. But the title which the corporation acquires in such cases is what may be termed a "qualified or terminable fee" for street purposes only, and which it holds not as proprietor, but as an agency of the state in trust for the public for street purposes, and which it can neither sell nor devote to a private use.²⁵⁶ It was urged in a case where the fee-simple

²⁵⁵ Cooley Taxation (2d ed.), 588. Cf. Burroughs Taxation, 494, and 2 Desty Taxation, § 190. It has been held that the power to compel a property owner to pay for a sidewalk in front of his property is referable to the police power rather than the power of taxation. This doctrine, where maintained, rendered inapplicable constitutional requirements as to uniformity of taxation: *In re Goddard*, 16 Pick. (Mass.) 504; *Mayor &c. v. Mayberry*, 6 Humph. (Tenn.) 368, 373; *Washington v. Mayor &c.*, 1 Swan (Tenn.) 177; 2 Swan (Tenn.) 364. Under the Illinois constitution of 1848, which required all taxes to be uniform, it was held that the property owner could not be assessed to pay for the construction of a sidewalk in front of his property, and that the assessment could not be justified as a valid exercise of police

power: *City of Ottawa v. Spencer*, 40 Ill. 211; *Gredley v. City of Bloomington*, 88 Ill. 554; *City of Chicago v. Larned*, 34 Ill. 203. The rule thus established is not maintained under the constitution of 1870, since, it is claimed, the constitutional guaranty of uniformity of taxation is not as strong under the latter constitution as the former. At any rate ample provision is found in the latter constitution for compelling the property owner to construct sidewalks: *White v. People*, 94 Ill. 604.

²⁵⁶ *Fairchild v. City of St. Paul*, 46 Minn. 540; s. c. 49 N. W. 325. See also, 2 Dillon Munic. Corp., § 589; Cooley Const. Lim., 688; *Lewis Eminent Domain*, § 277; *Elliott Roads & Streets* (2d ed.), § 223 et seq.; *Mills Eminent Domain*, §§ 50, 51; *Boom Co. v. Patterson*, 98 U. S. 403-406; *Sweet v. Buffalo &c. R. Co.*, 79 N. Y. 293-299.

in land had been condemned for street purposes, that as assessments for benefits could only be made for local improvements, and as it was only necessary to take an easement in land for street purposes, therefore the taking the fee was not for a local improvement; consequently, if taken, no assessments could be levied to pay for it. "The legislature having authorized, as it might, the condemnation of the fee for the purpose of opening or widening a street, which is a local improvement, payment for the land taken in fee for that purpose is as much a part of the cost of the improvement as would have been payment for an easement had that been the interest taken."²⁵⁷

§ 1160. Highways.—A county board in Kansas has no power to order the improvement of a strip of ground laid out and intended as a street through land platted in blocks and lots that has never been used or traveled as a road, and that has never been regularly laid out as a road in accordance with the general road laws, under the statute which provides for the improvement of "any regularly laid out road."²⁶⁰ Under the Oregon statutes which place all county roads under the supervision of the county court, such court has power to reduce a road of the statutory width of sixty feet to the width of forty feet.²⁶¹ Under the Nebraska statutes a county board has no jurisdiction to establish a public road where no commissioner has been appointed to examine into and report upon its expediency, unless the written consent of all the land-owners whose land is sought to be taken for that purpose is filed with the county clerk.²⁶² The right of ap-

²⁵⁷ *Fairchild v. City of St. Paul*, 46 Minn. 540; s. c. 49 N. W. 325.

²⁶⁰ *Barker v. Commissioners &c.*, 45 Kan. 681; s. c. 26 Pac. 585. Nor has the county board jurisdiction to order the improvement of any county road unless the petition therefor is signed by a majority of the resident landowners within one-half mile on either side of such regularly laid out road, within the terminal points mentioned in the petition, in accordance with the requirements of the statute: *Barker v. Board &c.*, 45 Kan. 681; s. c. sub nom. *Barker v. Hovey*, 26 Pac. 585. Where a petition is for the extension of a village street, a request contained therein that the street be declared a public highway being harmless, as the street is presumably a pub-

lic highway, it is not necessary that all the tracts abutting thereon be specified in the notice of meeting, or that their several occupants be served, as in proceedings to declare a public highway: *State v. O'Connor*, 78 Wis. 282; s. c. 47 N. W. 433. The board of county commissioners in Indiana has authority to act in all matters pertaining to the establishment and construction of county roads at a special session convened upon oral notice from the county auditor: *Loesnitz v. Seelinger*, 127 Ind. 422; s. c. 25 N. E. 1037; following *White v. Fleming*, 114 Ind. 560; s. c. 16 N. E. 487.

²⁶¹ *Heiple v. Clackamas Co.*, 20 Or. 147; s. c. 25 Pac. 291.

²⁶² *Warren v. Brown*, 31 Neb. 8; s.

peal from the decision of the commissioners of highways in regard to vacating a road under the Illinois statute allowing such an appeal is limited to owners of land adjoining that part of the road to be vacated.²⁶³

§ 1161. **Opening highways.**—It has been held that the legislative intention in the statutes of Pennsylvania providing that the court, on being petitioned to grant a view “for a road,” shall appoint qualified persons to view the grounds proposed for “such road” and make report of their proceedings, and that if the persons appointed shall agree that there is occasion for “a road” they shall proceed to lay out the same, having respect to the shortest distance and the best ground for “a road,” was that there should be a separate petition for each road, and a single proceeding throughout including the recording of the road.²⁶⁴ The supervisors of a township can not refuse to obey an order of the court to open a highway made upon a confirmed report of viewers, under the Pennsylvania statutes, on the ground that they did not think it necessary.²⁶⁵ The duty of tracing the line of a proposed public road under the statutes of Louisiana is intrusted to a jury of freeholders, and police juries, the county authorities, have no right on a petition to establish a public road to trace the line of it. But they have certain authority as to its width and direction, and unless it can be shown that they have absolutely dictated the line to be followed, it will not be held that they have exceeded their authority.²⁶⁶

§ 1162. **Repairing highways.**—By a Wisconsin statute, railroad companies are authorized to construct their road-beds across, along or upon highways, on condition that they restore such highways to their former state of usefulness. The duty is imposed by law upon towns to repair highways within their limits and to remove obstructions therefrom. It has been held that when a railroad company has, in constructing its road-bed along and upon a highway, within a town's limits, practically destroyed the highway, the town has such an interest in the preservation and protection of the highway as will

c. 47 N. W. 633. The proceedings had under a statute to create a highway should be so definite and certain that a competent surveyor could, with a record before him, point out its location: *Warren v. Brown*, *supra*.

²⁶³ *Commissioners &c. v. Quinn*, 136 Ill. 604; s. c. 27 N. E. 187; fol-

lowing *Taylor v. Commissioners*, 88 Ill. 526; and overruling *Whitmer v. Commissioners*, 96 Ill. 289.

²⁶⁴ *In re Roads in Sadsbury Tp.*, 147 Pa. St. 471; s. c. 23 Atl. 772.

²⁶⁵ *In re Road in Roaring Brook Tp.*, 140 Pa. St. 632; s. c. 21 Atl. 411.

²⁶⁶ *Calder v. Police Jury*, 44 La. An. 173; s. c. 10 So. 726.

enable it to maintain an action for an injunction to compel the company to restore the highway to its former state of usefulness.²⁶⁷

§ 1163. Bridges.—In Missouri the mode of contracting by a county for the erection of bridges as provided in the statutes is by an order, a letting to bidders, and an approval of the bid by the county court; then a county authority known as bridge commissioner makes the contract formally with the contractor. To bind a county on a contract for the erection of a bridge, the signing of the contract by the bridge commissioner is not essential where it appears that the county court approved the bid for the work and the contractor signed the contract, and that the bridge commissioner in the matter acted for the county.²⁶⁸ Although a bridge commissioner has no power to make any contract differing in any substantial respect from the bid approved by the county court, the building of a bridge pursuant to the plans and specifications being under his direction, unimportant changes made to meet unforeseen exigencies are allowable.²⁶⁹

§ 1164. Construction of bridges.—Though a commissioner of highways may have exceeded his powers in making a contract for the erection of a bridge before the highway of which the bridge will form a part has been laid out, yet, after such highway has been laid out, he may cause the bridge to be constructed at the point of intersection with the stream and for that purpose may carry out the former contract.²⁷⁰ Where the ordinary let out the building of a county bridge to one who was not the lowest bidder, the court is justified in refusing to do more than grant an injunction against paying the contractor more than the amount of the lowest bid, the bridge having been built

²⁶⁷ *Town of Jamestown v. Chicago &c. R. Co.*, 69 Wis. 648; s. c. 34 N. W. 728; following *Town of Sheboygan v. Sheboygan &c. Co.*, 21 Wis. 675; distinguishing *City of Milwaukee v. Milwaukee &c. Co.*, 7 Wis. 85.

²⁶⁸ *Bryson v. Johnson Co.*, 100 Mo. 76; s. c. 13 S. W. 239.

²⁶⁹ *Bryson v. Johnson Co.*, 100 Mo. 76; s. c. 13 S. W. 239, in which case the court based the right of the contractor to a recovery upon the statute of the state which provides that "if a claim against a county be for work and labor done or materials furnished in good faith by the claimant, under contract with the county authorities, or with any

agent of the county lawfully authorized, the claimant, if he shall have fulfilled his contract, shall be entitled to recover the just value of such work, labor and material, though such authorities or agent may not, in making such contract, have pursued the form of proceeding prescribed by law." Cf. *Heidelberg v. St. Francois Co.*, 100 Mo. 69; s. c. 12 S. W. 914. See also, *Wolcott v. Lawrence Co.*, 26 Mo. 272; *Johnson v. Wilson*, 2 N. H. 202; *Johnson v. School District*, 67 Mo. 319; *Maupin v. Franklin Co.*, 67 Mo. 327.

²⁷⁰ *Huggans v. Riley*, 51 Hun (N. Y.) 501; s. c. 4 N. Y. S. 282.

and accepted by the county.²⁷¹ A contractor, after drawing the specifications for a township bridge, and being specially informed as to the sum desired to be expended in its construction, bid on it, and, being the lowest bidder, was awarded the contract, and built the bridge without having given "good and sufficient security for the performance of the work," as required by the Michigan statutes. The bridge was never accepted or used by the township. It was held that there was no valid contract.²⁷² In an action by the contractor for building a bridge, under an act validating irregular proceedings of the town officers for its erection, evidence of the proceedings of the town authorities referred to in the act was admissible to show on what the ratification by the legislature was founded.²⁷³ A contract, made by bridge commissioners of a county, to pay a certain sum for the erection and completion of a bridge, as fast as the money is collected by the tax collector, though not negotiable by the law merchant, is assignable, and under the Tennessee statutes the assignee can sue thereon in his own name; and the assignment is completed by indorsement thereof on the contract and delivery of the instrument; and notice of the assignment is not necessary to hold the commissioners liable.²⁷⁴ Power to construct bridges with a view of facilitating sewerage and drainage does not include power to make bridges over railroad tracks for a street crossing.²⁷⁵ Nor does power to grade, pave and repair give such power.²⁷⁶ Though a statute which provides that county boards may authorize towns to build bridges and issue their bonds in payment therefor does not expressly confer such power of appointment, the county board may, in its resolution authorizing the building of a bridge, appoint commissioners to supervise its construction.²⁷⁷ A stat-

²⁷¹ *Crabtree v. Gibson*, 78 Ga. 230; s. c. 3 S. E. 10.

²⁷² *Mackey v. Columbus Tp.*, 71 Mich. 227; s. c. 38 N. W. 899.

²⁷³ *Wrought Iron Bridge Co. v. Town of Attica*, 2 N. Y. S. 359; s. c. 49 Hun (N. Y.) 513.

²⁷⁴ *Smith v. Hubbard*, 1 Pickle (Tenn.) 306; s. c. 2 S. W. 569.

²⁷⁵ *Phelps v. City of Detroit*, 120 Mich. 447; s. c. 79 N. W. 640.

²⁷⁶ *Phelps v. City of Detroit*, *supra*.

²⁷⁷ *Barker v. Town of Oswegatchie*, 10 N. Y. S. 834; s. c. 62 Hun (N. Y.) 208. See also, *People v. Meach*, 14 Abb. Pr. (N. S.) (N. Y.) 429 (where the court, considering a statute on this subject, said:—"The objection

that the commissioners are not the proper agents of the board of supervisors to execute the power of building the bridge, and that this should be executed by town or village authorities, I regard as unfounded. The supervisors have the power, and may execute it in any way that satisfies their sound discretion. No particular set of agents is required by the statute or by the general law. The practice of doing it by commissioners is a very general one, and approved by usage of long standing. I do not regard it as the usurpation of an office, but the execution of an agency"); *Town of Kirkwood v. Newburg*, 45 Hun (N. Y.) 323.

ute investing the commissioner of highways with the care, superintendence, repair and improvement of highways and bridges within his town, as well as charging him with the custody and disbursement of whatever money is raised by the town for those purposes, where a town meeting votes to raise and appropriate a sum of money for the erection of a bridge across a stream, the commissioner of highways is charged with the duty to erect it and to make appropriate contracts therefor in the absence of any action placing the work in the hands of other agents.²⁷⁸

§ 1165. **Sewers.**—The power of a municipality, as a rule, to construct sewers is given in express terms or by implication. The subject is more fully treated in a subsequent chapter.^{278a} An ordinance for the construction of a sewer by special taxation will not be declared invalid, so as to defeat a confirmation of the tax, because it provides for an outlet by a connection with another sewer which has not in fact been constructed at the time of the levy.²⁷⁹ The legislature may authorize the circuit court to construct drains partly within the city limits and partly without.²⁸⁰ Construction of sewers is not within the scope of corporate authority of a town.²⁸¹ A public improvement must not be unreasonable and oppressive, and in determining this, the surroundings, situation and use of abutting property must be taken into consideration, together with the expense of the proposed improvement.²⁸² An ordinance declaring a certain tract of land a sewer district and providing for a sewer in the street in the center of the land but no lateral sewers, and no drainage for the streets off the line of the sewer other than ditches sufficient to carry off the water on the surface, and assessing the cost of the sewer on the land, is void.²⁸³ In the construction of sewers through land that has not

²⁷⁸ *Berlin Iron Bridge Co. v. Wagner*, 10 N. Y. S. 840; s. c. 57 Hun (N. Y.) 346. See also, *Mather v. Crawford*, 36 Barb. (N. Y.) 564; *Huggans v. Riley*, 4 N. Y. S. 282; s. c. 51 Hun (N. Y.) 501; *People v. Meach*, 14 Abb. Pr. (N. S.) (N. Y.) 429; *Boots v. Washburn*, 79 N. Y. 207.

^{278a} § 1317, post.

²⁷⁹ *Ryder v. City of Alton*, 175 Ill. 94; s. c. 51 N. E. 821. Cf. *Maywood Co. v. Village of Maywood*, 140 Ill. 216; s. c. 29 N. E. 704; *Burhans v. Village of Norwood Park*, 138 Ill. 147; s. c. 27 N. E. 1088; *Payne v.*

Village of South Springfield, 161 Ill. 285; s. c. 44 N. E. 105.

²⁸⁰ *Sauntman v. Maxwell*, 154 Ind. 114; s. c. 54 N. E. 397.

²⁸¹ *Brunswick Gaslight Co. v. Brunswick Village Corp.*, 92 Maine 493; s. c. 43 Atl. 104.

²⁸² *Bickerdike v. City of Chicago*, 185 Ill. 280; s. c. 56 N. E. 1096. Cf. *Warren v. City of Chicago*, 118 Ill. 329; s. c. 11 N. E. 218; *Cram v. City of Chicago*, 139 Ill. 265; s. c. 28 N. E. 758; *People v. Cook*, 180 Ill. 341; s. c. 54 N. E. 173.

²⁸³ *Bickerdike v. City of Chicago*, 185 Ill. 280; s. c. 56 N. E. 1096. Cf.

been platted the municipality has no right to dictate to an owner how he shall subdivide his land, and the property can not be assessed in the character of lots when it has not been subdivided.²⁸⁴ In many cases, in populous cities, the power of the city to make needed improvements amounts to impotency by reason of owners of large tracts of land refusing to subdivide their property and holding the same, as tillable land, in the possession of truck gardeners, until such time as surrounding owners by improvements shall have increased the value of all adjacent property. Apparently time only, in such cases, affords the only adequate remedy unless the law of public nuisances shall be greatly extended. The New Jersey General Statutes, page 605, govern the construction of sewers independently of special provisions granted in city charters.²⁸⁵ Undoubtedly the general doctrine is that a municipality can exercise its powers within its corporate limits, but this general rule has its qualification in the matter of constructing sewers where it may become necessary to extend the sewer beyond the corporate limits in order to secure a suitable outlet.²⁸⁶ The certificate of the board of public works that a district sewer conforms to the system of sewers established is sufficient to show that the sewer is in harmony with the general system.²⁸⁷ The commissioners of highways have implied authority, under the Illinois statutes, to allow a village to construct a sewer in a highway in their town.²⁸⁹ The fact that the outlet for a system of sewers provided for by an ordinance passes over private property would not invalidate the ordinance.²⁹⁰ But where a trunk sewer is solely for the benefit of the inhabitants of a particular town, it can not be constructed through the street of another without the consent of the owners of the soil, or, in the absence of such consent,

Edwards v. City of Chicago, 140 Ill. 440; s. c. 30 N. E. 350; *Title Guarantee & Trust Co. v. City of Chicago*, 162 Ill. 505; s. c. 44 N. E. 832; *Gray v. Town of Cicero*, 177 Ill. 459; s. c. 53 N. E. 91; *Mason v. City of Chicago*, 178 Ill. 499; s. c. 53 N. E. 354.

²⁸⁴ *Bickerdike v. City of Chicago*, 185 Ill. 280; s. c. 56 N. E. 1096; *Warren v. City of Chicago*, 118 Ill. 329; s. c. 11 N. E. 218; *Cram v. City of Chicago*, 139 Ill. 265; s. c. 28 N. E. 758; *People v. Cook*, 180 Ill. 341; s. c. 54 N. E. 173.

²⁸⁵ *Herbert v. Mayor &c.*, 64 N. J. L. 548; s. c. sub nom. *State v. Mayor &c.*, 46 Atl. 608.

²⁸⁶ *Maywood Co. v. Village of May-*

wood, 140 Ill. 216; s. c. 29 N. E. 704; *Shreve v. Town of Cicero*, 129 Ill. 226; s. c. 21 N. E. 815; *Cochran v. Village of Park Ridge*, 138 Ill. 295; s. c. 27 N. E. 939; *City of Coldwater v. Tucker*, 36 Mich. 474.

²⁸⁷ *Dollar Sav. Bank v. Ridge*, 79 Mo. App. 26. Report of board of public works to common council of a certain public improvement held to be sufficient,—see *Cass Farm Co. v. City of Detroit*, 124 Mich. 433; s. c. 83 N. W. 108.

²⁸⁹ *Cochran v. Village of Park Ridge*, 138 Ill. 295; s. c. 27 N. E. 939.

²⁹⁰ *Burhans v. Village of Norwood Park*, 138 Ill. 147; s. c. 27 N. E. 1088.

without the condemnation of such owners' rights as provided in the statute authorizing its construction.²⁹¹

§ 1166. Construction of sewers.—The power by the statute being expressly given to make such a local improvement within its borders, the power to secure an outlet for it beyond the borders follows necessarily by implication.²⁹² And it is not necessary that the title to the land to be taken for a sewer should be acquired before passing an ordinance for the construction of a sewer by special assessment.²⁹³ Where the owners of premises specially assessed for a proposed public improvement appear and file objections to the confirmation of the assessment, they thereby waive any and all defects in the notice of application for judgment.²⁹⁴

§ 1167. The same subject continued.—A city being authorized by its charter to build a sewer whenever it may be necessary for sanitary or other purposes is not precluded from building a sewer and assessing the cost to lot-owners by the fact that property holders in the district have constructed a private sewer, irrespective of the cost of this private sewer.²⁹⁵ Where a charter of a city requires, in the construction of a sewer, that the size thereof shall be prescribed by ordinance, but there is no such requirement in regard to the inlets or manholes, it is not necessary to specify in the ordinance matters of detail relating to the construction of such inlets and manholes.²⁹⁶

§ 1168. Contracts for construction of sewers.—A contract for the construction of a sewer in Kansas City provided that the contractor

²⁹¹ *Van Brunt v. Town of Flatbush*, 128 N. Y. 50; s. c. 27 N. E. 973; reversing s. c. 13 N. Y. S. 545.

²⁹² *Maywood Co. v. Village of Maywood*, 140 Ill. 216; s. c. 29 N. E. 704.

²⁹³ *Village of Hyde Park v. Barden*, 94 Ill. 26; *Holmes v. Village of Hyde Park*, 121 Ill. 129; s. c. 13 N. E. 540; *Hunerberg v. Village of Hyde Park*, 130 Ill. 156; s. c. 22 N. E. 486.

²⁹⁴ *Walker v. City of Aurora*, 140 Ill. 402; s. c. 29 N. E. 741; *Murphy v. City of Peoria*, 119 Ill. 509; s. c. 9 N. E. 895; *Quick v. Village of River Forest*, 130 Ill. 323; s. c. 22 N. E. 816.

²⁹⁵ *City of St. Joseph v. Owen*, 110 Mo. 445; s. c. 19 S. W. 713.

²⁹⁶ *City of St. Joseph v. Owen*, 110

Mo. 445; s. c. 19 S. W. 713. The commissioners of a sewer district under the statutes of Arkansas have no authority except to construct the sewers and pay for their construction. When they have then turned them over to the city, they are subject to the control of the city, and the board of commissioners have no further control over them. Therefore, they have no authority to contract or bind themselves as a board or the sewer district for water furnished for flushing the sewers in the district: *Pine Bluff Water & Co. v. Sewer Dist. No. 1*, 56 Ark. 205; s. c. 19 S. W. 576; *Martin v. Hilb*, 53 Ark. 300; s. c. 14 S. W. 94.

should be responsible for all damages to persons or property from negligence, and indemnify the city against all claims for damage on account of such neglect; and the sureties agreed that he should faithfully perform the contract. It was held that as the charter of the city requires that such contracts should contain a covenant for the payment of laborers, to be guaranteed by sureties, and gave laborers the right to an action thereon, the bond, apart from the covenant for the benefit of laborers, was for the benefit of the city only, and an action against the sureties on their contract for damages for injuries sustained by the carelessness of the contractor or his employes could not be maintained by a third person.²⁹⁷ Though a contract with a city to construct a sewer provides that the work shall be done to the satisfaction of the board of public works, the contractor, in an action against the city for its refusal to permit him to perform part of the work, need not show a compliance with this provision, the action not being for work done under the contract. And a provision in the contract that the board of public works shall adjudicate the amount earned by the contractor, and the damages suffered by the city from his non-performance of the contract, did not necessitate an adjudication of the contractor's damage arising from the city's breach of contract.²⁹⁸

§ 1169. Power as to drains and sewers discretionary.—The power of a municipal corporation to determine for itself the best method of constructing drains and sewers can not be interfered with by the courts, for it is a discretionary power committed to the municipi-

²⁹⁷ *City of Kansas City v. O'Connell*, 99 Mo. 357; s. c. 12 S. W. 791.

²⁹⁸ And a provision in the contract authorizing the board of public works to suspend or relet the construction of the sewer if the work should be improperly or imperfectly performed did not authorize it to arbitrarily shorten the sewer against the contractor's protest: *Markey v. City of Milwaukee*, 76 Wis. 349; s. c. 45 N. W. 28. A contract with a city for the construction of a sewer provided that the work should be commenced on such day as the commissioner of public works should designate, and be completed within sixty days thereafter, excluding the time during which work might be delayed by difficulties that could not

be foreseen or avoided, or by any act or omission of the city, "all of which shall be determined by the said commissioner of public works, who shall certify to the same in writing." It was held that the obtaining of such certificate was not a condition precedent to the maintenance of an action to recover moneys earned under the contract: *Toop v. City of New York*, 13 N. Y. S. 280; following *Dady v. Mayor &c.*, 57 Hun (N. Y.) 456; s. c. 10 N. Y. S. 819. The contract need not specifically follow the ordinance and advertisement unless the variance is such as to be prejudicial to the property owners: *Ottumwa Brick &c. Co. v. Ainley*, 109 Iowa 386; s. c. 80 N. W. 510.

pal authorities. As long as the corporate authorities keep within the discretion conferred upon them they are the exclusive judges of the plan and method of constructing drains and sewers.²⁹⁹

§ 1170. **Local assessments for drains and sewers.**—The statute of Maine relating to drains and sewers was held constitutional over the objection that it was repugnant to the provision which requires taxes to be “assessed equally, according to the just value thereof.” The supreme court said: “Some objects of taxation, however, that are of public utility, also operate to bestow some particular and special benefit upon particular interests; and so far as this benefit is special and beyond and apart from that enjoyed by the community in general, and by the recipient as a member thereof, it is not a public work or purpose that must be provided for from the public revenue or taxes, that the constitution declares shall be assessed on property, ‘equally, according to the just value thereof,’ but it may be charged to or assessed upon interests according to the benefits bestowed. The purpose of the constitutional provision is to equalize public burdens and not to assume those of individuals.”³⁰⁰

²⁹⁹ *Leeds v. City of Richmond*, 102 Ind. 372; s. c. 1 N. E. 711; *City of Kokomo v. Mahan*, 100 Ind. 242; *Macy v. City of Indianapolis*, 17 Ind. 267. See also, *Town of Sullivan v. Phillips*, 110 Ind. 320; s. c. 11 N. E. 300; *Weis v. City of Madison*, 75 Ind. 241; s. c. 39 Am. R. 135; *Cummins v. City of Seymour*, 79 Ind. 491; s. c. 41 Am. R. 618; *City of Evansville v. Decker*, 84 Ind. 325; s. c. 43 Am. R. 86; *Hebron G. R. Co. v. Harvey*, 90 Ind. 192; s. c. 46 Am. R. 199; *Lipes v. Hand*, 104 Ind. 503, 508; s. c. 1 N. E. 871; 4 N. E. 160; *Pettigrew v. Village of Evansville*, 25 Wis. 223; *Gregory v. Bush*, 64 Mich. 37; s. c. 31 N. W. 90; 35 Alb. L. J. 278. A city is liable for negligence in failing to keep a sewer in repair as well as for negligence in its construction: *Mayor &c. v. Duffy*, 70 Md. 47; s. c. 16 Atl. 642. See, as to the care required of a corporation in construction of its public improvements, *City of Boulden v. Fowler*, 11 Colo. 396; s. c. 18 Pac. 337; *Dewein v. City of Peoria*, 24 Ill. App. 396; *City of Champaign*

v. Forrester, 29 Ill. App. 117; *Borough of Bethlehem v. Haus (Pa.)*, 26 W. N. C. 348; s. c. 19 Atl. 437; *Topeka Water Supply Co. v. City of Potwin Place*, 43 Kan. 404; s. c. 23 Pac. 578, an action for discharging sewage into a stream furnishing the water supply; *City of Elgin v. Hoag*, 25 Ill. App. 650; *Middlesex Co. v. City of Lowell*, 149 Mass. 509; s. c. 21 N. E. 872; *Maguire v. Mayor &c.*, 76 Ga. 84.

³⁰⁰ *City of Auburn v. Paul*, 84 Maine 212; s. c. 24 Atl. 817, in which it was held that a landowner may be required to contribute towards the cost of a public work a sum equal to the increased value of his property by reason of peculiar and special benefits thereby given, in addition to those bestowed upon him in common with the general public. See also, *State v. Western Union Tel. Co.*, 73 Maine 518–526; *Dorgan v. City of Boston*, 12 Allen (Mass.) 223; *Inhabitants &c. v. County Com'rs*, 13 Pick. (Mass.) 60; *Goddard, Petitioner*, 16 Pick. (Mass.) 504; *Attorney-General v. City of*

§ 1171. **Drainage continued.**—The statutes of Wisconsin providing for drainage have been considered in several cases by the supreme court of that state, and have been adjudged to be valid, as they were an exercise of the police power of the state.³⁰¹ In the proceedings for drainage under the drainage act of Wisconsin, a town, in moving to vacate the assessments made upon it, is held to the same rules that would govern if it were seeking in an equitable action to set aside and cancel the assessments. So if a town has already, when it moves to vacate such an assessment, apportioned the amount of the assessment to the taxpayers of the town, levied the same upon them or their property, collected a portion and is proceeding to collect the balance, it can not sustain its motion. If there is any remedy, then, it is in an action by individual taxpayers or owners of the property charged with the taxes, and not in the town or municipality.³⁰² The petition for the improvement, in proceedings under the drainage act of Wisconsin, need not state that the town, which it is proposed to assess for benefits resulting to it, as a whole will be benefited thereby, nor specify the nature of the benefits.³⁰³ The court being required by the drainage act of Wisconsin to make an order prescribing the notice to be given of the time and place of hearing the petition for the improvement, the publication of the order itself, containing all the essentials of a valid notice instead of a formal notice, is a substantial compliance with the statute.³⁰⁴ In a proceeding under the statute of Michigan for drainage, the requirement that the petition for the widening of a drain should show that one or more of the petitioners were assessed for its construction is jurisdictional, and a petition failing to show such facts is fatally defective.³⁰⁵

Cambridge, 16 Gray (Mass.) 247; Morse v. Stocker, 1 Allen (Mass.) 150, 159; Hingham &c. Co. v. Norfolk Co., 6 Allen (Mass.) 353, 359; Butler v. Worcester, 112 Mass. 541, 555; Holt v. City Council &c., 127 Mass. 408, 412. And where the statute merely imposes a tax for benefits, involving no question arising under the exercise of eminent domain, no appeal to a jury need be provided for: Howe v. City of Cambridge, 114 Mass. 388; Chapin v. City of Worcester, 124 Mass. 464. Assessments of the nature referred to in the text are discussed and ap-

proved in Dyar v. Farmington Village Corporation, 70 Maine 515.

³⁰¹ Town of Muskego v. Drainage Com'rs, 78 Wis. 40; s. c. 47 N. W. 11; following Bryant v. Robbins, 70 Wis. 258; s. c. 35 N. W. 545; State v. Stewart, 74 Wis. 620, 629; s. c. 43 N. W. 947.

³⁰² Town of Muskego v. Drainage Com'rs, 78 Wis. 40; s. c. 47 N. W. 11.

³⁰³ Town of Muskego v. Drainage Com'rs, *supra*.

³⁰⁴ Town of Muskego v. Drainage Com'rs, *supra*.

³⁰⁵ Tinsman v. Monroe Probate Judge, 82 Mich. 562; s. c. 46 N. W. 780.

§ 1172. **Liability of the corporation.**—The act of determining the dimensions of a culvert is a ministerial and not a judicial act, and a city is liable for all damages caused by the insufficiency of the dimensions.³⁰⁶ Where a municipal corporation collects in one channel a great body of water, it must use reasonable care to provide an outlet for it.³⁰⁷ Municipal corporations are liable for negligence in devising a plan for construction of a sewer, but there is no liability unless there is negligence.³⁰⁸

³⁰⁶ *Young v. City of Kansas*, 27 Mo. App. 101. See *Collins v. City of Waltham*, 151 Mass. 196; s. c. 24 N. E. 327 (an action for damages caused by the flowage of water from open gutters in the streets. The city was held not liable where it did not appear that the gutters brought down more water than the streets would otherwise have done or brought it down in a different manner); *Hazard v. City of Council Bluffs*, 79 Iowa 106; s. c. 44 N. W. 219 (where it appeared that plaintiff's horse was injured by stepping on a brick washed into the street by the overflow from a culvert. It was held error to instruct the jury that the city was not liable for the reason that such an injury could not have been foreseen and apprehended as a result of the insufficient capacity or lack of repair of the culvert); *City of Kearney v. Thoemason*, 25 Neb. 147; s. c. 41 N. W. 115; *City of Seymour v. Commins*, 119 Ind. 148; s. c. 21 N. E. 549 (where the defective construction of a ditch caused filthy and poisonous waters to remain stagnant, and poisonous and unwholesome vapors therefrom permeated and made impure the air within plaintiff's dwelling, generating malaria and disease, and rendering the house uninhabitable); *Gross v. City of Lampasas*, 74 Tex. 195; s. c. 11 S. W. 1086; *Sheridan v. City of Salem*, 148 Mass. 196; s. c. 19 N. E. 172; *Stoddard v. Village of Saratoga Springs*, 52 Hun (N. Y.) 610; s. c. 4 N. Y. S. 745

(where the contract for the construction of the sewer having been made by the village, the fact that it raised the amount expended by an assessment on the adjoining owners was held not to alter its validity. Nor could the city protect itself on the ground that it was not authorized to construct the sewer); *Buchanan v. City of Duluth*, 40 Minn. 402; s. c. 42 N. W. 204; *Collins v. City of Waltham*, 151 Mass. 196; s. c. 24 N. E. 327 (in which case, it being alleged that further damage was caused by the stoppage of a drain in a highway, it was held that it must be shown that it was the duty of the city to keep the drain clear, and that if kept clear the damage would not have occurred).

³⁰⁷ *Rice v. City of Evansville*, 108 Ind. 7; s. c. 9 N. E. 139; 58 Am. R. 22; *Lipes v. Hand*, 104 Ind. 503; s. c. 1 N. E. 871; 4 N. E. 160; *City of Evansville v. Decker*, 84 Ind. 325; s. c. 43 Am. R. 86; *Weis v. City of Madison*, 75 Ind. 241; s. c. 39 Am. R. 135; *City of Indianapolis v. Lawyer*, 38 Ind. 348.

³⁰⁸ *Rice v. City of Evansville*, 108 Ind. 7; s. c. 9 N. E. 139; 58 Am. R. 22; *City of North Vernon v. Voegler*, 103 Ind. 314; s. c. 2 N. E. 821; *City of Crawfordsville v. Bond*, 96 Ind. 236; *City of Evansville v. Decker*, 84 Ind. 325; s. c. 43 Am. R. 86; *Cummins v. City of Seymour*, 79 Ind. 491; s. c. 41 Am. R. 135; *Weis v. City of Madison*, 75 Ind. 241; s. c. 39 Am. R. 135; *City of Indianapolis v. Huffer*, 30 Ind. 235; *Stackhouse*

§ 1173. The same subject continued—Rights in percolating water.—In an action against a city in Ohio for damages caused by the destruction of pipes which had been placed in the earth and used by the owner of the land for years for the purpose of carrying water from a spring on his lands to a mill, and for damages to the spring which it was contended had received its supply of water by percolation of the soil in the construction of a sewer by the city, the supreme

v. City of La Fayette, 26 Ind. 17; s. c. 89 Am. D. 450; City of Logansport v. Wright, 25 Ind. 512. See, as to liability of corporations for negligence in the construction of drains, sewers, etc., and injury to private property resulting therefrom, under various statements of facts, Haney v. City of Kansas, 94 Mo. 334; s. c. 7 S. W. 417; Addy v. City of Janesville, 70 Wis. 401; s. c. 35 N. W. 931; Harrigan v. City of Wilmington, 8 Houst. (Del.) 140; s. c. 12 Atl. 779; Levy v. Salt Lake City, 5 Utah 302; s. c. 16 Pac. 598; affirming s. c. 3 Utah 63; 1 Pac. 160; Mayor &c. v. Kiernan, 50 N. J. L. 246; s. c. 13 Atl. 170; Beach v. City of Elmira, 58 Hun (N. Y.) 606; s. c. 11 N. Y. S. 913; Trowbridge v. Inhabitants &c., 144 Mass. 139; s. c. 10 N. E. 796; Loughran v. City of Des Moines, 72 Iowa 382; s. c. 34 N. W. 172 (where the city was held liable in damages at the suit of the property owner, not only for the decreased rental value of the premises, but also for the loss of time and expenses incurred by reason of sickness produced by noxious odors resulting from the contents of a sewer being thrown upon the premises, which was caused by faulty construction of the sewer); Daggett v. City of Cohoes, 54 Hun (N. Y.) 639; s. c. 7 N. Y. S. 882; following Siefert v. City of Brooklyn, 101 N. Y. 136; s. c. 4 N. E. 321; Miller v. Mayor &c., 47 N. J. Eq. 62; s. c. 20 Atl. 61; Mayor &c. v. Dufty, 70 Md. 47; s. c. 16 Atl. 642; Pottner v. City of Minneapolis, 41 Minn. 73; s. c. 42 N. W. 784; Kosmak v. Mayor &c., 53 Hun (N. Y.) 329; s. c. 6 N. Y. S. 453; Pearson v. City of Duluth, 40 Minn. 438; s. c. 42 N. W. 394; Boston Belting Co. v. City of Boston, 149 Mass. 44; s. c. 20 N. E. 320; Elliott v. City of Oil City, 129 Pa. St. 570; s. c. 18 Atl. 553; Richlicke v. City of St. Louis, 98 Mo. 497; s. c. 11 S. W. 1001; Butler v. Village of Edgewater, 53 Hun (N. Y.) 633; s. c. 6 N. Y. S. 174; City of Peoria v. Crawl, 28 Ill. App. 154 (an action for damages from an overflow of a culvert maintained by the city, where it was held that the plaintiff need not prove that the culvert was built by persons employed by the city, as this would be presumed); Briegel v. City of Philadelphia, 135 Pa. St. 451; s. c. 19 Atl. 1038; 26 W. N. C. (Pa.) 253 (an action for damages occasioned by the negligent plumbing and drainage of a school building, whereby water and filth were deposited in the neighboring cellars); Young v. City of Kansas, 27 Mo. App. 101; Spangler v. City &c. of San Francisco, 84 Cal. 12; s. c. 23 Pac. 1091 (holding that it was no defense that the flow was unusual where it appeared that the sewer would not have carried off all the water if it had been kept in repair); Anderson v. Mayor &c., 8 Houst. (Del.) 516; s. c. 19 Atl. 509 (where the city was held liable where the flooding of a cellar was in consequence of the negligent work of a plumber acting under its license in laying a private drain from an adjoining house to the public main in the street).

court of Ohio has made some rulings of importance as to powers of a city council in construction of sewers and to liability of a city in consequence of such construction, as follows: The statutes of Ohio give cities power to build sewers, and sewerage being one of the legitimate uses to which a public street may be devoted, the construction in such a street of a sewer, if done in a lawful manner, is an authorized use by a city of the street.³⁰⁹ There can be no enjoyment of a street of a city adverse to the city under a license from its governing authority. A city has no power by grant to give any individual any rights in one of its streets inconsistent with the future legitimate uses of the street by the city.³¹⁰ And no right by prescription can exist as to percolating water, and injury to the spring by draining it or cutting off the water supplied to it by percolation was not per se actionable.³¹¹

§ 1174. Massachusetts decisions as to assessment for sewers.—

Under the Massachusetts statute authorizing the board of aldermen of Boston to construct and maintain common sewers, and the statute which provides that the board may take and divert the water of a stream within the city and devote the same to the purposes of sewerage and drainage, it has been held such board has power to order a single structure to serve both as a conduit for the stream and as a common sewer, and that they may assess under the general statutes,

³⁰⁹ *Elster v. City of Springfield*, 49 Ohio St. 82; s. c. 30 N. E. 274; *Cincinnati v. Penny*, 21 Ohio St. 499.

³¹⁰ *Elster v. City of Springfield*, supra, the court holding, according to the doctrine of the text, that no right by prescription to maintain pipes in a street would vest in the plaintiff, although he had enjoyed the use more than twenty-one years, and that any damage resulting from removal of those pipes, and thus interrupting the flow of water through them, would be *damnum absque injuria*.

³¹¹ *Elster v. City of Springfield*, supra. The statute of Ohio which provides that no contract involving the expenditure of money can be entered into by a municipality unless the clerk shall certify that the money required by the contract is in the

treasury to the credit of the fund is intended for the protection of taxpayers by checking municipal extravagance and the incurring of indebtedness, and is not intended to attach liability to a city for negligence where the city would not be liable. Hence, the mere fact that there was no money in the treasury to pay the cost of the sewer at the time of making the contract would not make the city liable, even though there was negligence in its construction. Nor would the fact that the act under which the city was proceeding to raise the money was unconstitutional give a right of action to plaintiff on the ground of negligence in the construction of the sewer: *Elster v. City of Springfield*, 49 Ohio St. 82; s. c. 30 N. E. 274.

upon those benefited thereby, their proportional part of the expenditure which was necessary for the structure as a sewer.³¹²

§ 1175. **Use of street for private drain.**—Where a borough charter in Pennsylvania empowers the council to authorize the construction in the streets of sewers, etc., the council may authorize a citizen to construct a private under-drain along a public street without the consent of an abutting lot-owner.³¹³

§ 1176. **Improvements by street-railway companies.**—A municipal corporation which by an ordinance of its governing board authorizes a street-railroad company to use its streets for a track, and imposes upon the company the burden of reconstructing a street in which it is to lay its tracks “with the same kind of material used by the [corporation] in the remaining portion of the streets,” where this condition has been performed by the company, can not compel the company, upon the corporation afterwards determining to change the material of its pavement, to construct its portion thereof of the new material.³¹⁴

³¹² *Gray v. Board &c.*, 139 Mass. 328; s. c. 31 N. E. 734. In ascertaining damages caused to a landowner by condemning a strip of his land for sewer purposes, the jury should consider not only the value of the property taken, but also the effect of the taking on that which is left, with reference to all the uses to which it was before adapted; and in estimating the value of that which is taken they may consider all the uses to which it might properly have been applied if it had not been taken: *Maynard v. City of Northampton*, 157 Mass. 218; s. c. 31 N. E. 1062. So, in this case, there was evidence that the property would have been valuable for the extension of a near-by factory, and upon the city introducing evidence that an extension of the factory would be very expensive because the land in question was a steep hillside, composed of clay and quicksand, it was held that the judge might properly, in his discretion, allow the landowner to show that such extension could be erected without difficulty

and at reasonable cost. See also, *Edmonds v. City of Boston*, 108 Mass. 535; *Chase v. City of Worcester*, 108 Mass. 60.

³¹³ *Wood v. McGrath*, 150 Pa. St. 451; s. c. 24 Atl. 682. It was argued in this case that the right of the council to authorize the digging of the drain was limited to public purposes only, and could not be exercised in favor of an individual citizen for a private purpose. The court said that this was answered by *Smith v. Simmons*, 103 Pa. St. 32, in which it was held that it was competent for the authorities of a borough to grant permission to a citizen to dig up a street of the borough for the purpose of laying a water pipe to lead water from a spring to his private house, and that the digging of the necessary ditch in the street for that purpose was not per se a nuisance. Repeated in *Borough of Susquehanna Depot v. Simmons*, 112 Pa. St. 384; s. c. 5 Atl. 434.

³¹⁴ *Borough of Norristown v. Norristown &c. R. Co.*, 148 Pa. St. 87; s. c. 23 Atl. 1060. An ordinance of a

§ 1177. **The same subject continued.**—The condition upon which a street-railroad company was by the legislature and a city given the right of constructing its track upon a street of a city and to run its cars thereon was that it should keep the surface of the street within the rails, and for one foot outside thereof, and to the extent of the ties, “in good and proper order and repair.” This company had operated its railroad for about eighteen years without any pavement between the rails. The city passed an ordinance providing for ordering its streets, so far as street railroads occupied them, to be paved, and in case the companies declined, to do the work itself and assess the companies or bring action against them for the cost. This company was ordered to pave between its tracks with asphalt. It was held, under the circumstances of this case, that the city could not recover the cost of paving between the tracks with asphalt, as it did not appear on the trial that at the time the city ordered the pavement the space occupied by the railroad was not in good order and repair or that the pavement was necessary. Further, that the enactment by the city of the ordinance requiring the pavement of the portion of the street occupied by the railroad company was not presumptive evidence of the necessity for such improvement.³¹⁵

§ 1178. **Street-railway company bound to repair.**—A charter granted by the governing authorities of a municipality to a railway company to construct and operate a street railway within its corporate limits constitutes a contract between such company and the municipality.³¹⁶ Such charter is to be strictly construed against the railway

city conferring the right upon a railroad company to “inclose and occupy . . . that portion of the levee, batture and wharves in the city in front of its riparian property, acquired or to be acquired,” between certain streets, and to erect and maintain thereon such ferry facilities, wharves, piers, warehouses, tracks, depots, etc., as should be necessary and convenient for the transfer of cars, engines, passengers and freight, and in the transaction of its business, does not authorize the placing of piles or any other structure outside of the lines of the city wharf. The right to erect these improvements is confined to so much of the levee and wharf of the city as lay in front of the riparian prop-

erty of the railroad company, and does not extend beyond the wharf line: *Texas &c. R. Co. v. City of New Orleans*, 40 Fed. 111. In this case, the river being a navigable stream, it was within the exclusive control of congress, and neither the city nor the state could authorize any obstruction of its navigation.

³¹⁵ *City of Binghamton v. Binghamton &c. R. Co.*, 61 Hun (N. Y.) 479; s. c. 16 N. Y. S. 225.

³¹⁶ *Chicago v. Sheldon*, 9 Wall. 50; *Coast Line R. Co. v. Mayor &c.*, 30 Fed. 646; *State v. Corrigan &c. St. R. Co.*, 85 Mo. 263; *District of Columbia v. Washington &c. R. Co.*, 1 Mack. (D. C.) 361; s. c. 4 Am. & Eng. R. Cas. 161; *Farrar v. City of St. Louis*, 80 Mo. 379; *New Or-*

company, and it has no doubtful rights under such charter, for where there are doubts they are construed against the grantee and in favor of the municipality.³¹⁷ A street-railway company is bound to keep in repair that portion of the street used by it, even in the absence of a stipulation in its charter requiring it to do so; but there is doubt as to whether it is compelled to improve the street, as ordered by the city, in the absence of a contract to that effect.³¹⁸ Where a passenger railway company is bound by its charter to keep the streets through which it is constructed in "perpetual good repair at the proper expense of said company," subject to the regulations of the council of the city as to paving, repairing, etc., and an ordinance of the city provides that the "entire cost and expense of maintaining, paving, repairing and repaving that may be necessary upon any road, street, avenue or alley occupied by them" shall be upon the railroad companies traversing its streets, and by other provisions subordinates the companies to the general authority and power of the municipality over its streets, it is the province of the city to determine when paving is needed, and how it shall be done, whether with the same kind of material as before, or with a different and better material.

§ 1179. **Lighting of streets.**^{318a}—The law in regard to supplying the city with lighting by gas, electricity, or otherwise, is not harmonious. It would seem that general power would authorize the purchase, or rental, of all necessary equipments for furnishing the municipality with necessary lighting. But the power to furnish the inhabitants with light when it involves a considerable outlay for plant, machinery, etc., ought to be found in the express powers granted or clear implication.³¹⁹ Authority given to a city council to pass ordinances for lighting the streets does not by implication embrace power to erect and maintain electric light plants.³²⁰ Power conferred upon a company to supply light to the inhabitants of a city does not prevent the city from supplying light

leans Gas Co. v. Louisiana Light Co., 115 U. S. 650; s. c. 6 S. Ct. 252; Greenwood v. Freight Co., 105 U. S. 13; New Jersey v. Yard, 95 U. S. 104.

³¹⁷ Citizens' R. Co. v. Jones, 34 Fed. 579; Mayor &c. v. Ohio &c. R. Co., 26 Pa. St. 355; Birmingham &c. R. Co. v. Birmingham &c. R. Co., 79 Ala. 465; West Philadelphia &c. R. Co. v. City of Philadelphia, 10 Phila. (Pa.) 70.

³¹⁸ Western Paving &c. Co. v. Citizens' St. R. Co., 128 Ind. 525; s. c. 26

N. E. 188; 28 N. E. 88. See also, Elliott Roads & Streets (2d ed.), §§ 774-776.

^{318a} See ch. 33, post.

³¹⁹ Arbuckle-Ryan Co. v. City of Grand Ledge, 122 Mich. 491; s. c. 81 N. W. 358.

³²⁰ Howell v. City of Millville, 60 N. J. L. 95; s. c. 36 Atl. 691. Power of city of Atlantic City to provide for erection of poles, etc., for lighting: Oakley v. City of Atlantic City, 63 N. J. L. 127; s. c. 44 Atl. 651.

to other parts of the city not supplied prior to the passage of the ordinance.³²¹ A town prior to its being incorporated as part of a city has no power to make a contract to take effect after its consolidation.³²² Under charter of Greater New York a contract for lighting must be authorized by resolution of the board of public improvements and an ordinance or resolution of the municipal assembly.³²³

§ 1180. Contracts—Construction of.—The subject of municipal contracts of all kinds is elsewhere considered,³²⁴ and is only incidentally considered in this connection in relation to streets and their improvement. A provision in a street paving contract to keep the pavement in repair for five years is invalid where the charter requires the expense of repairs to be paid from the general fund.³²⁵ A contract in which the grade varies from that in the ordinance is void.³²⁶ Under a contract for street paving providing that "all loss or damage arising out of the nature of the work, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same," should be cast on the contractor, it was held that the bad condition of the street necessitating additional material to keep the pavement up to grade was a "difficulty" to be borne by the contractor.³²⁷ Where the law under which a local improvement is made does not require the contractor to give a bond, and the contract is duly performed, the fact that the contractor's bondsman was interested in the contract, and was an officer of the city with which the contract was made, does not invalidate the assessment made to pay for such improvement.³²⁸ Under a New York statute all contracts for work to be done in New York City involving an expenditure of more than \$1,000 must be let to the lowest bidder in a manner fixed by ordinance of the common council; and it was established by ordinance that in all such cases the commissioner of public works should issue proposals and advertise for bids, and, when necessary, cause a survey of the work to be made by a

³²¹ *Titusville Electric Light & Co. v. City of Titusville*, 196 Pa. St. 3; s. c. 46 Atl. 195.

³²² *Hendrickson v. City of New York*, 160 N. Y. 144; s. c. 54 N. E. 680.

³²³ *Blank v. Kearney*, 59 N. Y. S. 645; s. c. 28 Misc. (N. Y.) 383.

³²⁴ Ch. 18, vol. 1.

³²⁵ *Boyd v. City of Milwaukee*, 92 Wis. 456; s. c. 66 N. W. 603.

³²⁶ *Haisch v. City of Seattle*, 10 Wash. 435; s. c. 38 Pac. 1131; *Buckley v. City of Tacoma*, 9 Wash. 253; s. c. 37 Pac. 441.

³²⁷ *Murdock v. District of Columbia*, 22 Ct. Cl. 464.

³²⁸ *Trustees &c. v. Rausch*, 122 Ind. 167; s. c. 23 N. E. 717.

competent engineer, and that the advertisement should state as far as possible the quantity and quality of the work to be done. It was held that an estimate which placed the amount of stone excavation at more than double, and the earth excavation at less than one-half, the actual amount, did not form a basis for a valid contract.³²⁹ An ordinance providing all work shall be done in such manner as the commissioners of public works shall deem expedient, is on its face an unwarranted delegation of power by the common council, and the assessments made for such work are void.³³⁰ After the passage of an

³²⁹ *In re Anderson*, 47 Hun (N. Y.) 203. The California statute in regard to street work in San Francisco providing that in case the assessment for the payment of a contract is adjudged invalid through no fault of the contractor, the board of supervisors shall pay the amount due the contractor out of the street department fund of the city, presupposes a valid contract binding on the city and county; and where it was adjudged by the court that there was no assessment because there was no contract, it was held that no liability attached to the municipality: *Daly v. City of San Francisco*, 72 Cal. 154; s. c. 13 Pac. 321. The fact that an assessment levied by a village to pay for a public improvement is invalid furnishes no ground to the contractor for such improvement to abandon his contract, where the charter of the village authorizes it to make new assessments in lieu of the one declared void, and the village is not shown to be in default in the matter: *Village of Morgan Park v. Gahan*, 136 Ill. 515; s. c. 26 N. E. 1085.

³³⁰ *Phelps v. Mayor &c.*, 112 N. Y. 216; s. c. 19 N. E. 408. A contract for paving a street in a city stipulated that the work was to be approved by the street commissioner, whose certificate was to be conclusive, and that payment was not to be required till after apportionment and assessment of the expense had been approved by the common

council. The commissioner's certificate was filed to the effect that the work had been performed in accordance with the contract, but an apportionment and assessment, confirmed by the council, was set aside for irregularities of the city officials. Meanwhile the statute had vested the entire power of apportionment and assessment in the board of apportionment, which refused to make another assessment, on the ground that the work had not been done in accordance with the contract. No power was given to the board to re-investigate the character of the work. It was held that the city could not resist payment of the contractor on the ground that no apportionment or assessment had been made: *Reilly v. City of Albany*, 112 N. Y. 30; s. c. 19 N. E. 508. Where it appears that the plans of the proposed improvement were on file when the engineer advertised for proposals, it will also be presumed, in the absence of evidence, that the specifications were also on file, as the law requires: *Knell v. City of Buffalo*, 7 N. Y. S. 233; s. c. 26 N. Y. St. 607. An assessment for laying cross-walks constructed under a contract awarded without advertisement on the same day that other contracts for the same kind of work were awarded for a lower price has been held to be invalid: *In re Rosenbaum*, 6 N. Y. S. 184; s. c. 25 N. Y. St. 134.

ordinance for the regulating and grading of a street to a certain point, a contractor contracted with the city to do the work, and entered on the performance thereof. Thereafter the ordinance was amended so as to provide for grading the street only to a point short of the one named in the ordinance. It was held that amending the ordinance did not abrogate the contract or affect its obligation, and until the city acted on the ordinance, and forbade the contractor going on under his contract, he had a right to pursue the work.³³¹ Under a statute of New York providing for the awarding of contracts for doing work for the city to the lowest bidder, an advertisement for bids for grading a public street gave only estimates of the quantities of rock and earth to be removed, the official who made the estimate being ignorant of the amount of work to be done and the proportion of rock and earth to be removed. It was held that a contract based on such estimates was not a contract with the lowest bidder, and was void.³³² A bond given to secure the performance of a contract to construct a sewer was conditioned to pay the excess in the expense on completion of the contract by the commissioner of public works, "on notice from the commissioner of the excess so due." It was held that the failure of the commissioner to give the contractor notice of the amount he was required to pay was ground for a nonsuit in an action on the bond.³³³

§ 1181. The same subject continued—Advertisements for bids, etc.—The Iowa statute relating to the letting of contracts for the paving and grading of streets in cities provides that "all such contracts shall be made by the council in the name of the city, * * * and shall be made with the lowest bidder or bidders, upon sealed proposals, after public notice, * * * which notice shall contain a description of the kind and amount of work to be done and materials to be furnished, as nearly accurate as practicable." It was held that this statute implies a determination by the council in advance of the publication of notice of the kind of material to be used in the proposed work; and an advertisement for bids "for all the different kinds of modern pavements now in use," regardless of the material of which it might be composed, was not a compliance with the stat-

³³¹ *Ottendorfer v. Fortunato*, 56 N. Y. Super. Ct. 495; s. c. 4 N. Y. S. 629.

³³² *Reilly v. City of New York*, 54 N. Y. Super. Ct. 463. Where the statutory requirement that a resolution for an improvement shall be published before a contract is made

for the improvement is not complied with, the city is not liable to the contractor for not allowing him to go on under the contract thus unlawfully made: *Jardine v. Mayor &c.*, 11 Daly (N. Y.) 116.

³³³ *Mayor &c. v. Reilly*, 13 N. Y. S. 521; s. c. 59 Hun (N. Y.) 501.

ute, and invalidated an assessment made against abutting property to pay the cost of the paving.³³⁴ Where certain work was to be done under the direction of the city engineer, and he fixed the grade line on the ground in conformity with the new line alleged by the contractor to have been laid down on the profile, and he in good faith filled the street up to such grade line under the constant supervision of the engineer, who finally approved the work, and certified that it had been performed in accordance with the contract, it was held that there was a practical construction of the contract which the court could not ignore.³³⁵ Where there is evidence that by a change in the plan of work, not provided for by the contract, made by defendant's engineers, additional work had been required at greater expense, it was held to be error to hold that plaintiff made no case for the jury on a paragraph of his complaint claiming compensation for the extra work.³³⁶ Where the defense in an action by the assignee of a contractor against a city for street improvement is that the contractor had failed to complete the work within the time agreed, whereby the defendant had been caused to expend unnecessary sums for the compensation of the inspector of the work, and there is evidence that the delay resulted from the failure of defendant to furnish grade lines and levels, and that, though it was not bound to do so by the contract, it had undertaken to furnish them voluntarily, and caused the contractor to believe that it would do so, a verdict allowing only part of the inspector's compensation is supported by the evidence.³³⁷ In such an action, defendant having filed a counter-claim for an amount alleged to be overpaid on the rock excavation, evidence that the earth with which the excavation had been filled had been removed in several places and the amount of rock excavated calculated from the data thus obtained, and found to be less than that for which the contractor had been paid, will warrant the submission of the question to the jury as to whether such overpayment had been made.³³⁸

§ 1182. Conditions precedent to recovery by contractor, etc.—

A street grading contract provided that the city should retain, from the amount coming to the contractor, inspectors' fees for such time as the work should remain uncompleted beyond a specified time, but that the time during which the work was delayed by the city, which should be determined by third parties, should be excluded. It was

³³⁴ *Coggeshall v. City of Des Moines*, 78 Iowa 235; s. c. 41 N. W. 617.

³³⁵ *O'Dea v. City of Winona*, 41 Minn. 424; s. c. 43 N. W. 97.

³³⁶ *Mulholland v. Mayor &c.*, 113 N. Y. 631; s. c. 20 N. E. 856.

³³⁷ *Mulholland v. Mayor &c.*, *supra*.

³³⁸ *Mulholland v. Mayor &c.*, *supra*.

held that it was a condition precedent to the right of the contractor to be relieved from the allowance of such inspectors' fees for the time that the work was delayed by the city, that the matter should be submitted to and determined by such third parties, unless they refused or neglected to act upon it.³³⁹ Where a contract is awarded to the lowest bidder, who furnishes the material in compliance with the bid, and it is used by the board, the contractor can recover therefor, though the contract was not in writing, in accordance with a provision of the city charter. It is immaterial that no security for the performance of the contract was given by the contractor, where it does not appear that the board required any, and the charter provides for "good and sufficient security, as required by said board."³⁴⁰ Where a city, by its contract, agrees to pay for an improvement upon its completion and the approval of it by the city, it can not avoid its liability by delaying to approve the work when it is completed according to contract.³⁴¹ Where a city charter authorizes the city to contract for improvements only by paying for the improvements by warrants against the property abutting upon the improvements to be paid for, a contract by which the city agrees to pay for an improvement from its general fund, whether an original contract or a modification of one authorized by its charter, is void.³⁴² Where, in a contract for the improvement of a street, the city reserves the right to lay or relay any and all water-pipes or sewers during the progress of the work, the contractor can not recover the additional cost to him of hauling dirt, caused by the laying of a water main in the street, though the city surveyor promised that he should be paid for such extra work; if the surveyor had authority to bind the city, the promise was without consideration.³⁴³

§ 1183. Indiana decisions as to letting contracts.—The purpose of requiring the letting of contracts for street improvements to be advertised is to secure fair competition and to enable the governing board to let the contracts upon the most advantageous terms. The advertisement is not to give notice to the property holders, nor does the letting of the contract adjudicate upon or determine in any degree their personal or property rights. The matter of accepting or rejecting bids, and of letting the contract, is purely administrative

³³⁹ *Phelan v. Mayor &c.*, 119 N. Y. 86; s. c. 23 N. E. 175.

³⁴⁰ *Carey v. City of East Saginaw*, 79 Mich. 73; s. c. 44 N. W. 168.

³⁴¹ *North Pac. Lumbering &c. Co. v.*

City of East Portland, 14 Or. 3; s. c. 12 Pac. 4.

³⁴² *North Pac. Lumbering &c. Co. v. City of East Portland*, *supra*.

³⁴³ *Rens v. City of Grand Rapids*, 73 Mich. 237; s. c. 41 N. W. 263.

in character, depending entirely upon the discretion of the governing board.³⁴⁴ It follows that such a governing board, which has rejected all bids received in pursuance of due notice of the letting of a contract for a street improvement, may, at a subsequent meeting, without a re-advertising for bids, reconsider the vote of rejection and award the contract to one of the original bidders.³⁴⁵ A written proposal by the town authorities of the work to be done, a written bid to do the proposed work, and a written acceptance of the bid by the proper authorities, together constitute a contract, wholly in writing, and valid and binding on the contractor and town.³⁴⁶ The assign-

³⁴⁴ *Platter v. Board &c.*, 103 Ind. 360; s. c. 2 N. E. 544.

³⁴⁵ *Ross v. Stackhouse*, 114 Ind. 200; s. c. 16 N. E. 501. The Indiana statute which provides that "when-ever a majority of all the resident owners of any lots or parcels of land on any street or alley, not less than one square (to be estimated by numbers or by measuring the front lines of such lots or parcels of land bordering thereon), shall petition the board of trustees of such town to grade, pave, gravel or macadamize, or for either kind of said improvement, the board of trustees may cause the same to be done according to the specifications by them to be adopted, by contract given to the best bidder, after advertising to receive proposals therefor," etc., has been held to fully authorize an ordinance for the improvement of a street to its full width, both sidewalks and roadway: *Wiles v. Hoss*, 114 Ind. 371; s. c. 16 N. E. 800; for, said the court:—"The term 'street' in its ordinary acceptation includes sidewalks, and that it is always given that meaning unless the language with which it is associated changes or restricts its significance;" citing *State v. Berdetta*, 73 Ind. 185; s. c. 38 Am. R. 113; *City of Kokomo v. Mahan*, 100 Ind. 242; *Dooley v. Town of Sullivan*, 112 Ind. 451, 454; s. c. 14 N. E. 566. The court therefore held that a petition of the property owners for the

improvement of "Hope street, between Willow and Schofield streets," authorized an ordinance for the improvement of "that portion of Hope street and sidewalks thereof lying between Schofield and Willow streets."

³⁴⁶ It was urged here that there was no proper advertisement for bids for the improvement of the street. Inasmuch as the statute of Indiana provides that in suits like this, to enforce assessments, "no question of fact shall be tried which may arise prior to the making of the contract for said improvement under the order of the board of trustees," the court held that the supreme court would not be authorized to reverse the court below on the ground that the evidence failed to show a "proper advertisement for bids." *Wiles v. Hoss*, 114 Ind. 371; s. c. 16 N. E. 800. See also, *Clements v. Lee*, 114 Ind. 397; s. c. 16 N. E. 799, where this court said:—"A person about to enter into a contract with a city council must examine the records so far as to see that the common council has taken, or attempted to take, the steps necessary to acquire jurisdiction to enter into a contract. If the record fails to show that such steps were taken, a contractor or one about to contract has no right to rely upon it. Where it appears, however, that an attempt was made to take the jurisdictional steps, such as the giving of

ment, unless assented to by the county, would not render it liable to the assignee for the amount to be received under it by the latter, nor prevent the county from making a settlement in good faith with the original contractor without retaining enough to pay the claim of the assignee.³⁴⁷ When rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, can not be assigned without the consent of the other party to the original contract.³⁴⁸ It would be contrary to public policy that a county should be involved in controversies and litigations between its contractors and their creditors.³⁴⁹ The terms of the contract itself, are quite inconsistent with the theory that the original contractors can at their pleasure and without the assent of the county split up the contract and assign it in parts so as to transfer to different persons or corporations the duty of furnishing different kinds of material and labor, and the right of recovering compensation for such material and labor from the county. In some cases, however, the assignments were of the whole or part of money already due or to become due to the contractor, which were assignments of a fund and not of any obligation to perform work, and these were held binding.³⁵⁰ In others the assignments were of entire contracts for the

any sort of notice, the sufficiency of the notice can not be inquired into after the work has been done, with the acquiescence of the parties benefited, under color of the proceedings;" citing *Taber v. Ferguson*, 109 Ind. 227; s. c. 9 N. E. 723; *Ross v. Stackhouse*, 114 Ind. 200; s. c. 16 N. E. 501, which qualifies the rule somewhat as follows:—"While it is true that the statute prohibits the trial of any question of fact which arose prior to the making of the contract for a street improvement, it is nevertheless essential that the transcript must show the taking of such jurisdictional steps as legally authorize the common council to contract for the improvement. It must appear that the letting of the contract was advertised. In the absence of notice inviting proposals for the work the contract will be

invalid;" citing *Moore v. Cline*, 61 Ind. 113; *Overshiner v. Jones*, 66 Ind. 452; *Yeakel v. City of La Fayette*, 48 Ind. 116; *Baker v. Tobin*, 40 Ind. 310; *Moberry v. City of Jeffersonville*, 38 Ind. 198; *City of Indianapolis v. Imberry*, 17 Ind. 175; *Anthony v. Williams*, 47 Ind. 565.

³⁴⁷ *County Com'rs v. Diebold Safe & Co.*, 133 U. S. 473; s. c. 10 S. Ct. 399.

³⁴⁸ *Arkansas Val. & Co. v. Belden Mining Co.*, 127 U. S. 379, 387, 388; s. c. 8 S. Ct. 1308.

³⁴⁹ *Board & Co. v. O'Conner*, 86 Ind. 531; *Secrist v. Board & Co.*, 100 Ind. 59; *Wallace v. Lawyer*, 54 Ind. 501.

³⁵⁰ *Brackett v. Blake*, 7 Met. (Mass.) 335; *Field v. Mayor & Co.*, 6 N. Y. 179; *Hall v. City of Buffalo*, 1 Keyes (N. Y.) 193; *Parker v. City of Syracuse*, 31 N. Y. 376; *People v. Comptroller*, 77 N. Y. 45.

labor of convicts, or for labor upon streets, which were held from the nature of the subject to imply no personal confidence in the contractor.³⁵¹ Where there is no controversy as to the performance of the work or as to the amount to be paid, but only as to the person entitled to receive payment, the court treated the assignment of the contractor as one of money only, and held the assignee entitled to recover against the city.³⁵²

§ 1184. Effect of an assignment of a contract.—An agreement by which a surety for the faithful performance of a contract is to make advances to a contractor to enable him to carry on the work, a city improvement, and to retain the amount of such advances and compensation therefor out of money arising from warrants to be paid to the contractor on account of such work, which the surety had a warrant of attorney to collect, and who had filed the latter with the comptroller, without notice to the city of such an agreement, will not bind the corporation to which the contractor is indebted. Nor is the corporation, under such a state of facts, bound to notify the surety of the contractor's indebtedness to the corporation. Such an agreement is not, therefore, an assignment of the contract to the surety which would entitle him to recover from the corporation an amount which it had applied to the indebtedness of the contractor.³⁵³ The only right which a surety under such a warrant of attorney and agreement acquires is a right to receive what the city really owes the contractor.³⁵⁴

³⁵¹ *Horner v. Wood*, 23 N. Y. 350; *Devlin v. Mayor &c.*, 63 N. Y. 8; *Ernst v. Kunkle*, 5 Ohio St. 520; *City of St. Louis v. Clemens*, 42 Mo. 69; *Taylor v. Palmer*, 31 Cal. 240.

³⁵² *Philadelphia v. Lockhardt*, 73 Pa. St. 211, 216. But see *Philadelphia's Appeal*, 86 Pa. St. 179, 182; *Geist's Appeal*, 104 Pa. St. 351, 354.

³⁵³ *Clement v. City of Philadelphia*, 137 Pa. St. 328; s. c. 20 Atl. 1000.

³⁵⁴ *Clement v. City of Philadelphia*, 137 Pa. St. 328; s. c. 20 Atl. 1000. The supreme court distinguished *Philadelphia v. Lockhardt*, 73 Pa. St. 211, where the contractor had assigned all moneys due and to become due under his contract with the city to merchants, who, on the faith of the assignment, furnished

lumber for the building, accepted orders from and acted as trustee for all the mechanics and material men, and virtually assumed and discharged all the obligations of their assignor under the contract. The city, with full knowledge of those facts, and after repeated recognition of the right of the assignee to receive the moneys arising from the contract, paid a portion of them to the contractor, and attempted to justify the payment on the ground that the assignment was invalid. In this contention it was defeated. There was no question of set-off involved in the suit, and no demand for more than the contractor could recover if the assignment had not been made.

§ 1185. **When a contract is complete.**—Where there is a proposal for bids to do work on any public improvement ordered by a municipal council or board, the contract for the work is only completed by the acceptance by the board of the bid of the lowest bidder for doing the work, the making of a bond, usually with sureties, by the bidder, and the acceptance of such bond by the board. The evidence of such acceptance in the form of a resolution, order or ordinance must be upon the record of the board's proceedings, and must show that whatever may be required by the statutes as to the mode or number of votes of the board necessary to bind the municipality or corporation by the contract has been complied with.^{354a}

§ 1186. **Letting contract after returning bids.**—A city council may order a public improvement and advertise for bids, and if the council in accordance with a resolution deferring the letting of a contract returns the bids unopened to the bidders, it may afterwards let a contract for making such improvement without again declaring the improvement to be a public necessity.³⁵⁵ It is undoubtedly

^{354a} *Sullivan v. City of Leadville*, 11 Colo. 483; s. c. 18 Pac. 736, sustaining a verdict in favor of the city in an action for breach of contract on the ground that an order accepting a bid for street work was invalid, as the record failed to show the concurrence of a majority of the council or the call of yeas and nays on the same, as the statutes of Colorado require. See also, *Town of Durango v. Pennington*, 8 Colo. 257-262; s. c. 7 Pac. 14; *Tracey v. People*, 6 Colo. 151.

³⁵⁵ *Davies v. City of Saginaw*, 87 Mich. 439; s. c. 49 N. W. 667. In *Ferdinand v. Mayor &c.*, 59 Hun (N. Y.) 623; s. c. 13 N. Y. S. 226, where a contract made with the city to regulate and grade a certain street, which authorized the city to declare the work abandoned if not satisfactory, and relet the contract, the contractor to pay any excess should the work be let at a greater expense, and to be paid the difference if the expense were less, had been declared abandoned; and after a lapse of six years the city had made a contract

with another contractor for "regulating, grading, and setting curb and gutter stones, and flagging sidewalks" in the same street, at a price considerably less than that of the first contract,—the general term of the supreme court overruled the exceptions of the assignee of the contract to a dismissal of an action which he brought for the difference in cost, on the ground that this was not such a reletting or continuance of the first contract as would give him a cause of action. In *Lodor v. McGovern*, 48 N. J. Eq. 275; s. c. 20 Atl. 209, it was held that it is a breach of the contract where the contract for a pavement required a foundation of concrete to be laid, composed of "best hydraulic cement, . . . clean, sharp sand, and . . . clean, broken stone," not to measure more than two inches in their largest dimension, and the contractor in doing the work used refuse stone, from two to six inches in their largest dimension, over which was poured a mixture of cement admitted not to be the best brand.

true that a city has no right to readvertise for bids when there is an existing contract for the same thing, yet where a second contract is made after the usual formalities have been performed the court will presume that the board acted regularly in effecting the second contract, and that a valid and sufficient reason existed for such action.³⁵⁶

§ 1187. **Discretion of municipal authorities.**—The council of a city vested with power to pass ordinances providing for the paving and repaving of its streets is the judge both of the necessity or expediency of making improvements, and of the manner in which the work shall be done, and its action in providing for repaving a street with a particular kind of material is not the subject of review by a court.³⁵⁷ A city clothed with power to improve its streets can not be enjoined from making such an improvement, by an abutting landowner, upon the ground that the work is being defectively performed.³⁵⁸

³⁵⁶ *Spaulding v. North San Francisco &c. Ass'n*, 87 Cal. 40; s. c. 25 Pac. 249. After a contract for street work has been awarded, a city charter provides that within a certain time after the awarding of the contract the owners of three-fourths of the abutting lots where the work is to be done, or of the lots which are liable to be assessed for the work, or their agents, may elect to take the work, under a written contract, at the price at which the same may be awarded; and that the superintendent of streets shall in his official capacity make all written contracts, receive all bonds and do all other acts that pertain to the street department. Upon an application in such a case by lot-owners to the superintendent of streets, and his consideration of the application and a signing of the written contract with them to do the work, a contractor to whom such work had been awarded can not in mandamus proceedings have the court review the decision of the superintendent of streets in such matter on the ground that there was not an application by the required proportion of the lot-owners to take the work. The decision

of the superintendent of streets is final and conclusive, it being presumed that he discharged his duty and was satisfied that the requirement of the charter in that respect had been met: *Fairchild v. Wall*, 93 Cal. 401; s. c. 29 Pac. 60.

³⁵⁷ *Alberger v. Mayor &c.*, 64 Md. 1; s. c. 20 Atl. 988, in which case it was held that a city commissioner's advertisement for proposals to furnish materials in a lump for the improvements authorized by an ordinance for repaving a street with a particular kind of material, and for similar improvements authorized by other ordinances, instead of advertising separately for proposals to furnish only the materials required for that special work, was a proper one.

³⁵⁸ *Dever v. City of Junction City*, 45 Kan. 417; s. c. 25 Pac. 861. Nor (it was held) is such an abutting landowner entitled to an injunction restraining the city from making such an improvement on the ground that the character of the work is such that it will necessitate a special tax against the abutting property owners to pay therefor, where the ordinance under which the im-

§ 1188. **Approval of contract by council—Rejection.**—Where the charter provides that prior to the commencement of work on a public improvement a contract shall be approved by the common council and a tax levied to defray the cost thereof the approval of a contract by the council is essential to its validity. The power to approve would seem to necessarily imply the power to reject. In the absence of any fraud, or any violation of the law, in respect to the lowest responsible bidder, it seems clear that the common council have the right to reject a contract and to refuse to go on with the work.³⁵⁹

§ 1189. **Repaving of street.**—The law of Pennsylvania in regard to the repaving of streets may be stated as follows: Where there has been a new paving of the streets in cities and large towns and the expense of it has been assessed against the fronting lot owners, there can not be an assessment against them for repair or repaving.³⁶⁰ Nor can the expense of repaving be charged against an abutting owner where the original paving was paid for out of the public treasury.³⁶¹

§ 1190. **Title to street essential to jurisdiction.**—A city acquires no title to the bed of a street until it has been regularly condemned as a public highway and the amount of the damages awarded therefor to the owner has been paid or tendered by the city authorities. And until such title is acquired the city can not lawfully enter upon the

provement is being made, attached to his petition as a part thereof, does not provide for any special tax to pay for the improvement, and his petition does not allege that any such tax has been levied, nor any act done indicating that such a tax is about to be levied.

³⁵⁹ *Grant v. Common Council &c.*, 91 Mich. 274; s. c. 51 N. W. 997, denying a writ of mandamus to the common council and board of public works to enforce a contract for public work in which the relator was the lowest bidder, his bid accepted and contract made with him by the board of public works, and the common council failed to approve.

³⁶⁰ *Borough of Greensburg v. Laird*, 138 Pa. St. 533; s. c. 21 Atl. 96; *Hammett v. Philadelphia*, 65 Pa. St. 146; *Washington Ave.*, 69 Pa. St. 352; *Seeley v. City of Pittsburgh*, 82 Pa.

St. 360; *Michener v. City of Philadelphia*, 118 Pa. St. 535; s. c. 12 Atl. 174.

³⁶¹ *City of Williamsport v. Beck*, 128 Pa. St. 147; s. c. 18 Atl. 329; *Borough of Greensburg v. Laird*, 138 Pa. St. 533; s. c. 21 Atl. 96. Cf. *City of Harrisburg v. Segelbaum*, 151 Pa. St. 172; s. c. 24 Atl. 1070, holding that abutting owners were not liable for the cost of repairing a street merely because the expense of the original paving, nearly sixty years before, had not been paid by the then owners, but by the public. As to what constitutes "paving," see *Burnham v. City of Chicago*, 24 Ill. 496; *Huidekoper v. City of Meadville*, 83 Pa. St. 156; *Warren v. Henly*, 31 Iowa 31; *Borough of Greensburg v. Laird*, 138 Pa. St. 533; s. c. 21 Atl. 96.

land and assesses the adjoining owners for the expense of grading, paving and curbing the street.³⁶²

§ 1191. **Opening and improving streets in one proceeding.**—The work of widening, grading and opening a street may be treated as one general improvement, and may be authorized to be conducted as such.³⁶³ And the same commissioners who make the assessment for benefits may also assess the compensation for land appropriated or injuriously affected, and embrace the result of each proceeding in their report. But the condemnation proceeding is nevertheless a distinct and separate matter, and subject to the same legal conditions and restraints as in other cases. And only such benefits can be considered and allowed therein as pertain to that branch of the improvement. For example, if the improvement embraces the widening of a street, as well as the grading and opening thereof, then the commissioners, in estimating the net damages to a lot from the appropriation of the strip taken therefrom for such improvement, can not lawfully consider and offset proportionate benefits for grading and opening the entire street in front of the lot, but only the benefits to that portion of the lot not taken from that branch of the improvement, as, for example, its increased value from a frontage on a wider thoroughfare. In ascertaining the just compensation to which the owner may be entitled, special benefits are allowed, because the real issue is as to the amount of damage suffered. And so it may be found that the benefits equal or exceed the damage to a particular tract, in which case only the excess, if such there be, should be considered in the general or final assessment for benefits for the entire improvement. But if the damages in the condemnation proceedings exceed the benefits allowed therein, the landowner can not lawfully be com-

³⁶² *Mayor &c. v. Hook*, 62 Md. 371, in which the court held that assessments for such work as a proposed street, determined and imposed in advance of the condemnation of the street, were illegal and void, and their collection should be perpetually enjoined. See also, *State v. Graves*, 19 Md. 351; *Graff v. Mayor &c.*, 10 Md. 544; *Norris v. Mayor &c.*, 44 Md. 598, 604; *Stewart v. Mayor &c.*, 7 Md. 500. A property owner who has at his own expense well and properly set curbstones in front of his property on the proper line, in accordance with the style in

common use, can not be assessed, while they are in good order and repair, for the expense of replacing them: *Wistar v. City of Philadelphia*, 111 Pa. St. 604; s. c. 4 Atl. 571, in which the city sought to impose upon such an owner of abutting property the expense of a change of curbstones that they might be better adapted to the roadway as it had been repaired; following *City of Philadelphia v. Wistar*, 92 Pa. St. 404, and *Wistar v. Philadelphia*, 80 Pa. St. 505.

³⁶³ *Cook v. Slocum*, 27 Minn. 509; s. c. 8 N. W. 755.

pelled to offset the amount awarded therefor against the general assessment for benefits, for he is entitled to be paid therefor in money.³⁶⁴

§ 1192. Description of work in resolution.—Property owners can not sustain an action to vacate an assessment for an improvement on the ground only that the common council adopted a resolution for paving a street forty-two feet wide, and directed the city engineer to advertise for bids, and the lowest bid being accepted by the council for paving forty-two feet, the engineer made a contract for paying thirty-seven feet, omitting a space of five feet between the rails of a street-car track on the street, which it was the duty of the street railroad company to keep in repair, the specification for the paving not including the space between the rails, and the cost of that part of the paving not being included in the assessment. In addition to any such irregularity as this, they must show injury resulting to them on account of the irregularity.³⁶⁵

§ 1193. Conclusiveness of assessor's or other official's action.—Should a charter of a city impose the duty, and confer the power, upon assessors, in matters of local public improvements, to determine the benefits to the citizen's property and assess accordingly, it is a matter entirely within their discretion, and conclusive upon the property owners, in so far as they can not attack it collaterally,—as in an action to restrain the collection of the assessment on the ground of an over-assessment of the benefits upon a complainant's property, there being no claim that any land benefited was not assessed, nor that there was any fraud in making the assessment. But upon a state of facts to justify it, relief might be given upon a direct review by certiorari of the assessment.³⁶⁶ Assessors in finally determining the amounts to be assessed for benefits may fix such amounts without regard to the value of the buildings, for the reason that the amount of benefits was not affected by the improvements upon the lots, without violating any principle.³⁶⁷ Where the city council has sole power,

³⁶⁴ McKusick v. City of Stillwater, 44 Minn. 372; s. c. 46 N. W. 769.

³⁶⁵ Voght v. City of Buffalo, 133 N. Y. 463; s. c. 31 N. E. 340, holding also, the fact that land on one side of a street is assessed for paving a little more in amount than that on the other side, because the last-mentioned side is incumbered by a street-car track, does not invalidate the assessment, as it is competent

for the assessors thus to exercise their judgment as to the apportionment of the benefits.

³⁶⁶ Hoffeld v. City of Buffalo, 130 N. Y. 387; s. c. 29 N. E. 747.

³⁶⁷ Hoffeld v. City of Buffalo, 130 N. Y. 387; s. c. 29 N. E. 747. Cf. Kennedy v. City of Troy, 77 N. Y. 493; Clark v. Village of Dunkirk, 75 N. Y. 612; s. c. 12 Hun (N. Y.) 181; O'Reilly v. City of Kingston,

by statute, to determine what portion of the expense of local improvements shall be paid by the public its determination is conclusive.³⁶⁸ Where an improvement is to be paid for by special assessment, the decision by the board of public works, or other corporate authority, as to what property is benefited, and to what extent by the improvement, is conclusive and can not be reviewed in the absence of fraud or mistake of fact.³⁶⁹

§ 1194. Assessments for paving streets and constructing sidewalks.—Assessments for permanent improvement of streets such as paving may be assessed against the abutting owner but only to the extent of the peculiar benefits. A distinction was made, however, between improvements of that kind and the improvements of sidewalks, and the rule does not apply to the latter. "A sidewalk has always been regarded as an appendage to and a part of the premises to which it is attached, and is so essential to the beneficial use of such premises that its improvement may be regarded as a burden belonging to the ownership of the land and the order or requisition for such improvement as a police regulation. On this ground I conceive it to be quite legitimate to direct it to be put in order at the sole expense of the owner of the property to which it is subservient and indispensable."³⁷¹

§ 1195. When cost of repairing can not be charged to abutters.—The charter of a city made the cost of the construction of its streets

114 N. Y. 439; s. c. 21 N. E. 1004. As to relief in equity, see *Strusburgh v. Mayor &c.*, 87 N. Y. 452.

³⁶⁸ *Watson v. City of Chicago*, 115 Ill. 78; s. c. 3 N. E. 430.

³⁶⁹ *State v. Board &c.*, 27 Minn. 442; s. c. 8 N. W. 161; *Dousman v. City of St. Paul*, 22 Minn. 387. And so possibly where the board acts on illegal principles of assessment: *State v. District Court*, 33 Minn. 164; s. c. 22 N. W. 295. That a mistake of fact in the absence of fraud would be sufficient, see *State v. District Court &c.*, 47 Minn. 406; s. c. 50 N. W. 476.

³⁷¹ *State v. Mayor &c.*, 37 N. J. L. 415, 423. See also, *Weller v. McCormick*, 47 N. J. L. 397, 400; s. c. 1 Atl. 516; *Paxson v. Sweet*, 13 N. J. L. 196; *Kirkpatrick v. Commissioners*, 42 N. J. L. 510; *State v. Commissioners &c.*, 46 N. J. L. 116;

Goddard, Petitioner, 16 Pick. (Mass.) 504; *City of Lowell v. Hadley*, 8 Met. (Mass.) 180; *Mayor &c. v. Mayberry*, 6 Humph. (Tenn.) 368; *Washington v. Mayor &c.*, 1 Swan (Tenn.) 177; *Whyte v. Mayor &c.*, 2 Swan (Tenn.) 364; *De Blois v. Barker*, 4 R. I. 445; *Buffalo &c. Cemetery v. City of Buffalo*, 46 N. Y. 503; *Borough of Greensburg v. Young*, 53 Pa. St. 280; *Sands v. City of Richmond*, 31 Gratt. (Va.) 571; s. c. 31 Am. R. 742; *State v. City Council &c.*, 12 Rich. (S. C.) 702; *Bonsall v. Mayor &c.*, 19 Ohio 418; *Hydes v. Joyes*, 4 Bush (Ky.) 464; *Palmer v. Way*, 6 Colo. 106; *Hart v. City of Brooklyn*, 36 Barb. (N. Y.) 226; *Woodbury v. City of Detroit*, 8 Mich. 274; *Town of Macon v. Patty*, 57 Miss. 378; s. c. 34 Am. R. 451.

chargeable against abutting property holders, and the cost of repairing the streets was to be paid by the city. Such a charter does not authorize the city to charge the abutting owners of property who, when they were beyond the limits of the city, had constructed a street in front of their property, with the cost of repairing such streets, after they were embraced in its extended limits, on the theory that such repairs of those streets constituted a construction of the same.³⁷⁴

§ 1196. Power of assessment illustrated and limited.—A law is not unconstitutional which authorizes the application of assessments for benefits on residues of lots, thus reducing the awards for the parts taken in opening streets.³⁷⁵ The power to assess city property for local improvements may be constitutionally delegated by the legislature to a board of assessors acting independently of the city council.³⁷⁶ Farm land in a rural district can not in Pennsylvania be assessed under the “foot-front rule” for municipal improvements, and a statute directing such assessment has been held to be void.³⁷⁷ A city may be enjoined from collecting assessments for improving its market property at the expense of the adjoining property of individuals, as it can not do so under its power over streets and alleys.³⁷⁸ The assessment of special benefits for the purpose of raising a fund to pay those who have been damaged by opening, widening or vacation of streets is a species of taxation, and therefore

³⁷⁴ *O'Meara v. Green*, 16 Mo. App. 118. The court, referring to the principle that the necessity of a public improvement within the limits of the charter power of a city being a question upon which the judgment of the legislative department of the city was conclusive, as held in *Sheehan v. Martin*, 10 Mo. App. 285; *Kemper v. King*, 11 Mo. App. 116, 127; and *Young v. City of St. Louis*, 47 Mo. 492, said:—“But this principle does not extend so far as to allow the legislature of the city to violate the charter itself by charging the cost of street repairs upon adjacent property owners. The municipal assembly can not, merely by calling the repairs of a street by the name of construction or improvement, make such repairs, construction or improvement, and so exonerate the city from paying for

them, and cast the burden upon adjoining property owners.”

³⁷⁵ *Genet v. City of Brooklyn*, 99 N. Y. 296; s. c. 1 N. E. 777.

³⁷⁶ *City of Little Rock v. Board &c.*, 42 Ark. 152.

³⁷⁷ *City of Scranton v. Pennsylvania Coal Co.*, 105 Pa. St. 445. In *re East Syracuse*, 20 Abb. N. C. (N. Y.) 131, it was held to be within the discretion of village trustees to improve a public highway outside the corporate limits of the village, where it appeared that the highway led to a gravel bed owned by the village, and that the work was done on the highway so as to enable the village authorities to draw larger loads of gravel and more of them in the same length of time.

³⁷⁸ *City of Fort Wayne v. Shoaff*, 106 Ind. 66; s. c. 5 N. E. 403.

within the power of the legislature.³⁷⁹ Such assessments of special benefits caused by vacation of a street may be made personal against the owner, and the fact that they are generally against the property specially benefited and not against the owner personally can not affect the constitutionality of a statute authorizing them to be made against the owner. It is in the discretion of the legislature.³⁸⁰

§ 1197. The same subject continued.—Where provision is made by law for a review of assessment proceedings, and a body appointed with the power to set the assessment aside or correct the error complained of, and the party wholly fails to appear before such body or take any steps to have such correction made, he is not in position to appeal to the courts for redress in the absence of fraud or bad faith.³⁸¹ That a resolution by a city council directing its clerk to give the requisite legal notice for bids for repairing a street, and of the day of meeting to take action thereon, does not fix the day of meeting, but allows the clerk to fix such day, will not invalidate an assessment for such improvement, the notice actually given being in accordance with the statute.³⁸² Nor will such an assessment be held invalid,

³⁷⁹ *In re Vacation of Centre St.*, 115 Pa. St. 247; s. c. 8 Atl. 56.

³⁸⁰ *In re Vacation of Centre St.*, 115 Pa. St. 247; s. c. 8 Atl. 56. General statutes of the state of Georgia conferring upon one of its cities the power of taxation, and of making by-laws, regulations and ordinances, have been held not to empower it, in the absence of express legislative authority, to make local assessments for improvements upon the property adjacent to the streets on which the improvements were made: *City Council &c. v. Murphey*, 79 Ga. 101; s. c. 3 S. E. 326. The provision in the Minnesota constitution empowering the legislature to authorize "municipal corporations" to levy assessments for local improvements without regard to a cash valuation of the property assessed has been held to authorize such legislation in respect to counties: *Dowlan v. Sibley Co.*, 36 Minn. 430; s. c. 31 N. W. 517.

³⁸¹ *Brown v. City of Grand Rapids*,

83 Mich. 101; s. c. 47 N. W. 117; *Williams v. City of Saginaw*, 51 Mich. 120; s. c. 16 N. W. 260; *Comstock v. City of Grand Rapids*, 54 Mich. 641; s. c. 20 N. W. 623; *Peninsula &c. Lumber Co. v. Crystal Falls Tp.*, 60 Mich. 510; s. c. 27 N. W. 666. To justify an interference of a court, on certiorari, with the judgment of commissioners in assessment of benefits, on the ground that the assessment was in excess of the benefits conferred by an improvement, there must be cogent proofs of error on the part of the commissioners. To make an objection that the commissioners did not take into consideration the benefits to other lots than those of remonstrants, the latter must show that the error has, or at least may have, injured them, by imposing upon their lands more than a proper assessment: *State v. Mayor &c.*, 45 N. J. L. 104.

³⁸² *Gilmore v. City of Utica*, 131 N. Y. 26; s. c. 29 N. E. 841; affirming s. c. 15 N. Y. S. 274.

where the common council is authorized to accept the bid for the public improvement which is deemed most favorable, because a lower bid than the one accepted was received, in the absence of any abuse of its power by the council.³⁸³

§ 1198. **Collateral attack of assessments.**—It is a settled rule that statutes granting to municipal corporations power which involves the imposition of burdens upon private property are to be strictly construed; and where such statutes require the doing of some particular thing in its nature jurisdictional as a condition precedent to the right to impose such burden, the failure to do the thing required will render the whole proceeding void.^{383a} It seems generally held, however, that in matters of local improvements, where jurisdiction over the whole subject is conferred upon a municipal corporation, with power to make local assessments for that purpose, any failure to comply strictly with any statutory requirement not affecting the jurisdiction will be regarded a mere irregularity, and in a collateral proceeding will be disregarded.³⁸⁴

³⁸³ *Gilmore v. City of Utica*, 131 N. Y. 26; s. c. 29 N. E. 841; affirming s. c. 15 N. Y. S. 274. And in an action to vacate a street assessment, the fact that plans for the street improvement were in the alternative would be immaterial in the absence of proof that any one was misled or prevented from bidding, or that the cost of the work done was enhanced thereby: *Gilmore v. City of Utica*, supra.

^{383a} *Niklaus v. Conkling*, 118 Ind. 289; s. c. 20 N. E. 797; *City of Madison v. Smith*, 83 Ind. 502; *Welty Assessments*, § 319; *Supervisors v. United States*, 4 Wall. 435; *Mason v. Fearson*, 9 How. 248; *Wheeler v. City of Chicago*, 57 Ill. 415; *Merritt v. Village of Portchester*, 71 N. Y. 309; *Myrick v. City of La Crosse*, 17 Wis. 456; *Case v. Johnson*, 91 Ind. 477; *City of Logansport v. Dykeman*, 116 Ind. 15; s. c. 17 N. E. 587; *Hoyt v. City of East Saginaw*, 19 Mich. 39.

³⁸⁴ *Jackson v. Smith*, 120 Ind. 520; s. c. 22 N. E. 431; *Montgomery v. Wasem*, 116 Ind. 343; s. c. 15 N. E.

795; 19 N. E. 184; *Ross v. Stackhouse*, 114 Ind. 200; s. c. 16 N. E. 501; *City of Elkhart v. Wickwire*, 121 Ind. 331; s. c. 22 N. E. 344; *Smith v. Engle*, 44 Iowa 265. As, for instance, if the statute requires the filing of a petition as a condition precedent to the exercise of jurisdiction, or the giving of some particular notice, if a petition was filed, though defective, or some notice was given, though not a compliance with the statutory requirement, the proceeding is not void and will be sufficient to withstand a collateral attack: *Johnson v. State*, 116 Ind. 374; s. c. 19 N. E. 298; *Hobbs v. Board &c.*, 116 Ind. 376; s. c. 19 N. E. 186; *Otis v. De Boer*, 116 Ind. 531; s. c. 19 N. E. 317; *Prezinger v. Harness*, 114 Ind. 491; s. c. 16 N. E. 495; *Robinson v. Rippey*, 111 Ind. 112; s. c. 12 N. E. 141; *Strieb v. Cox*, 111 Ind. 299; s. c. 12 N. E. 481; *Pickering v. State*, 106 Ind. 228; s. c. 6 N. E. 611; *Argo v. Barthand*, 80 Ind. 63; *Ricketts v. Spraker*, 77 Ind. 371.

§ 1199. **Suit to restrain assessment.**—A suit by property owners to set aside an assessment made for improvement and restrain its collection is not maintainable against the consent of the city, as these owners may, upon application of the city for judgment upon the assessment warrant, present and have determined any objection to the assessment going to its validity.³⁸⁵ But such a suit may be maintained and the validity of the assessment determined and the proper relief granted, if the city do not object to the matter being presented to the court in that manner instead of in the manner provided in its charter.³⁸⁶ Where by the provisions of the charter of a city a full opportunity is given to property owners to be heard upon the propriety of an assessment for improvements, they can not complain, where an assessment has been wholly set aside and a new one ordered by the governing authority, that the notice of the original assessment was not properly given. Such an irregularity would be cured by the proceedings relating to the new assessment.³⁸⁷ And where a council appropriates for an improvement—as for a sewer—a sum over and above the amount appropriated for that purpose by the appropriation bill of the preceding year, and the same is made a special assessment against certain property, but afterwards a new assessment is ordered and the excess is taken off of that property and appropriated from the general fund, the owners of such property should not be heard to complain that such appropriation was not submitted to the electors of the city.³⁸⁸

§ 1200. **Actions to vacate assessments.**—An action in equity to vacate an assessment and restrain its collection can not be maintained merely because the assessment is for any reason invalid or illegal.³⁸⁹ The foundation of this rule is principally in public policy. It would lead to great embarrassment and inconvenience if the collection of taxes and assessments were to be delayed by such actions.³⁹⁰ The reason why an action at law can not be maintained for the recovery of money paid upon an illegal assessment, not void upon its

³⁸⁵ *Albrecht v. City of St. Paul*, 47 Minn. 531; s. c. 50 N. W. 608; overruling *Mayall v. City of St. Paul*, 30 Minn. 294; s. c. 15 N. W. 170.

³⁸⁶ *Albrecht v. City of St. Paul*, 47 Minn. 531; s. c. 50 N. W. 608. Cf. as to actions for injunction being sustained, *Minnesota &c. Co. v. Palmer*, 20 Minn. 468; *Sewall v. City of St. Paul*, 20 Minn. 511.

³⁸⁷ *Townsend v. City of Manistee*

88 Mich. 408; s. c. 50 N. W. 321, involving an assessment for construction of a sewer.

³⁸⁸ *Townsend v. City of Manistee*, 88 Mich. 408; s. c. 50 N. W. 321.

³⁸⁹ *Heywood v. City of Buffalo*, 14 N. Y. 534; *Guest v. City of Brooklyn*, 69 N. Y. 506.

³⁹⁰ *Strusburgh v. Mayor &c.*, 87 N. Y. 452.

face, so long as the assessment remains unvacated and unreversed, is because the action of the assessors is regarded as judicial, and because the assessment is regarded as in the nature of a judgment which can not be attacked collaterally. The money paid upon the assessment in such a case is treated as if collected by virtue of a valid judgment, which can be retained until the judgment is vacated or reversed.³⁹¹ An action can be maintained to vacate an assessment which is a lien upon land, and thus a cloud upon title, when the assessment is in fact invalid and the invalidity does not appear upon the face of the assessment, and will not necessarily appear in any proceeding taken by a purchaser to recover possession of the land. This is so because in such a case the action comes under one of the recognized heads of equity jurisprudence.³⁹²

§ 1201. Allegations necessary.—In an action by a property owner whose property has been assessed for improvements in its front, to set aside such assessment and restrain its collection, it is not sufficient for the complaint to allege in direct terms the inequality and injustice of such assessment; it must also allege facts showing such inequality and injustice, or going to the groundwork of the

³⁹¹ *Strusburgh v. Mayor &c.*, 87 N. Y. 452.

³⁹² *Diefenthaler v. Mayor &c.*, 111 N. Y. 331; s. c. 19 N. E. 48; approving and following *Strusburgh v. Mayor &c.*, 87 N. Y. 452, in which the plaintiff's action in equity, the relief prayed for being for a judgment declaring the assessment invalid to the extent of an overpayment claimed by the plaintiff, and then to recover the amount of such overpayment, was held to have been properly brought and maintainable. Earl, J., said:—"Here is a case where it is conceded that the plaintiff is equitably and justly entitled to the sum which he seeks to recover. The only obstacle in his way is the unvacated assessment. That obstacle, without any fault of his, he is unable to overcome or remove in an action or proceeding at law. No degree of vigilance which could have been expected or required of him would have enabled him before payment to discover the illegality in

the assessment. Unless, then, he can have equitable relief there will be a wrong without a remedy—an absolute failure of justice. Upon general principles of equity, then, we think he should have the equitable relief he seeks against the obstacle interposed in aid of the legal relief which he demands." Again he said:—"It will not be against public policy to allow an action under the circumstances of this case to be maintained. The assessments have been collected and the revenue for public purposes has been realized. It will be no more embarrassing for a municipality to be compelled to pay this debt than to be compelled to pay a debt of any other kind. Under such circumstances there can be no public policy which will be served or promoted by depriving a citizen of the money justly due him and leaving it where it has been placed by the illegal action of a municipality or its officers."

assessment.³⁹³ Such a complaint alleging facts showing mere irregularities and failures to comply with some minor statutory requirements will be held insufficient unless it further alleges an offer to pay the amount of such assessments justly chargeable to the property of the complainant.³⁹⁴

§ 1202. **Evidence—Proof required.**—In an action to restrain the sale of land for non-payment of an assessment for a local improvement, and to set aside the assessment because of alleged invalidity in the proceedings, the burden is upon plaintiff to establish the invalidity complained of, there being no presumption in such an action that municipal authorities have acted illegally or that conditions precedent have not been performed.³⁹⁵ Where a charter of a village requires the petition for laying out a street to be signed by persons owning land on the line thereof, but does not require the fact of such ownership to be stated in the petition, the fact that the petition for opening a street does not show on its face that the persons signing it are owners does not tend to negative their ownership; and in an action of this kind the invalidity of the proceedings in that respect could not be established.³⁹⁶ And a plaintiff in such an action is foreclosed by an order of confirmation of a report of commissioners on the matter of an improvement from objections which might have been corrected on appeal from such a report.³⁹⁷ Besides, where parties interested in the lands taken for the street, and especially those under whom such a plaintiff claims, who were then owners of the land, had acquiesced in the proceeding and accepted awards made to them, the plaintiff would be concluded from alleging irregularities in such proceeding.³⁹⁸ And the fact that the specifications upon which the bids for grading were based embraced another street as well as the one in question would be immaterial where it appears that profile maps showing the amount and kind of excavation and

³⁹³ *Meggett v. City of Eau Claire*, 81 Wis. 326; s. c. 51 N. W. 566; *Pratt v. Lincoln Co.*, 61 Wis. 62; s. c. 20 N. W. 726; *Fifield v. Marinette Co.*, 62 Wis. 532; s. c. 22 N. W. 705; *Wisconsin Central R. Co. v. Ashland Co.*, 81 Wis. 1; s. c. 50 N. W. 937, 940.

³⁹⁴ *Meggett v. City of Eau Claire*, 81 Wis. 326; s. c. 51 N. W. 566.

³⁹⁵ *Tingue v. Village of Port Chester*, 101 N. Y. 294; s. c. 4 N. E. 625.

See 1 Greenleaf Evidence, § 74; *Bouton v. City of Brooklyn*, 15 Barb. (N. Y.) 375, 395; *In re Ingraham*, 64 N. Y. 310; *Heinemann v. Heard*, 62 N. Y. 448.

³⁹⁶ *Tingue v. Village of Port Chester*, 101 N. Y. 294; s. c. 4 N. E. 625.

³⁹⁷ *Tingue v. Village of Port Chester*, supra.

³⁹⁸ *Tingue v. Village of Port Chester*, supra.

filling required on each street were separately made and filed with the specifications.³⁹⁹

§ 1202a. Actions to recover money paid upon illegal assessments.—

If money is compulsorily obtained by a municipal corporation on an assessment void on the face of the record for lack of jurisdiction of the person or property, or by reason of the unconstitutionality of the statute under which the assessment is made, it may be recovered from the municipality in an action at law brought by the wronged taxpayer. But in case money is collected under an assessment illegal, as, for instance, by reason of the existence of some fact outside of the record, it can not be recovered until the assessment is set aside.⁴⁰⁰ And where one person assessed has brought an action to set aside an assessment and had judgment in his case, the assessment against others would not be affected or invalidated by such judgment. Each one will be obliged to have it set aside as against his property before he can maintain an action to recover the sums paid under it.⁴⁰¹

§ 1203. Power to assess abutting owners.—The universal holding is that a street is for the public use, and its improvement is for a public purpose; and a municipality may tax abutting lands for the improvement of a portion of a street. In this respect the municipality has great discretion, but it may abuse that discretion so that the courts would be justified in interfering to prevent gross injustice.⁴⁰² While a municipality can not tax a single man for his own benefit alone, it can tax a group of citizens for their joint benefit.⁴⁰³

³⁹⁹ *Tingue v. Village of Port Chester*, *supra*.

⁴⁰⁰ *Trimmer v. City of Rochester*, 130 N. Y. 401; s. c. 29 N. E. 746; *Horn v. Town of New Lots*, 83 N. Y. 100; *Purssell v. Mayor &c.*, 85 N. Y. 330; *Strusburgh v. Mayor &c.*, 87 N. Y. 452; *Bruecher v. Village of Port Chester*, 101 N. Y. 240; s. c. 4 N. E. 272; *Jex v. Mayor &c.*, 103 N. Y. 536; *Swift v. City of Poughkeepsie*, 37 N. Y. 511; *Bank &c. v. Mayor &c.*, 43 N. Y. 184; *Marsh v. City of Brooklyn*, 59 N. Y. 280; *Peyser v. Mayor*, 70 N. Y. 497.

⁴⁰¹ *Trimmer v. City of Rochester*, 130 N. Y. 401; s. c. 29 N. E. 746; *Matter of Delancey*, 52 N. Y. 80; *Wilkes v. Mayor &c.*, 79 N. Y. 621; *Purssell v. Mayor &c.*, 85 N. Y. 330; *Chase v. Chase*, 95 N. Y. 373; *Moore*

v. City of Albany, 98 N. Y. 396 (where it was held that in case all the assessments on the roll were illegal for a common cause, not appearing on the face of the roll, or on the record on which it rested, a judgment vacating an assessment in favor of one taxpayer did not vacate the assessments against the others); *Reid v. Board &c.*, 128 N. Y. 364; s. c. 28 N. E. 367.

⁴⁰² *City of Independence v. Gates*, 110 Mo. 374; s. c. 19 S. W. 728. See also, *Paulson v. City of Portland*, 16 Or. 450; s. c. 19 Pac. 450; *Little Rock v. Katzenstein*, 52 Ark. 107; s. c. 12 S. W. 198; *City of Pueblo v. Robinson*, 12 Colo. 593; s. c. 21 Pac. 899.

⁴⁰³ *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Inhabitants &c. v. Mor-*

§ 1204. **The same subject continued.**—Where a city, in exercising its authority to improve streets, is required, on petition of a majority of the property owners affected, to designate by ordinance the section of a street to be improved, and a section is designated and the contract let, the city can not thereafter improve only a part of the section designated, and collect the cost therefor from the proprietors abutting on the part so improved; a tax-bill in such a case is not legally issuable until the entire work is completed in accordance with the contract, and as designated by the ordinance.⁴⁰⁴ The cost of improvement should be apportioned among the abutting property owners throughout the entire district designated by the ordinance for improvement, on the principle that all the property in the designated district must be taxed.⁴⁰⁵ The constitutional provisions as to uniformity of taxation and the like are only applicable to taxation in the ordinary acceptance of the term, and are wholly inapplicable to mere local assessments for public improvements.⁴⁰⁶

§ 1205. **Rule in Texas as to homestead.**—The rule is well settled in Texas that local assessments for pavements or sidewalks, or other improvements of a similar character, when imposed and levied by a city according to law upon the abutting property, are special taxes, for which the homestead may be sold, as other lands, in the mode which may be provided by law. The homestead may be subjected to forced sale, under the constitution, for taxes due thereon; and these local assessments, if regularly levied, will create a lien upon even the homestead, of which the district court, under the constitution, has ample jurisdiction, and may foreclose the same.⁴⁰⁷ And where the

ton, 25 Mo. 593; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; *City of St. Louis v. Allen*, 53 Mo. 44; *Keith v. Bingham*, 100 Mo. 300; s. c. 13 S. W. 683, which cases settle that the power of municipalities to assess for benefits is referable to the taxing power, though such assessments are not "taxes" in the sense that word is usually employed.

⁴⁰⁴ *City of Independence v. Gates*, 110 Mo. 374; s. c. 19 S. W. 728.

⁴⁰⁵ *City of Independence v. Gates*, 110 Mo. 374; s. c. 19 S. W. 728. See also, *Diggins v. Brown*, 76 Cal. 318; s. c. 18 Pac. 373; *Rentz v. City of Detroit*, 48 Mich. 544; s. c. 12 N. W. 694; *City of Kansas v. Baird*, 98 Mo.

215; s. c. 11 S. W. 243; *Desty Taxation*, 29, 30.

⁴⁰⁶ *City of St. Joseph v. Owen*, 110 Mo. 445; s. c. 19 S. W. 713; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; *Farrar v. City of St. Louis*, 80 Mo. 379; *Lockwood v. St. Louis*, 24 Mo. 20; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Garrett v. City of St. Louis*, 25 Mo. 505.

⁴⁰⁷ *Bordages v. Higgins*, 1 Tex. Civ. App. 43; s. c. 19 S. W. 446. See also, *Lufkin v. City of Galveston*, 58 Tex. 545; *Wood v. City of Galveston*, 76 Tex. 126; s. c. 13 S. W. 227; *Adams v. Fisher*, 63 Tex. 651; s. c. 75 Tex. 657; 6 S. W. 772; *Allen v. City of Galveston*, 51 Tex. 302; *Round-*

owners of a homestead are duly notified of the foreclosure proceedings in such a case of lien, a judgment of the district court foreclosing the lien is conclusive as against a collateral attack in trespass to try title by the purchaser at such foreclosure sale against the original owners, even though such judgment be based on erroneous conclusions of law and entered by default.⁴⁰⁸

§ 1206. Liability of the corporation for negligence.—The supreme court of the District of Columbia have declared the principle to be as follows:—"A mere error of judgment in the construction of such work does not seem, on the authorities, to be a ground of action in the absence of carelessness in the selection of a plan or the employment of proper agents to devise and execute it."⁴⁰⁹ It is therefore competent, in an action for damages resulting from the construction of a public work against a municipal corporation, for the corporation to show that its governing authorities exercised care in the selection of engineers of capacity and skill to make the plans for the work and capable persons to superintend the work to relieve the corporation from liability.⁴¹⁰ A municipal corporation, in discharging the duties imposed upon it by statute, in the matter of public improvements, as in caring for its highways, as long as its acts are kept within the authority of the statute, is not liable for damages to individual property if no wanton or unnecessary damage is done, and it is not guilty of negligence in causing the damage.⁴¹¹ The implied liability for damages in construction of a municipal improvement arises for all damages not necessarily incident to the work, and which are chargeable to the improper or unskilful manner of executing it.⁴¹² When undertaking a public improvement a municipality is bound to exercise the same degree of care and prudence that a cautious individual would do if the whole loss or risk were his own; and it is liable, like an individual, for damages resulting from negligence or omission of duty.⁴¹³ The making of an improvement authorized by charter is

tree v. City of Galveston, 42 Tex. 612.

⁴⁰⁸ Bordages v. Higgins, 1 Tex. Civ. App. 43; s. c. 19 S. W. 446.

⁴⁰⁹ Johnston v. District of Columbia, 1 Mackey 427.

⁴¹⁰ City of Terre Haute v. Hudnut, 112 Ind. 542; s. c. 13 N. E. 686. See also, Van Pelt v. City of Davenport, 42 Iowa 308; Lehn v. City of San Francisco, 66 Cal. 76; s. c. 4

Pac. 965; Barnes v. District of Columbia, 91 U. S. 540.

⁴¹¹ Bronson v. Borough of Wallingford, 54 Conn. 513; s. c. 9 Atl. 393; Judge v. City of Meriden, 38 Conn. 90.

⁴¹² City of Denver v. Rhodes, 9 Colo. 554; s. c. 13 Pac. 729; Powers v. City of Council Bluffs, 50 Iowa 197.

⁴¹³ City of Denver v. Rhodes, 9

the performance of a public duty for which the city is not liable if it acts within its jurisdiction and with care and skill.⁴¹⁴ Where an improvement does not impose an additional servitude on a street the city is not liable in damages in the absence of a statute or negligence.⁴¹⁵ Damages growing out of uncertainty as to what a municipality may do in reference to opening a street are not recoverable,⁴¹⁶ nor are damages growing out of an honest error recoverable.⁴¹⁷

§ 1207. The same subject continued.—Where the plan of municipal work, as of gutters, drains and sewers especially, has been determined upon, the work of constructing them is ministerial and must be performed in a skilful, prudent and careful manner, so as not to injure private property; and a municipality is liable in a civil action for damages caused by the careless or unskilful manner of performing the work, or for failure of its duty to keep the same in good condition and repair.⁴¹⁸ In the construction of a public work which may have to resist sudden freshets, the degree of care or foresight which it is necessary to use must always be in proportion to the injury likely to result from the events to be guarded against.⁴¹⁹

§ 1208. Damages for improper construction.—There are degrees in the matter of corporate liability growing out of the nature of the subject-matter. There are certain things which the municipality does which are not specifically for the benefit of the general public,

Colo. 554; s. c. 13 Pac. 729; *Shearman & Redfield Negligence*, § 144; *Harper v. City of Milwaukee*, 30 Wis. 365; *Barton v. City of Syracuse*, 36 N. Y. 54.

⁴¹⁴ *Home Building & Co. v. City of Roanoke*, 91 Va. 52; s. c. 20 S. E. 895.

⁴¹⁵ *Willis v. City of Winona*, 59 Minn. 27; s. c. 60 N. W. 814.

⁴¹⁶ *Brill Co. v. City of Philadelphia*, 167 Pa. St. 1; s. c. 31 Atl. 348.

⁴¹⁷ *De Baker Building v. Southern Cal. R. Co.*, 106 Cal. 257; s. c. 39 Pac. 610.

⁴¹⁸ *City of Logansport v. Wright*, 25 Ind. 512; *Mills v. City of Brooklyn*, 32 N. Y. 489; *McCarthy v. City of Syracuse*, 46 N. Y. 194; *Barton v. City of Syracuse*, 36 N. Y. 54; *Nims v. Mayor &c.*, 59 N. Y. 500. In *Hitchins v. Mayor &c.*, 68 Md. 100; s. c. 11 Atl. 826, it was held that there is a municipal liability where the prop-

erty of private persons is flooded by surface water, either directly or by the water being set back, when this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts or sewers, or of the negligent failure to keep the same in repair and free from obstruction, and this whether the lots are below the grade of the streets or not. See also, *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463; *Barton v. City of Syracuse*, 36 N. Y. 54; *Rowe v. Portsmouth*, 56 N. H. 291; *Mayor &c. v. Wilson*, 50 Md. 138; *Kranz v. Mayor &c.*, 64 Md. 491; s. c. 2 Atl. 908.

⁴¹⁹ *Mayor &c. v. Bailey*, 2 Denio (N. Y.) 433; *City of Denver v. Capelli*, 4 Colo. 25; *Powers v. City of Council Bluffs*, 50 Iowa 197.

but are in the nature of private enterprises carried on for the benefit of the corporators, such as water works, gas works and other things of a proprietary nature. In regard to matters of this nature it is reasonable and proper that there should be a greater degree of liability than where the public only is interested. In this respect these corporations are looked upon as occupying the same position as private corporations, which, having accepted a valuable franchise on condition of the performance of certain public duties, are held to contract by the acceptance for the performance of these duties. In the case of public corporations, however, the liability is contingent on the law affording the means of performing the duty, which in some cases, by reason of restrictions upon the power of taxation, they might not possess. But assuming the corporation to be clothed with sufficient power by the charter to that end, the liability of a city or village vested with control of its streets for any neglect to keep them in repair, or for any improper construction, has been determined in many cases.

§ 1209. The same subject continued—Constitutional provisions.—

The constitutional provisions that "the property of no person shall be taken or damaged for public use without just compensation therefor" gives to an individual, whose property has been damaged by construction of a public improvement, a right of action, although the work has been carefully and skilfully performed.⁴²⁰ And though no statute has been passed by the legislature prescribing the manner of enforcing such a constitutional provision, an abutting landowner is entitled to his action for damages by a city to his property caused in changing the grade of a street in its front.⁴²¹ A constitutional provision that "private property shall not be taken or damaged for public use without just compensation" is self-enforcing.⁴²² Where a change of grade of a street, even though not sanctioned by an ordinance, has been recognized by the public and by the officers of the city, a city may be liable to one injured by the change of grade.⁴²³

⁴²⁰ *City of Plattsmouth v. Boeck*, 32 Neb. 297; s. c. 49 N. W. 167; following *Harmon v. City of Omaha*, 17 Neb. 548; s. c. 23 N. W. 503.

⁴²¹ *Householder v. City of Kansas*, 83 Mo. 488.

⁴²² *Householder v. City of Kansas*, 83 Mo. 488; *People v. McRoberts*, 62 Ill. 38; *Johnson v. City of Parkersburg*, 16 W. Va. 402; *Blanchard v. City of Kansas*, 16 Fed. 444; *McEl-*

roy v. Kansas City, 21 Fed. 257; *Moore v. Atlanta*, 70 Ga. 611.

⁴²³ *Mayor &c. v. Geiler*, 13 Lea (Tenn.) 611. In *Whitmore v. Village of Tarrytown*, 137 N. Y. 409; s. c. 16 N. Y. S. 740, where a road in a village was cut down by the village authorities and a steep embankment left in front of the abutting property, which embankment was subsequently removed at vari-

§ 1210. **Damages from defective streets.**—It is the duty of a city, in grading its streets, to build and finish the slopes on the side of the streets in such a manner that they will be in a reasonably and ordinarily safe condition as to persons lawfully in the streets, and so as not to unnecessarily and unreasonably endanger the lives and limbs of passers-by upon its sidewalks.⁴²⁴ Under a charter authorizing a city to condemn “an easement in land for the construction of cuts and fills upon real estate abutting on any street,” the city may acquire an easement in lots abutting on a street for the purpose of slopes rendered necessary by grading the street above or below the surface of the lots.⁴²⁵

§ 1211. **Measure of damages.**—The measure of damages growing out of an improvement of the streets may be stated in general terms, applicable in most cases, to be the difference in value before and after the improvement is made. As a general rule, if an improvement of a street works an injury to private property the measure of damages is

ous times, extending through a period of several years, by the village road commissioner with the village teams and employes, although there was no formal resolution of the trustees ordering the removal, it was held that as these acts were done openly the knowledge of the trustees would be presumed, and the village would be liable for damages to the abutting property caused by this removal. In *City of Jeffersonville v. Myers*, 2 Ind. App. 532; s. c. 28 N. E. 999, it was held that the owner of a lot abutting on a street, the grade of which had been changed by the action of the United States with the permission of the city council, had a right of action for damages to his lot caused by the change of grade, under the Indiana statute.

⁴²⁴ *Nichols v. City of St. Paul*, 44 Minn. 494; s. c. 47 N. W. 168.

⁴²⁵ *Kuschke v. City of St. Paul*, 45 Minn. 225; s. c. 47 N. W. 786; *McDonald v. City of Ashland*, 78 Wis. 251; s. c. 47 N. W. 434 (a bridge built by a private citizen with lumber furnished by the city, and forming part of a sidewalk of a platted

city street, and used daily, was a public highway, and the city was responsible for personal injuries occasioned by it being covered with ice); *Tice v. Bay City*, 84 Mich. 461; s. c. 47 N. W. 1062. In *Thompson v. Village of Quincy*, 83 Mich. 173; s. c. 47 N. W. 114, evidence of several resolutions of the council, passed during the two years previous to the accident, ordering the repair of the sidewalk, was held admissible to show knowledge of its defective condition, when connected with evidence that the repairs were not made. As to liability of cities for personal injuries occasioned by defective streets growing out of the duty of cities to construct them properly and keep them in proper repair, under their general power of control, and rules of evidence and instructions to juries in actions against cities for such injuries, see also, *Nichols v. City of St. Paul*, 44 Minn. 494; s. c. 47 N. W. 168; *Moore v. City of Platteville*, 78 Wis. 644; s. c. 47 N. W. 1055; *City of South Omaha v. Cunningham*, 31 Neb. 316; s. c. 47 N. W. 930.

the depreciation in the market value, or the damage sustained less the benefit conferred.⁴²⁶ The true measure of damages growing out of a change of grade is the difference in market value immediately before and immediately after the grading not including improvements.⁴²⁷ It is proper in considering the damages growing out of a change in grade to take into consideration the use made of the improvements.⁴²⁸ The damages for land taken for a sewer is the value of the land taken.⁴²⁹ The city is liable for damages caused by the construction of a sewer though constructed by an independent contractor.⁴³⁰ The value of trees destroyed and sidewalk taken, and cost of grading rendered necessary by a change in the grade, are proper to be considered.⁴³¹ Evidence of the necessity of filling in a lot and raising buildings is proper evidence.⁴³²

§ 1212. Offset against damages.—In the making of public improvements in the streets where damages therefrom ensue the matter of offset is sometimes important. Where property damaged is a homestead the damages can not be offset by the increased value of the property for business purposes.⁴³³ The only benefit which it is proper to offset against the damages is the special benefit to the particular property which does not arise as to other adjacent property.⁴³⁴ Where a portion of a lot is condemned for a street there may be offset against the damages the benefits received by the remainder of the lot in a special assessment proceeding,⁴³⁵ but not so in a case of special taxation.⁴³⁶ Where the city takes land for public purposes, in award-

⁴²⁶ *Village of North Alton v. Dorsett*, 59 Ill. App. 612; *Springer v. City of Chicago*, 135 Ill. 552; s. c. 26 N. E. 514; *City of Bloomington v. Pollock*, 141 Ill. 346; s. c. 31 N. E. 146; *City of Plattsmouth v. Boeck*, 32 Neb. 297; s. c. 49 N. W. 167; *City of Omaha v. Kramer*, 25 Neb. 489; s. c. 41 N. W. 295; *City of Dallas v. Leake* (Tex. Civ. App.), 34 S. W. 338; *City of San Antonio v. Mulaly*, 11 Tex. Civ. App. 596; s. c. 33 S. W. 256; *City of Harvard v. Crouch*, 47 Neb. 133; s. c. 66 N. W. 276.

⁴²⁷ *Chase v. City of Portland*, 86 Maine 367; s. c. 29 Atl. 1104; *Dale v. City of St. Joseph*, 59 Mo. App. 566.

⁴²⁸ *Preston v. City of Cedar Rapids*, 95 Iowa 71; s. c. 63 N. W. 577.

⁴²⁹ *City of Atlanta v. Hunnicutt*, 95 Ga. 138; s. c. 22 S. E. 130.

⁴³⁰ *Cabot v. Kingman*, 166 Mass. 403; s. c. 44 N. E. 554.

⁴³¹ *Cook v. City of Ansonia*, 66 Conn. 413; s. c. 34 Atl. 183.

⁴³² *City Council &c. v. Schrameck*, 96 Ga. 426; s. c. 23 S. E. 400.

⁴³³ *City of Dallas v. Kahn*, 9 Tex. Civ. App. 19; s. c. 29 S. W. 98.

⁴³⁴ *Barr v. City of Omaha*, 42 Neb. 341; s. c. 60 N. W. 591; *Kirkendall v. City of Omaha*, 39 Neb. 1; s. c. 57 N. W. 752. See *Chase v. City of Portland*, 86 Maine 367; s. c. 29 Atl. 1104.

⁴³⁵ *Waggeman v. Village of North Peoria*, 155 Ill. 545; s. c. 40 N. E. 485.

⁴³⁶ *City of Bloomington v. Latham*, 142 Ill. 462; s. c. 32 N. E. 506. See also, as to set-off in change of street grades, §§ 1220-1228, post.

ing compensation to the owners taxes which are liens are properly deducted.⁴³⁷

§ 1213. **Unauthorized modification of contract.**—A contract for grading a street, with a provision that it shall be brought to a certain height, and that the work shall be done under the supervision of the city engineer, does not confer upon the engineer authority to change the grade or modify in any essential particular the provisions of the contract, unless expressly authorized by the city council;⁴³⁸ and acting as individuals, the members of the city council can not ratify such a change of contract; they could only do it acting as a body.⁴³⁹ Such ratification can not be inferred merely from the acceptance of the work covered by the contract.⁴⁴⁰ Nor can an implied contract be inferred, from the fact that a street is subsequently used by the public, to pay for work performed upon the street without the assent of the municipality.⁴⁴¹

⁴³⁷ *Carpenter v. City of New York*, 64 N. Y. S. 839; s. c. 57 App. Div. (N. Y.) 584.

⁴³⁸ *Murphy v. City of Albina*, 22 Or. 106; s. c. 29 Pac. 353, an action for extra work on a quantum meruit, in which the court affirmed a judgment for the city. See also, *Bone-steel v. Mayor &c.*, 22 N. Y. 162; *Rens v. City of Grand Rapids*, 73 Mich. 237; s. c. 41 N. W. 263; *Dillon v. City of Syracuse*, 9 N. Y. S. 98; s. c. 29 N. Y. St. 912; *Genovese v. Mayor &c.*, 55 N. Y. Super. Ct. 397. The court, in *Murphy v. City of Albina*, supra, said:—"When this contract was signed and executed, no officer of defendant had any authority to change its provisions, unless expressly authorized by the common council. That body alone, or some one duly authorized by it, was competent to change the terms of the contract or the grade of the street. The duty of the engineer was to see that the terms of the contract were complied with, and the street brought to the grade as provided therein; and for that purpose, and that alone, he was the agent of the city. But when he assumed to change the grade as established by

the city, he was doing an unauthorized act, and one in no way binding on the defendant. The change made by him was a material one, raising the surface of the street from three to ten inches above that established by the city, and, if valid, imposed upon the defendant a liability for \$466 worth of work in excess of its contract, and that without its assent. If such an act is valid and binding on the defendant, there is but little protection for municipal corporations against the unauthorized acts of subordinate agents."

⁴³⁹ *Murphy v. City of Albina*, 22 Or. 106; s. c. 29 Pac. 353; 1 *Dillon Munic. Corp.* 455, n.; 15 *Am. & Eng. Encyc. Law* 1028; *Dey v. Mayor &c.*, 19 N. J. Eq. 412; *Butler v. Charlestown*, 7 Gray (Mass.) 12; *Stoystown &c. Co. v. Craver*, 45 Pa. St. 386; *In re St. Helen's Mill Co.*, 3 Sawy. 88; *Zottman v. City of San Francisco*, 20 Cal. 96; *Gashwiler v. Willis*, 33 Cal. 11.

⁴⁴⁰ *Murphy v. City of Albina*, 22 Or. 106; s. c. 29 Pac. 353.

⁴⁴¹ *Taft v. Inhabitants &c.*, 14 Mass. 282; *McDonald v. Mayor &c.*, 68 N. Y. 23; *Davis v. School Dist.*, 24 Maine 349; *Pratt v. Town of Swan-*

§ 1214. **Rights of abutters.**—The individual rights of owners of lots along the streets of a city to a way of ingress or egress through those streets will not be disregarded that public benefits may accrue.⁴⁴² The statutory remedy for abutters whose property is damaged by change of grade of a street, by means of an assessment of damages ordered to be made by the board of assessors, and the delivery by the comptroller of assessment bonds in the amount awarded, has been held exclusive, and that therefor an action could not be maintained against the city for damages suffered, or for fraud or breach of duty on the part of the assessors in proceedings under the statute.⁴⁴³ The taking by the public authorities of earth or soil of a road, the fee of which is in the abutters, is justified as incident to the easement vested

ton, 15 Vt. 147; *Wilson v. School Dist.*, 32 N. H. 118.

⁴⁴² *Gargan v. Louisville &c. R. Co.*, 89 Ky. 212; s. c. 11 Ky. L. 489; 12 S. W. 259, an action brought by a city under the power given in its charter with a cross-petition of the railway company in whose interest it was to be closed, to close a portion of a street, which was resisted by property owners. The supreme court of Kentucky reversed the court below and ordered the petition for vacating the street to be dismissed, the position of the court being that "the corporation, whether municipal or private, seeking to appropriate the street to its own use, must resort to the writ of *ad quod damnum*, and under it compensate the owner for the injury sustained." This court, in *Lexington &c. R. Co. v. Applegate*, 8 Dana (Ky.) 289, held this right of property in the streets to be as inviolable as the property in the lots themselves. In *Transylvania University v. City of Lexington*, 2 B. Mon. (Ky.) 25, discussing the constitutional question presented in that case, Robertson, Chief Justice, for the court said:—"As a private right it must, like that of vicinage, be limited by its own nature and end; that is, chiefly by the necessity of access to, and outlet from, the ground of the proprietor." In this

last case it was held that the owner of ground on any street in Lexington has a right, as inviolable as it is indisputable, to the common and unobstructed use of the contiguous highway, so far as it may be necessary for affording him certain incidental easements and services and a convenient outlet to other streets, and of this right the legislature can not deprive him without his consent or a just compensation in money. The doctrine of the text is sustained also by the holding in *Fulton v. Short Route R. &c. Co.*, 85 Ky. 640; s. c. 4 S. W. 332, that the construction of a railroad on a street was not per se an encroachment upon the rights of the abutting landowner; but when deprived of the reasonable use of the street by its construction he may apply to the courts for relief. In *Gargan v. Louisville &c. R. Co.*, supra, it appeared that the persons owning the lots on this street, a part of which it was proposed to vacate in order to go east, where the center of trade lay, would first have to go west to the next street, then north or south to another street, thence east and for this reason the court held their consent was necessary to the closing of the street.

⁴⁴³ *Heiser v. Mayor &c.*, 104 N. Y. 68; s. c. 9 N. E. 866.

in the public only so far as the removal of it is necessary in the process of construction and repair; and the digging of gravel from the bed of a road below grade for use on the surface with the intention of filling up the pit thus made with less valuable earth is a violation of the abutter's rights, for which he may maintain an action against the contractor.⁴⁴⁴ Under a statute giving compensation to the owner of a lot damaged by a change of grade of a street, the cause of action accrues at the time of the physical change of grade, and a purchaser of property upon a street the grade of which is not established, but who is aware at the time that it will be changed, is entitled to damages upon the actual change of the grade.⁴⁴⁵

§ 1215. Interest of abutters in streets.—Any person or corporation having dedicated land to the use of the public, as for a street, is precluded by such appropriation from re-asserting any right to the actual possession of the land, at least so long as it remains in the public use.⁴⁴⁶ As a general rule no one can acquire, by adverse occupation, as against the public, the right to a street or square dedicated to the public use.⁴⁴⁷ Where a municipal corporation has sold lots which have been improved by the grantees, on account of the advantages of right of way over streets bounding their lots, it is neither in the power of the corporation to divest them of their right, nor in the power of the legislature to authorize a re-entry upon such streets and sale of them.⁴⁴⁸ Any conveyance by a city of land which has been dedicated to the purposes of a street is void as against one who has purchased city lots abutting upon those streets, because he is entitled to a right of way over those streets as appurtenant to the land.⁴⁴⁹

⁴⁴⁴ *Robert v. Sadler*, 104 N. Y. 229; s. c. 10 N. E. 428.

⁴⁴⁵ *Borough of Freemansburg v. Rodgers* (Pa.), 8 Atl. 872.

⁴⁴⁶ *Moose v. Carson*, 104 N. C. 431; s. c. 10 S. E. 689; 17 Am. St. 681; *Kennedy v. Jones*, 11 Ala. 63; *Proctor v. Town of Lewiston*, 25 Ill. 153; *Adams v. Saratoga &c. R. Co.*, 11 Barb. (N. Y.) 414; *In re Penny Pot Landing*, 16 Pa. St. 79; *Re Pearl Street*, 111 Pa. St. 565; s. c. 5 Atl. 430; *Grogan v. Town of Hayward*, 4 Fed. 161 (where, by laying off streets, third parties had been induced to buy lots adjacent to them and build on the lots, by an individual grantor. The dedication to the public use was held irrevocable, although the streets had not been for-

mally accepted by the authorities of the town); *Mayor &c. v. United States*, 10 Pet. 662.

⁴⁴⁷ *Hoadley v. City of San Francisco*, 50 Cal. 265; *People v. Pope*, 53 Cal. 437.

⁴⁴⁸ *Adams v. Chicago &c. R. Co.*, 39 Minn. 286; s. c. 39 N. W. 629; *Brooks v. Riding*, 46 Ind. 15.

⁴⁴⁹ *Moose v. Carson*, 104 N. C. 431; s. c. 17 Am. St. 681; 10 S. E. 689. See also, *Pratt v. Law*, 9 Cranch 456-500; *Chaplain v. Brown*, 15 R. I. 579; s. c. 10 Atl. 639; *Sarpy v. Municipality No. 2*, 9 La. An. 597; s. c. 61 Am. D. 221; *City of Port Huron v. Chadwick*, 52 Mich. 320; *Harrison v. Augusta Factory*, 73 Ga. 447.

§ 1216. **Liability of corporation for consequential injuries.**—The Minnesota supreme court have adopted this rule: A municipal corporation is liable for damages caused to private property by grading streets when a private owner of the soil over which the streets are laid would be liable if improving for his own use.⁴⁵⁰ But a city is not liable for wholly failing to provide drainage or sewerage, nor for a mere error of judgment as to the *plan* of drainage, nor for the insufficient size or capacity of drains or gutters for the purpose intended, at least if the adjoining property is not in any worse condition than if no gutters or drains whatever had been constructed.⁴⁵¹ A city is not liable for consequential injuries to adjoining property, resulting from raising the grade of a street, although the result may be to interfere with the flow of surface water, and cause it to accumulate on the premises of another.⁴⁵² The settled doctrine in New Jersey is that the mere incidental diversion of surface water by a municipality in grading and improving its streets, by which the land of an individ-

⁴⁵⁰ O'Brien v. City of St. Paul, 25 Minn. 331; Dyer v. City of St. Paul, 27 Minn. 457; s. c. 8 N. W. 272; McClure v. City of Red Wing, 28 Minn. 186; s. c. 9 N. W. 767; Henderson v. City of Minneapolis, 32 Minn. 319; s. c. 20 N. W. 322.

⁴⁵¹ Alden v. City of Minneapolis, 24 Minn. 254; McClure v. City of Red Wing, 28 Minn. 186; s. c. 9 N. W. 767; Henderson v. City of Minneapolis, 32 Minn. 319; s. c. 20 N. W. 322. In Defer v. City of Detroit, 67 Mich. 346; s. c. 34 N. W. 680, it was held that where the plan adopted by a municipal corporation in constructing a public improvement must necessarily cause an injury to private property equivalent to some appropriation of the enjoyment thereof to which the owner is entitled the municipality is liable; but where the fault found is with the wisdom of the measure, or its sufficiency or adaptability to carry out or accomplish the purpose intended, and where its construction according to the plan adopted invades no private rights, the municipality is not liable; citing City of Detroit v. Beckman, 34 Mich. 125; Ash-

ley v. City of Port Huron, 35 Mich. 296. Cf. Dermont v. Mayor &c., 4 Mich. 435. In Pye v. City of Mankato, 36 Minn. 373; s. c. 31 N. W. 863, it was held that it amounts to a positive trespass, for which a city is liable, when it intercepts the natural flow of surface water, and gathers it up and conducts it in another direction by means of a gutter or other artificial channel, and constructs the gutter of inadequate capacity, in consequence of which the water is cast in large and injurious quantities upon the premises of any property owner. See also, O'Brien v. City of St. Paul, 18 Minn. 176; Kobs v. City of Minneapolis, 22 Minn. 159; O'Brien v. City of St. Paul, 25 Minn. 331; McClure v. City of Red Wing, 28 Minn. 186; s. c. 9 N. W. 767; Hogenson v. St. Paul &c. R. Co., 31 Minn. 224, 226; s. c. 17 N. W. 374.

⁴⁵² Lee v. City of Minneapolis, 22 Minn. 13; Alden v. City of Minneapolis, 24 Minn. 254, 263; O'Brien v. City of St. Paul, 25 Minn. 331; Henderson v. City of Minneapolis, 32 Minn. 319; s. c. 20 N. W. 322.

ual is damaged, does not cause an injury for which redress may be had.⁴⁵³ But where a municipality deliberately enters upon a scheme of drainage in pursuance of which it will collect water from a large area and by artificial means cast it upon private property, through which the land from which the water is to be collected would not otherwise be drained, it threatens a wrong the commission of which equity may restrain by injunction.⁴⁵⁴

§ 1217. **Flowage of surface water from streets.**—The resident owner of a lot fronting upon a public street in a city can not restrain such city from building drains along the side or culverts across such streets in the vicinity, or from grading or otherwise improving the same, merely because such acts, when completed, would greatly increase the flow of surface water upon his land.⁴⁵⁵ In an action for damages done by a flow of water from a street upon the land of a person, caused by the digging of a ditch by a municipality, the person

⁴⁵³ *Town of Union v. Durkes*, 38 N. J. L. 21.

⁴⁵⁴ *Soule v. City of Passaic*, 47 N. J. Eq. 28; s. c. 20 Atl. 346. See *Field v. Inhabitants &c.*, 36 N. J. Eq. 118; s. c. on second appeal, sub nom. *Inhabitants &c. v. Field*, 37 N. J. Eq. 600; *Miller v. Mayor &c.*, 47 N. J. Eq. 62; s. c. 20 Atl. 61, in which it was also held that where the quantity of surface water sent to the point of discharge is increased by an enlargement of the area of drainage, but such enlargement results entirely from making the grade of the streets conform to the grade established by the proper authority, any injury resulting from the increase in the quantity of water discharged at that point is regarded in law as *damnum absque injuria*; but if the municipality, by means of a basin and culvert, discharges all the surface water carried to a particular point in such manner that the water, by its own force, makes a channel through the land of a citizen, a taking of private property for public use occurs; and if no compensation to the owner be provided, the use of his property by the municipality will be enjoined.

⁴⁵⁵ *Heth v. City of Fond du Lac*, 63 Wis. 228; s. c. 53 Am. R. 279; 23 N. W. 495; *Waters v. Village of Bay View*, 61 Wis. 642; s. c. 21 N. W. 811; *Allen v. City of Chippewa Falls*, 52 Wis. 430; s. c. 9 N. W. 284; *Hoyt v. City of Hudson*, 27 Wis. 656; *Turner v. Dartmouth*, 13 Allen (Mass.) 291; *Barry v. Lowell*, 8 Allen (Mass.) 127; *Dickinson v. Worcester*, 7 Allen (Mass.) 19; *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Parks v. Newburyport*, 10 Gray (Mass.) 28. In *Heth v. City of Fond du Lac*, supra, the court said:—"The officers of a municipality improving its streets solely for the public benefit, in an honest, skilful and careful manner, may, at least to a certain extent, exercise their own judgment and discretion as to the location and construction of drains and culverts, the grading and improving of streets, and the direction in which surface water shall be compelled to flow;" citing *Smith v. Gould*, 61 Wis. 31; s. c. 20 N. W. 369; *Harrison v. Board &c.*, 51 Wis. 645-64; s. c. 8 N. W. 731; *Alexander v. City of Milwaukee*, 16 Wis. 264; *Methodist &c. Church v. Mayor &c.*, 6 Gill (Md.) 391; s. c. 48 Am. D. 540.

damaged is entitled to recover the cost of filling up his lot where the flooding of the lot is continuous and the filling is necessary in order to keep out the water.⁴⁵⁶

§ 1218. The same subject continued.—Municipal corporations have a right to bring their streets to grade, and are not ordinarily liable for simply failing to provide culverts or gutters adequate to keep surface water off from adjoining lots below grade; but they are liable where the property of private persons is flooded, either directly or by water being set back, where this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts or sewers, or of the negligent failure to keep the same in repair and free from obstruction, whether the lots are below the grade of the street or not.⁴⁵⁷

⁴⁵⁶ In *Weir v. Borough of Plymouth*, 148 Pa. St. 566; s. c. 24 Atl. 94, it was held that where the necessary effect of digging a ditch is to throw water from the public street upon the land of a private person, the municipality that digs the ditch is not relieved of liability for damage done by such water by the fact that the ditch was dug upon the land of a third person with that person's consent. In *Cooper v. City of Dallas*, 83 Tex. 239; s. c. 18 S. W. 565, an action for damages to property resulting from an overflow caused by a change of grade of a street and insufficiency of a sewer, where it appeared that if plaintiff's premises had been raised to the new grade, which would have cost him \$500, the overflow would have been prevented, and that the value of his property was greatly increased by the grading of the street, it was held error to direct a verdict for the city on the ground of plaintiff's contributory negligence in failing to raise his property to the new grade.

⁴⁵⁷ 2 *Dillon Munic. Corp.*, § 1051. In *City of Denver v. Rhodes*, 9 Colo. 554; s. c. 13 Pac. 729, the holding was that while a municipal corporation could not be compelled to provide waterways of sufficient capac-

ity to carry off all surface waters likely to accumulate in the streets, yet such as the city had provided it was bound to keep in repair and free from obstructions, so that, up to their original capacity, they should be efficient. In *Rutherford v. Village of Holly*, 105 N. Y. 632; s. c. 11 N. E. 818; reversing s. c. 37 Hun (N. Y.) 639, it was held that if a village, in improving a highway, by the construction of gutters and a sluice or sewer, does not increase the flow of surface water on an adjoining lot beyond what it was before the improvement, it can not be compelled, by a mandatory injunction at the instance of the lot owner, to close the sluice. Cf. *Noonan v. City of Albany*, 79 N. Y. 470, 476. In *Rice v. City of Flint*, 67 Mich. 401; s. c. 34 N. W. 719, the city was held liable for so constructing abutments to a bridge across a river as to cause the water to set back, overflow and discharge into the area, basement, etc., to the injury of the buildings on the premises of the plaintiff. See also, *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Inman v. Tripp*, 11 R. I. 520; *Ross v. Clinton*, 46 Iowa 606; *Ashley v. City of Port Huron*, 35 Mich. 296; *Pennoyer v. City of Saginaw*, 8 Mich. 534.

§ 1219. **Flowage of water by construction of a levee.**—Where a statute authorized a city to build a levee along the banks of a river running through the city for the purpose of reclaiming lands subject to overflow in times of freshet, and to protect its highways from such overflow, and a city constructed the levee along the lands of an abutting owner in such a manner as to close several natural channels by which the waters of the river had been passing through the lands involved, and his lands being subsequently overflowed as a result of this construction, the city was held liable to him for the damage caused by the compressed and accumulated waters of the river overflowing his lowlands;⁴⁵⁸ and the city could not justify the submerging and destruction of valuable farms on the ground that the works causing the injury were constructed under a statute specially intended for their protection from floods;⁴⁵⁹ and the landowner did not waive his right to such damages, nor was he stopped from claiming them, by his having favored the work and offered to give the right of way for the levee or by his afterward refusing to give such right of way until the levee was extended so as to protect his lands. As the building of the levee by the city along the upper portion of his farm and refusing to extend it made it necessary for him to build a levee for the protection of his lowlands, the landowner had a right to do the work and prove what it would cost to do it, and recover the same as a part of his damages.⁴⁶⁰

§ 1220. **Damages for change of grade.**—Damages having once been assessed and paid to a property owner for injury to his property resulting by a change of grade in a street, the corporation would not be liable to him because the change proves to have cut off all access to his lot, as it must be presumed that the injury was covered by the

⁴⁵⁸ *Barden v. City of Portage*, 79 Wis. 126; s. c. 48 N. W. 210. See also, *Spelman v. City of Portage*, 41 Wis. 144, an action for damages occasioned by the construction of a wide embankment on the banks of the same river closing natural channels, and causing the overflow of lands. In that case the court said:—"We know of no principle of law which justified the city in making an embankment without proper culverts or drains, and thus damming up the waters and causing them to destroy the plaintiff's property."

⁴⁵⁹ *Barden v. City of Portage*, 79 Wis. 126; s. c. 48 N. W. 210. See also, *Folsom v. Apple River L. D. Co.*, 41 Wis. 602; *Hackstack v. Keshena Imp. Co.*, 66 Wis. 439; s. c. 29 N. W. 240; *Smith v. Gould*, 61 Wis. 31; s. c. 20 N. W. 369; *Pettigrew v. Village of Evansville*, 25 Wis. 223; *Arimond v. Green Bay &c. Canal Co.*, 31 Wis. 316.

⁴⁶⁰ *Barden v. City of Portage*, 79 Wis. 126; s. c. 48 N. W. 210. See also, *Thompson v. Milwaukee &c. R. Co.*, 27 Wis. 93; *Price v. Milwaukee &c. R. Co.*, 27 Wis. 98.

damages awarded.⁴⁶¹ Where the constitution provides that private property shall not be taken or damaged for public use, except on due compensation, the city is liable for materially changing the grade in case valuable improvements have been made according to the established grade.⁴⁶² Where the statute provides for damages growing out of a change of grade, and improvements are made with reference to the grade established, the owner is entitled to recover though the change is to the natural grade.⁴⁶³ Damages growing out of the grading of a street should include benefits and injuries to the property.⁴⁶⁴ It is the actual physical change in grade that should be taken into consideration and not the reduced value caused by the passage of the ordinance.⁴⁶⁵ The cost of changes and improvements rendered necessary by the change in grade is not admissible as a substantive cause of damage, although admissible as effecting the question of benefits.⁴⁶⁶ Where by reason of the change in the grade evidence is admissible to show the cost of filling to make a lot available for use at the new grade it is admissible, in connection with the other circumstances, in order to determine the value before and after the change.⁴⁶⁷ Increase in value from other causes than a change of grade is not to be taken into consideration. General benefits common to all property on the street are not to be considered, but only special benefits to the individual property.⁴⁶⁸ A husband who erects improvements on the land of his wife who was in possession can not recover damages growing out of a change in the grade.⁴⁶⁹ Damages caused by a change in grade can not be offset by an increase in value to the property in common with the entire neighborhood growing out of the abatement of a nuisance by the improvement.⁴⁷⁰ Where a city and railroad company agreed that the railroad should be raised and the street grade lowered one who is damaged by reason of his access to the track being more ex-

⁴⁶¹ *Keil v. City of St. Paul*, 47 Minn. 288; s. c. 50 N. W. 83.

⁴⁶² *City of Vicksburg v. Herman*, 72 Miss. 211; s. c. 16 So. 434. And see *Rudderow v. City of Philadelphia*, 166 Pa. St. 241; s. c. 31 Atl. 53; *City of Bloomington v. Pollock*, 141 Ill. 346; s. c. 31 N. E. 146; *Ryney v. City of Chicago*, 102 Ill. 64; *City of Joliet v. Blower*, 155 Ill. 414; s. c. 40 N. E. 619; *Chicago & C. R. Co. v. Ayers*, 106 Ill. 511; *City of Houston v. Hutchins* (Tex. Civ. App.), 33 S. W. 269.

⁴⁶³ *Ressegiou v. City of Sioux City*, 94 Iowa 543; s. c. 63 N. W. 184.

⁴⁶⁴ *City of Dallas v. Kahn*, 9 Tex. Civ. App. 19; s. c. 29 S. W. 980.

⁴⁶⁵ *Eachus v. Los Angeles & C. R. Co.*, 103 Cal. 614; s. c. 37 Pac. 750.

⁴⁶⁶ *Chase v. City of Portland*, 86 Maine 367; s. c. 29 Atl. 1104.

⁴⁶⁷ *Patton v. City of Philadelphia*, 175 Pa. St. 88; s. c. 34 Atl. 344.

⁴⁶⁸ *Cole v. City of St. Louis*, 132 Mo. 633; s. c. 34 S. W. 469.

⁴⁶⁹ *Nebraska City v. Northcutt*, 45 Neb. 456; s. c. 63 N. W. 807.

⁴⁷⁰ *Rudderow v. City of Philadelphia*, 166 Pa. St. 241; s. c. 31 Atl. 53.

pensive is not entitled to recover of the city.⁴⁷¹ Where a city changes the grade of a street it is not liable to the abutting landowner for the damages resulting therefrom to a house erected on the land after the change in the grade was authorized.⁴⁷² Under the Pennsylvania statute relating to boroughs, the court of quarter sessions having jurisdiction of a grievance suffered by the owner of a lot in a borough growing out of the enactment of an ordinance changing the width of a sidewalk in front of his property, the final order of that court in such a controversy is conclusive and not reviewable by the supreme court.⁴⁷³ A village is liable to abutting owners for damages occasioned by a change in the grade of its streets under the statutes of New York, where the change is made, with its permission, by a railroad company.⁴⁷⁴ The measure of a lot-owner's damage by reason of the

⁴⁷¹ *In re Tucker & Frankford Sts.*, 166 Pa. St. 336; s. c. 31 Atl. 117.

⁴⁷² *Groff v. City of Philadelphia*, 150 Pa. St. 594; s. c. 24 Atl. 1048. In *O'Brien v. City of Philadelphia*, 150 Pa. St. 589; s. c. 24 Atl. 1047, it was held that under the constitutional provision that "municipal and other corporations . . . shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements," one who has built a house on his lot in conformity with the existing physical grade of an old public highway in front of the lot might recover from the city damage to the lot resulting from a change in the grade. See also, *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *New Brighton Borough v. Peirsol*, 107 Pa. St. 280; *Ogden v. City of Philadelphia*, 143 Pa. St. 430; s. c. 22 Atl. 694; *City of Philadelphia v. Wright*, 100 Pa. St. 235; *Jones v. Borough of Bangor*, 144 Pa. St. 638; s. c. 23 Atl. 252, in which case *McCullum, J.*, said:—"Injuries to abutting property, caused by a change of grade, or alteration or enlargement of the street, do not necessarily result from the opening of it to public travel. It is true that in a proceeding to recover damages

caused by the opening and grading of a street the party must submit his whole claim, embracing consequential as well as direct injuries; but where the grading occurs as a separate act of the public authorities and so long after the opening of the street that the assessment of damages at the time of the appropriation can not include those resulting from the grading, the latter may be ascertained by a second view;" citing *Pusey v. Allegheny City*, 98 Pa. St. 522.

⁴⁷³ *Appeal of Borough of Chartiers (Pa.)*, 8 Atl. 181.

⁴⁷⁴ *In re Stack*, 50 Hun (N. Y.) 385; s. c. 3 N. Y. S. 231. In *Davis v. City of Crawfordsville*, 119 Ind. 1; s. c. 21 N. E. 449, it was held that a complaint alleging that the city had opened new streets, some of them parallel to and some intersecting the street in which complainant's property was situated, and that it so established the grade of such streets that the surface drainage from a large part of the city was diverted into the street on which his property was situated and cast on his land which was previously dry and not subject to overflow, did not state a cause of action, as the allegations did not positively show that complainant was injured

grading of a street, where he has been induced to waive objection to the progress of the work on the condition that the work should be done in a certain manner, and the work is not done as promised, is the loss sustained by him on account of the work not being done as promised.⁴⁷⁵

§ 1221. The same subject continued—Connecticut rule.—The Connecticut supreme court lay down this as the rule whether or not an abutting landowner can claim damages on account of a change of grade of a street by a municipality:—"[Such an abutter] can sustain no damage to his property unless the exercise of some beneficial right, incident or appurtenant to such property, has been impeded or impaired. It must, therefore, appear that there is, as appurtenant to such property, the right of approach, not outside of but within the limits of the public street, in a different manner from that of the public in general,—the right of access below the surface,—to use the sidewalk in a manner for which the general public have neither the occasion nor the power to use it; and in such a manner as is calculated to add to the risk of the public and to the liability of the [municipality]."⁴⁷⁶

in consequence of the city's negligence in grading the streets.

⁴⁷⁵ *City of Jeffersonville v. Myers*, 2 Ind. App. 532; s. c. 28 N. E. 999. In *Stewart v. City of Council Bluffs*, 84 Iowa 61; s. c. 50 N. W. 219, an instruction that the measure of damages in an action for damages caused by a change of grade of a street was the cost of restoring the property to the exact condition it was in before the change of grade, less resulting benefits, was held to be misleading, as not plainly and directly stating the rule that the difference in value before and after the change of grade is the measure of recovery.

⁴⁷⁶ *Shelton Co. v. Borough of Birmingham*, 61 Conn. 518; s. c. 24 Atl. 978, in which, upon the doctrine as announced in the text, the court held that the fact that such change of grade rendered useless an abutting owner's steps which projected into the sidewalk, and which he had used without objection for twen-

ty years as a means of access to his basement, was not an element of special damage, the borough charter conferring "sole and exclusive authority and control over all streets," and plaintiff having acquired no right to obstruct any part of the sidewalk with steps. See also, *Littlefield v. City of Norwich*, 40 Conn. 406; *New Haven v. Sargent*, 38 Conn. 50-56; *Woodruff v. Neal*, 28 Conn. 165, as to what a municipality may do looking to its liability for injuries to persons growing out of its control of streets; *Beardsley v. City of Hartford*, 50 Conn. 529, in which the court said:—"The city had no power to erect a railing that would simply fence in, in front and on the sides, the basement stairway, because "it would have had to go upon private ground to do this; and that it had no right to do. It could only make a railing along the outer line of the sidewalk, in front of the stairway."

§ 1222. The same subject continued—"Damage" clause in constitutions.—If consequential damages result to property owners from raising or lowering the grade of a street by a municipality, it is not a taking of private property for public use under the provisions of the constitution, and if a municipality act under authority of law in making a change of grade and with due care, it is not liable for consequential damages to abutting property unless made so by statute or constitutional provision.⁴⁷⁷

§ 1223. The same subject continued.—Measure of damages.—When city property is damaged by reason of the grading of the street upon which it abuts, the owner is entitled to remuneration. The difference in the market value of the property with the improvement and that without it, not considering general benefits shared by the general public, is the rule of compensation. In such case special benefits to the property directly attributable to the improvement may be set off against the damages sustained by the owner.⁴⁷⁸ The market value of such property is not what that property is worth solely for the purpose to which it is devoted, but the highest price it will bring for any or all uses to which it is adapted and for which it is available.⁴⁷⁹

§ 1224. Damages by change of grade further considered.—The owner of a city lot abutting on a street is entitled to recover damages from the city for injury to his property caused by grading the street, though the street has never been graded before, where the constitution of the state provides that "private property shall not be taken or damaged for public use without just compensation."⁴⁸⁰ The measure of

⁴⁷⁷ *Smith v. City of Eau Claire*, 78 Wis. 457; s. c. 47 N. W. 830. See also, *Alexander v. City of Milwaukee*, 16 Wis. 264; *Dore v. City of Milwaukee*, 42 Wis. 108; *Wallich v. City of Manitowoc*, 57 Wis. 9; s. c. 14 N. W. 812; *Dillon Munic. Corp.*, §§ 989, 990. The Wisconsin supreme court distinguishes the cases cited to the contrary from Illinois, Nebraska, Georgia, California, Missouri and West Virginia in this, that the constitution of each of those states provides that private property shall not be taken or damaged for public use without just compensation therefor, and that the cases cited enforced dam-

ages in such cases solely on the ground that the words "or damaged" were contained in the respective constitutions of those states.

⁴⁷⁸ *Lowe v. City of Omaha*, 33 Neb. 587; s. c. 50 N. W. 760; *Schaller v. City of Omaha*, 23 Neb. 325; s. c. 36 N. W. 533; *City of Omaha v. Kramer*, 25 Neb. 489; s. c. 41 N. W. 295.

⁴⁷⁹ *Lowe v. City of Omaha*, 33 Neb. 587; s. c. 50 N. W. 760. See also, *In re Furman St.*, 17 Wend. (N. Y.) 649; *Boom Co. v. Patterson*, 98 U. S. 403; *King v. Minneapolis & C. Co.*, 32 Minn. 224; s. c. 20 N. W. 135; *Goodin v. Canal Co.*, 18 Ohio St. 169.

⁴⁸⁰ *City of Bloomington v. Pollock*,

damages to the property of an owner of an abutting lot, where the grading of a street has been paid for in part by a special tax on the property, is the amount the property has been injured less the benefits, if any, accruing to the property from grading the street, but from such benefits should be subtracted the sum paid as a special tax on the property.⁴⁸¹

§ 1225. **The same subject continued.—Common-law action.**—If a city orders an improvement—as a change of grade of a street, for instance—and does not follow the requirements of the statute empowering its authorities to order such improvements in every particular, as to notice, etc., to owners of abutting lands, the owner of the property, if it sustains damages as a result of such improvement, can maintain his action against the corporation for such damages where the statute has allowed damages. And the corporation having failed to give proper notice as directed by the statute, and to observe any other re-

141 Ill. 346; s. c. 31 N. E. 146. The supreme court of Illinois said:—"It would seem then, in respect to the legal liability of a municipal corporation for damage done in grading its streets, that it is wholly immaterial from a legal standpoint whether such grading is done under an ordinance establishing a grade in the first instance, or under an ordinance abandoning the grade; for even if there be a prior ordinance it does not have the elements of a contract, does not impose a legal duty to level or bring the streets to the grade fixed by it, and does not prevent the municipality from placing its streets at any grade that it may thereafter ordain. In other words, either with or without a prior ordinance, the city is free to establish by ordinance any grade it sees fit, subject only to the qualification that such grade is not so wholly unreasonable as to render the ordinance void."

⁴⁸¹ City of Bloomington v. Pollock, 141 Ill. 346; s. c. 31 N. E. 146. Upon this point the supreme court adopts the language of Wall, J., of the appellate court, in City of Bloomington v. Pollock, 38 Ill. App. 133,

which was in the case above affirmed, as follows:—"The case is one where plaintiff seeks the 'just compensation' guaranteed by the constitution where private property has been damaged for public use. In respect to property not taken but damaged merely, the compensation is the amount of the damage less the benefit conferred. Now should the benefit be considered without regard to the cost of it to the owner of the property? Manifestly he is not benefited the whole sum of benefit conferred, because he has been compelled to pay a certain amount by way of assessment in order to obtain whatever benefit is attributable to the improvement. It is the net benefit which shall be deducted from the damage produced by the improvement, and the sum remaining will represent the 'just compensation' which he will be entitled to. This will usually be more than the difference in market value. At least it is so theoretically in all cases, for it is presumable that the market value is diminished to the extent of the damage less the benefit."

quirements of the statute, can not have such action dismissed on the ground that the statute provided for an appeal from the award of damages by the commissioner on damages to property and the property owner had failed to make such an appeal.⁴⁸²

§ 1226. **Estoppel of landowner.**^{482a}—A property owner petitioning the governing board of a municipality to order an improvement, who also stands by and sees the work in progress without a word of dissent, is estopped from claiming any remuneration from the municipality for the damage his property may have sustained by reason of the work.⁴⁸³ A property owner who has consented to a change of grade of a street and has signed a petition for the change, is estopped thereby from setting up a claim for damages on the ground that the petition was not signed by property holders owning a majority of front feet of property abutting upon the part improved.⁴⁸⁴ Where commissioners for assessments of damages under the Missouri statutes for opening a public road on petition, in the

⁴⁸² *City of Topeka v. Sells*, 48 Kan. 512; s. c. 29 Pac. 604, in which the court said:—"Notice to the owner is of the essence of all proceedings affecting property, and the vital complaint here is that the notice given to [the property owner] did not inform him that the proposed change of the grade of the street in front of his property was to be lowered, but did acquaint him with the fact that it was to be slightly raised, and this was in effect a notice to him that his property would not be materially injured by such change. When the change was made, however, and the street made to conform thereto, it was found that the street in front of his building was lowered eighteen inches. The city, therefore, did not give him notice of what they intended to do, nor did the city authorities conform to the terms of the notice given." See also, as to liability of corporation to common-law action for damages, *Healey v. City of New Haven*, 49 Conn. 394; *City of Elgin v. Eaton*, 83 Ill. 535; *People v. McRoberts*, 62 Ill. 38; *Clayburgh v. City of Chicago*, 25 Ill. 535; *City of Lafayette v. Wortman*, 107 Ind. 404; s. c. 8

N. E. 277. Under the statutes of Indiana, changes of grade of streets can not be made lawfully without first having damages to abutter's property assessed and tendered: *City of Logansport v. Pollard*, 50 Ind. 151; *City of Kokomo v. Mahan*, 100 Ind. 242; *Mattingly v. City of Plymouth*, 100 Ind. 545. A change of grade of a street without such an assurance and tender of damages is therefore an affirmative wrong or misfeasance and an action for damages lies: *Noyes v. Town of Mason City*, 53 Iowa 418; s. c. 5 N. W. 593; *Hempstead v. City of Des Moines*, 52 Iowa 303; s. c. 3 N. W. 123; *Dore v. City of Milwaukee*, 42 Wis. 108; *Wright v. Corporation of Georgetown*, 4 Cranch C. C. 534.

^{482a} See 1670 et seq., post.

⁴⁸³ *Cross v. City of Kansas*, 90 Mo. 13; s. c. 1 S. W. 749. See also, *City of Burlington v. Gilbert*, 31 Iowa 356; *Motz v. City of Detroit*, 18 Mich. 496; *Palmer v. Stumph*, 29 Ind. 329; *Hellenkamp v. City of Lafayette*, 30 Ind. 192; *Herman Estoppel*, § 554.

⁴⁸⁴ *Cross v. City of Kansas*, 90 Mo. 13; s. c. 1 S. W. 749.

exercise of their power to take into consideration the advantages as well as the disadvantages resulting from the establishment of the road to the land over which it runs, have determined that the benefit peculiar to the land not taken is a full equivalent for the land taken, and that the owner of it is not entitled to any damages, the owner of such land can not enjoin the establishment of the road on the ground that he has not been allowed any damages.⁴⁸⁵ A commissioner of highways has no right, by virtue of his office, to take materials from the adjoining land to repair the road without the consent of the landowner.⁴⁸⁶ A taxpayer is not estopped from asserting a jurisdictional defect in proceedings for the improvement of a highway when he had no knowledge of the defect at the time the proceedings were instituted, nor until after the improvement had been completed.⁴⁸⁷

§ 1227. **Actions by abutters—Pleading, etc.**—It has been held in Alabama that a complaint alleging that a city wantonly, wrongfully and illegally cut down the sidewalks adjoining plaintiff's lot, so as to injure and destroy its value, was not demurrable for failure to state that such alterations were not required to render the street ordinarily safe and convenient, where the city had general power to alter its streets with that view, without incurring liability for injuries to abutting property.⁴⁹⁰ A petition in an action against a city for damages to the property of the plaintiff caused by a street improvement alleging that he was the owner of a lot on a certain street; that said city had cut down, graded and improved without any condemnation proceedings, without making of any estimate of the cost of the work, without any petition having been presented to the city council, or any resolution having been passed or entered on the journal, or any attempt to ascertain the amounts chargeable against the lots fronting on said street or the benefits to accrue to the owners, and without any lawful assessment of the same, or any notice of such assessment,—has been held in Wisconsin, on demurrer, to state no cause of action.⁴⁹¹ An

⁴⁸⁵ *Lingo v. Burford*, 112 Mo. 149; s. c. 18 S. W. 1081; following *Daugherty v. Brown*, 91 Mo. 26; s. c. 3 S. W. 210. In *Stewart v. Board &c.*, 45 Kan. 708; s. c. sub nom. *Stewart v. Hovey*, 26 Pac. 683, it was held that though a landholder be one of the signers of a petition for the improvement of county roads, which the Kansas statute requires shall be signed by a majority of the resident landholders within the termini mentioned, he is not thereby es-

topped from asserting a jurisdictional defect for lack of sufficient signatures.

⁴⁸⁶ *Duryea v. Smith*, 16 N. Y. S. 688.

⁴⁸⁷ *Barker v. Board &c.*, 45 Kan. 681; s. c. sub nom. *Barker v. Hovey*, 26 Pac. 585.

⁴⁹⁰ *City Council &c. v. Townsend*, 84 Ala. 478; s. c. 4 So. 780.

⁴⁹¹ *Meinzer v. City of Racine*, 68 Wis. 241; s. c. 32 N. W. 139.

instruction to a jury that they should consider "the improvement of the street as contemplated by the ordinance changing the grade" was held not to be error in an Iowa case; for although the ordinance did not in terms allude to an improvement, such improvement was the purpose of the city council and was in fact accomplished. And there was no prejudice to the plaintiff by an instruction that by the change of grade a building was left "some two feet below the newly established grade," the fact being that the building was two and one-half feet below the grade, and the court did not intend to make an exact statement.⁴⁹²

§ 1228. **Questions for the jury.**—In Alabama it has been held, under former constitutional provisions that private property could not be taken or applied "by municipal corporations for public use" without making just compensation, that this excluded a liability for consequential injuries where there was no taking or appropriation of the property itself. But the provision in the present constitution which requires corporations invested with the power of taking private property for public use "to make just compensation for the property taken, injured or destroyed by the construction or enlargement of its works, highways or improvements" should be liberally construed in favor of the citizen.⁴⁹³ Under this constitutional provision, a city is liable for

⁴⁹² *McCash v. City of Burlington*, 72 Iowa 26; s. c. 33 N. W. 346. In this case a verdict that the property was not injured, but rather was benefited by the change, was held to have been supported by evidence showing that by the change in the grade the waters of a stream running through the street were provided for so as to avoid the liability to overflow.

⁴⁹³ *City Council &c. v. Townsend*, 80 Ala. 489; s. c. 2 So. 155. And, upon this idea, the court held that if one damaged is entitled to recover compensation for the injury to his property, the measure of his damages is the difference in the market value of his lot before and after the sidewalk was cut down; and neither the falling of his brick wall, nor the apprehended undermining of his house by subsequent rains, could be considered in estimating the damages; also that a

material change in a street, caused by a contingency which could not have been reasonably and fairly foreseen at the time of the original taking, or made merely because the corporate authorities may judge that the public convenience would be thereby increased, or the general appearance of the streets improved, if injury is thereby caused to the adjoining premises, is a new injury for which compensation may be claimed; and that, as whether the cutting down of a sidewalk adjacent to the plaintiff's lot to the level of the street, fifteen feet below, was a construction of the highway within the meaning of the constitutional provision, was a question of fact for the decision of the jury, it was error to instruct them that the plaintiff was entitled to recover if his property was injured, without regard to the circumstances, or character of the alteration. Such

damages to real estate caused by cutting down the adjacent sidewalks, which produces such a material change as could not have been reasonably foreseen at the time of the original dedication of the street, or if done merely to increase the public convenience above the ordinary standard of "useful, convenient and safe," or for ornamentation.⁴⁹⁴

damages must be confined to such as result directly from cutting down the street, and not include such as are consequential.

⁴⁹⁴ *City Council &c. v. Townsend*, 84 Ala. 478; s. c. 4 So. 780, holding further that whether cutting down the sidewalks was such an injury to plaintiff's property was a mixed question of law and fact for the jury, under proper instructions and with particular regard to the local situation of the property. So, in *Conklin v. City of Keokuk*, 73 Iowa 343; s. c. 35 N. W. 444, the Iowa supreme court held that under the provision of the code that "when any city or town shall have established the grade of any street or alley, and any person shall have built or made any improvement on such street or alley, according to the established grade thereof, and such city or town shall alter such

established grade in such a manner as to injure or depreciate the value of said property, said city or town shall pay the amount of the damages caused by the alteration," the question whether improvements have been made "according to the established grade" is one of fact for the jury; and that an instruction that if the respondent's intestate "intentionally built his improvements above the grade line as established by the ordinances of the city, this would be building according to established grade, and with reference thereto, and to correspond with it, within the meaning of the statute," was erroneous, as it made the question as to whether the improvements were made according to the grade depend entirely upon the intention of the builder, and a verdict thereupon in favor of the person damaged must be set aside.

CHAPTER XXVIII.

LOCAL OR SPECIAL ASSESSMENTS.

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§ 1228a. **Special assessments defined—Nature of.**—A special assessment, or local assessment as it is frequently called, is a species of taxation imposed by municipalities for the purpose of local improvement, and is based upon the assumption that the property in the locality of a proposed improvement will be specially and peculiarly benefited thereby by which a duty is imposed upon the owners to contribute an amount in payment of the cost of the improvement equal to the benefits received. There are manifestly many improvements in which the inhabitants of a municipality in the aggregate are but remotely interested, but which add materially to the value of the neighboring property as well as to the convenience, safety and enjoyment of local residents. Special assessments rest upon the ground that specials burdens may be imposed for special or peculiar benefits accruing from public improvements.¹ It is obvious that in a matter of local improvement a burden ought not to be imposed on the whole for the benefit of a few; in other words, general taxation for merely local purposes is not only unjust, but is not a legitimate function of government.² The exercise of the power of local or special assessment has been attempted to be justified upon the ground that it was a part of the police power and therefore not in violation of the restrictions requiring uniformity of taxation; but the reasons for basing it upon this ground are not satisfactory, and in some jurisdictions have been abandoned.³ Neither is the reasoning logical or well founded in those cases where the doctrine is sought to be established that a special assessment is not a tax. It has every feature of a tax, in the source of power exercised, the manner of imposition, the purpose and objects sought to be accomplished, excepting only that all inhabitants who are property owners are not affected by it, but only those who are benefited by the improvement. Instead of special

¹ *Norwood v. Baker*, 172 U. S. 269; s. c. 19 S. Ct. 187; *Mobile Co. v. Kimball*, 102 U. S. 691; *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190; s. c. 3 S. Ct. 293; *Bauman v. Ross*, 167 U. S. 548; s. c. 7 S. Ct. 966.

² *Municipality v. Dunn*, 10 La. An. 57; *Lockwood v. City of St. Louis*, 24 Mo. 20; *City of Raleigh v. Peace*, 110 N. C. 32; s. c. 14 S. E.

512; *City of Wilmington v. Yopp*, 71 N. C. 76; *Cain v. Commissioners*, 86 N. C. 8; *Busbee v. Commissioners*, 93 N. C. 143; *Cooley Const. Lim.* 498, 506.

³ *Palmer v. Way*, 6 Colo. 106; *Wilson v. Chilcott*, 12 Colo. 600; s. c. 21 Pac. 901; *City of Denver v. Knowles*, 17 Colo. 204; s. c. 30 Pac. 1041.

assessments being an infraction of the laws recognizing uniformity in assessments they are, in fact, in perfect harmony therewith, imposing as they do, upon the abutting owner, who is directly interested in the improvement, the expense thereof to the extent of his benefits. Special assessments in many cases are not a tax, for municipal purposes, but as to the locality affected thereby, as between the municipality and the property owner, they are in every essential particular taxation. A special assessment for street paving is not a tax for city purposes,⁴ and is not for the benefit of the entire city.⁵ Local assessments can only be imposed to pay for local improvements clearly conferring special benefits on property assessed and to the extent of those benefits only.⁶ The popular, as well as legal, signification of this term has always indicated those special and local impositions upon the property in the immediate vicinity of an improved street which are necessary to pay for the improvements, and which are laid with reference to the special benefits to such property.⁷ They are special and local impositions upon property in the immediate vicinity of municipal improvements, such as grading and paving streets, which are necessary to pay for the improvements and are laid with reference to the special benefits which the property is supposed to have derived from the expenditure.⁸ Hence a special assessment can not be made for constructing a town hall, a court-house, market house, water-works plant or any similar improvement for the general benefit of the inhabitants of the municipality.⁹ Water and sewer pipes connecting buildings in a street with mains are local improvements.¹⁰ Owing to the nature of special assessments, as indicated above, statutes and charters generally provide some method, by petition, or otherwise, as initial or preliminary steps to the institution of special assessment proceedings. The desire of those interested in the improvement and upon whom the burden will rest is, or should be, in all cases ascertained, and as a rule every opportunity is afforded for a hearing as to the nature of the improvement, the cost thereof, and intermediate steps, by the property owner, which is rarely done, or considered necessary in matters of general taxation. "The only essential elements of a 'local improvement' are those which the term itself implies, namely, that it shall benefit the property on which the cost is assessed in a manner

⁴ *Allen v. City of Davenport*, 107 Iowa 90; s. c. 77 N. W. 532.

Chamberlain v. City of Cleveland, 34 Ohio St. 551.

⁵ *Hanscom v. City of Omaha*, 11 Neb. 37.

⁸ *Hale v. City of Kenosha*, 29 Wis. 599; *Dorgan v. City of Boston*, 12 Allen (Mass.) 223.

⁶ *Hammett v. Philadelphia*, 65 Pa. St. 146; *Washington Avenue, In re*, 69 Pa. St. 352.

⁹ *Village of Morgan Park v. Wisconsin*, 155 Ill. 262; s. c. 40 N. E. 611.

⁷ *Hill v. Higdon*, 5 Ohio St. 243;

¹⁰ *Palmer v. City of Danville*, 154 Ill. 156; s. c. 38 N. E. 1067.

local in its nature and not enjoyed by property generally in the city."¹¹ If it renders the property more attractive and comfortable, and hence more valuable for use,—then it is an improvement. That the regular and systematic sprinkling of a street has this effect on the property fronting on it is a matter of common knowledge.

§ 1229. **Express legislative authority requisite.**—Municipal authorities can not levy an assessment for an improvement without express legislative permission.¹² The power can not be inferred from the general welfare clause in a charter;¹³ nor from the ordinary grant of power to levy taxes;¹⁴ nor from the power to make improvements.¹⁵ And the language of the statute or charter conferring authority will be strictly construed and confined to cases that are clearly and unmistakably within its scope.¹⁶ Authority to pave includes all that is necessary, usual or fit in paving.¹⁷ But it would not sustain an assessment for grading preparatory to paving.¹⁸

¹¹ *State v. Reis*, 38 Minn. 371; s. c. 38 N. W. 97.

¹² *State v. Mayor &c.*, 71 Wis. 502; s. c. 37 N. W. 809; *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468; *Drake v. Phillips*, 40 Ill. 388; *Flewelling v. Proetzel*, 80 Tex. 191; s. c. 15 S. W. 1043.

¹³ *Mayor &c. v. Hartridge*, 8 Ga. 23; *Green v. Ward*, 82 Va. 324; *Board &c. v. Taylor*, 99 N. C. 210; s. c. 6 S. E. 114; *Mays v. City of Cincinnati*, 1 Ohio St. 268; *Lott v. Ross*, 38 Ala. 156; *City of Cincinnati v. Bryson*, 15 Ohio 625.

¹⁴ *Cooley Taxation* (2d ed.), 609; citing *Sharp v. Speir*, 4 Hill (N. Y.) 76; *First Presbyterian Church v. City of Fort Wayne*, 36 Ind. 338; *Appeal of Powers*, 29 Mich. 504; *Hitchcock v. Galveston*, 96 U. S. 341.

¹⁵ *City of Fairfield v. Ratcliff*, 20 Iowa 396, where it was decided that power "to regulate and improve sidewalks" did not authorize a special assessment; *Mayor &c. v. Harwood*, 32 Md. 471; *Wright v. City of Chicago*, 20 Ill. 252; *Columbia v. Hunt*, 5 Rich. (S. C.) 550. See also, *Bucknall v. Story*, 36 Cal. 67; *Wilhams v. Mayor &c.*, 2 Mich. 560; *City Council &c. v. Dunbar*, 50 Ga. 387; *Gridley v. City of Bloomington*, 88 Ill. 555.

¹⁶ *Reed v. City of Toledo*, 18 Ohio 161; *Walker v. District of Columbia*, 6 Mackey 352; s. c. 12 Cent. R. 408; *Allentown v. Henry*, 73 Pa. St. 404; *City Council v. Murphey*, 79 Ga. 101; s. c. 3 S. E. 326; *Vance v. City of Little Rock*, 30 Ark. 435, 439; *Nelson v. City of Laporte*, 33 Ind. 258; *Caldwell v. Rupert*, 10 Bush (Ky.) 179, 182. "The power must be clear, plain and undoubted:" *Dillon, J.*, in *McNamara v. Estes*, 22 Iowa 246. See also, *Thompson v. Schermerhorn*, 2 Seld. (N. Y.) 92; *Clark v. City of Davenport*, 14 Iowa 494; *Lake v. Trustees &c.*, 4 Denio (N. Y.) 520; *Howell v. City of Buffalo*, 15 N. Y. 512; *Manice v. Mayor &c.*, 8 N. Y. 120; *Kyle v. Malin*, 8 Ind. 34, 37; *Clark v. City of Des Moines*, 19 Iowa 199; *Meech v. City of Buffalo*, 29 N. Y. 198; *Scovill v. City of Cleveland*, 1 Ohio St. 126.

¹⁷ *In re Burmeister*, 76 N. Y. 174; *Bigelow v. Inhabitants &c.*, 25 N. J. L. 297. Includes the paving of a cross-walk: *Matter of Burke*, 62 N. Y. 224. Whether or not curbstones are ordinarily used in paving sidewalks is a question of fact for the jury: *Schenley v. Commonwealth*, 36 Pa. St. 29.

¹⁸ *Green v. Ward*, 82 Va. 324.

§ 1230. **A continuing power.**—Unless restrained by the charter, under which the authority to impose special assessments is granted, that power is not spent when one improvement is made. It is a continuing power, and whenever its exercise becomes again necessary by reason of the destruction or inutility of the original improvement, it may be again exerted.¹⁹

§ 1231. **Purposes for assessment illustrated.**—No decision has ever attempted to enumerate the purposes for which special assessments may be levied, for the obvious reason that it is impossible to do so. The following are some of the purposes for which special assessments have been held to be proper: Opening streets;²⁰ for grading streets;²¹ for paving, repaving and other improvements of that character;²² altering and extending

Necessary excavations to prepare the street for new paving material were held not to constitute a "grading" in *Gibson v. Kayser*, 16 Mo. App. 404. Whether certain work is "reconstruction" or "repairs" is a mixed question of law and fact: *O'Meara v. Green*, 25 Mo. App. 198.

¹⁹ *State v. Mayor &c.*, 45 N. J. L. 482 (sewer); *Jeliff v. City of Newark*, 48 N. J. L. 101; s. c. 2 Atl. 627; *State v. Hotaling*, 44 N. J. L. 347 (repaving street); *Municipality v. Dunn*, 10 La. 57 (repaving); *City of Lafayette v. Fowler*, 34 Ind. 140; *Board &c. v. Fullen*, 111 Ind. 410; s. c. 12 N. E. 298; *Sheley v. City of Detroit*, 45 Mich. 431; s. c. 8 N. W. 52; *Gurnee v. City of Chicago*, 40 Ill. 165; *Wilkins v. City of Detroit*, 36 Mich. 120; s. c. 8 N. W. 701; 9 N. W. 427; *In re Burmeister*, 76 N. Y. 174; *City of Delphi v. Evans*, 36 Ind. 90, 99; *City of Kokomo v. Mahan*, 100 Ind. 242; *Farrar v. City of St. Louis*, 80 Mo. 379; *Estes v. Owen*, 90 Mo. 113; s. c. 2 S. W. 133. In Pennsylvania, an assessment for repaving is not permitted, as the property is not in such case deemed to receive a special benefit not shared by the public at large: *Ham-*

mett v. Philadelphia, 65 Pa. St. 148; *Wistar v. Philadelphia*, 111 Pa. St. 604; s. c. 4 Atl. 511; *Protestant Orphan Asylum's Appeal*, 111 Pa. St. 135; s. c. 3 Atl. 217; *Alcorn v. Philadelphia*, 112 Pa. St. 494; s. c. 4 Atl. 185.

²⁰ *Matter of Twenty-sixth St.*, 12 Wend. (N. Y.) 203; *Hammett v. Philadelphia*, 65 Pa. St. 146; *Matter of Decraw St.*, 18 Wend. (N. Y.) 568; *Nicols v. City of Bridgeport*, 23 Conn. 189; *Holton v. City of Milwaukee*, 31 Wis. 27; *Livingston v. Mayor &c.*, 8 Wend. (N. Y.) 85; *McMasters v. Commonwealth*, 3 Watts (Pa.) 292; *Litchfield v. Vernon*, 41 N. Y. 123; *Holmes v. Mayor &c.*, 12 N. J. Eq. 299; *State v. Dean*, 23 N. J. L. 335.

²¹ *City of Lafayette v. Fowler*, 34 Ind. 140; *Wray v. Mayor &c.*, 46 Pa. St. 365. And regrading: *McVerry v. Boyd*, 89 Cal. 304; s. c. 26 Pac. 885.

²² *O'Leary v. Sloo*, 7 La. An. 25; *Municipality v. Dunn*, 10 La. An. 57; *Schenley v. Commonwealth*, 36 Pa. St. 29; *Sheley v. City of Detroit*, 45 Mich. 431; s. c. 8 N. W. 52; *Williams v. Mayor &c.*, 2 Mich. 560; *Wilkins v. City of Detroit*, 46 Mich.

streets;²³ for sprinkling²⁴ and sweeping streets;²⁵ constructing and maintaining sewers and culverts in cities and villages;²⁶ water pipes in the streets;²⁷ and lighting the streets, etc.

120; s. c. 8 N. W. 701; 9 N. W. 427; *Bagg v. City of Detroit*, 5 Mich. 336; *McCormack v. Patchin*, 53 Mo. 33; *Richards v. City of Cincinnati*, 31 Ohio St. 506; *City of Cleveland v. Wick*, 18 Ohio St. 303; *City of Indianapolis v. Mansur*, 15 Ind. 112; *Mason v. City of Sioux Falls*, 2 S. Dak. 652; s. c. 51 N. W. 770; *Morrison v. Hershire*, 32 Iowa 271; *State v. City Council*, 34 N. J. L. 99; *Den v. Carron*, 26 N. J. L. 228; *State v. City of Newark*, 48 N. J. L. 101; s. c. 12 Atl. 770; *State v. City of Brunswick*, 32 N. J. L. 548; *Willard v. Presbury*, 14 Wall. 676; *Chambers v. Satterlee*, 40 Cal. 497; *People v. Austin*, 47 Cal. 353; *Bradley v. McAtee*, 7 Bush (Ky.) 667; *State v. City of Portage*, 12 Wis. 562; *Dean v. Borchsenius*, 30 Wis. 236; *Matter of Burke*, 62 N. Y. 224; *People v. Mayor &c.*, 4 N. Y. 419; *In re Burmeister*, 76 N. Y. 174; *Petition of Garvey*, 77 N. Y. 523; *In re Dugro*, 50 N. Y. 513; *In re Astor*, 53 N. Y. 617; *In re Smith*, 99 N. Y. 424; s. c. 2 N. E. 52; *Macon v. Patty*, 57 Miss. 378.

²³ *Hancock St. Extension*, 18 Pa. St. 26; *Jones v. Board &c.*, 104 Mass. 461.

²⁴ *State v. Reis*, 38 Minn. 371; s. c. 38 N. W. 97. See also, *Tifft v. City of Buffalo*, 7 N. Y. S. 633; s. c. 27 N. Y. St. 72. *Contra*, *Petit v. Duke*, 10 Utah 311; s. c. 37 Pac. 568.

²⁵ *Reinken v. Fuehring*, 130 Ind. 382; s. c. 30 N. E. 414, where it was held proper to include the sweeping of crossings.

²⁶ *Cincinnati v. Kasselmann* (Ohio), 23 Wk. Law Bul. 392; s. c. 10 Ohio Dec. R. 790; *Wolf v. City of Philadelphia*, 105 Pa. St. 25; *City of Atch-*

ison v. Price, 45 Kan. 296; s. c. 25 Pac. 605; *Stroud v. City of Philadelphia*, 61 Pa. St. 255; *Commonwealth v. Woods*, 44 Pa. St. 113; *Borough of Mauch Chunk v. Shortz*, 61 Pa. St. 399; *City of Philadelphia v. Tryon*, 35 Pa. St. 401; *Wright v. City of Boston*, 9 Cush. (Mass.) 233; *City of Springfield v. Sale*, 127 Ill. 359; s. c. 20 N. E. 86; *People v. City of Brooklyn*, 23 Barb. (N. Y.) 166; *Herman v. Wolf*, 33 Mo. App. 200; *City of St. Louis v. Oeters*, 36 Mo. 456; *Hill v. Warrell*, 87 Mich. 135; s. c. 49 N. W. 479; *Walker v. City of Aurora*, 140 Ill. 402; s. c. 29 N. E. 741, where a sewer assessment was sustained though no water-mains had been laid in the street (distinguishing *Hutt v. City of Chicago*, 132 Ill. 352; s. c. 23 N. E. 1010); *Protestant Orphan Asylum's Appeal*, 111 Pa. St. 135, 142; s. c. 3 Atl. 217. One who has paid a tax for a sewer in front of his property can not be compelled to pay a second tax for another sewer parallel therewith in the same street: *Philadelphia v. Verner*, 8 Pa. Co. Ct. 97. Cf. *Michener v. City of Philadelphia*, 118 Pa. St. 535; s. c. 12 Atl. 174. That special assessments may be levied for the construction of sidewalks, see *Kemper v. King*, 11 Mo. App. 116; *Flint v. Webb*, 25 Minn. 93; *White v. People*, 94 Ill. 604; *State v. Fuller*, 34 N. J. L. 227; *Sloan v. Beebe*, 24 Kan. 343; *Lufkin v. City of Galveston*, 58 Tex. 545.

²⁷ *Allen v. Drew*, 44 Vt. 174; *Allentown v. Henry*, 73 Pa. St. 404; *Northern Liberties v. Swain*, 13 Pa. St. 113; *Provident Inst. v. Mayor &c.*, 113 U. S. 506; s. c. 5 S. Ct. 612. A statute provided for the construc-

§ 1232. **Decision of council conclusive.**—An improvement being in truth and in fact a local improvement the decision of the municipality is final when it adopts one or another of the modes prescribed by law for the purpose of raising funds to pay for it.²⁸ If, however, an improvement is not a local improvement, a special assessment may be challenged by a property owner. The corporate authorities of a city can not arbitrarily determine that an improvement shall be treated as a local improvement.²⁹ In the opening of a street and the fixing of the assessment district the action of the council is conclusive.³⁰ The determination by a city council, having power under the charter, that an improvement is a benefit to abutting property is conclusive in a court of law.³¹ As to the sufficiency of the petition presented to the council preliminary to an assessment for a public improvement the decision of the council is conclusive.³²

§ 1233. **Preliminary steps to a valid assessment.**—(a) *The ordinance.*^{32a} An ordinance of the council is usually a prerequisite to a valid assessment. A valid ordinance for the construction of an improvement by special taxation is the foundation of the proceedings.³³ Where the law requires the city ordinance for a public improvement to specify the nature, character, locality and description of the improvement, it must be done or the assessment will be void.³⁴ It is competent for the city to amend its ordinance in order to cure irregularities after the completion of the work.³⁵ The passage of an

tion of a system of water-works and that the commissioners should establish a scale of rents to be called "water rents" and appropriated to different classes of buildings in reference to their dimensions, exposure to fire, etc. It was contended that the term "rents" implied the necessity of actual use by the property owner in order to create a liability or confer power upon the commissioners. But the court held that the protection in case of fire was sufficient benefit though no water was taken or used in the building: *Dasey v. Skinner*, 11 N. Y. S. 821; 33 N. Y. St. 15. See also, to the same point, *Warren v. City of Chicago*, 118 Ill. 329; s. c. 9 N. E. 218.

²⁸ *Village of Morgan Park v. Wiswall*, 155 Ill. 262; s. c. 40 N. E. 611.

²⁹ *City of Bloomington v. Chicago &c. R. Co.*, 134 Ill. 451; s. c. 26 N. E. 366.

³⁰ *Brown v. City of Saginaw*, 107 Mich. 643; s. c. 65 N. W. 601.

³¹ *Hutcheson v. Storrie* (Tex. Civ. App.), 48 S. W. 785.

³² *City of Kansas City v. Trotter*, 9 Kan. App. 222; s. c. 59 Pac. 679.

^{32a} See ch. 14, vol. 1.

³³ *City of Carlyle v. Clinton Co.*, 140 Ill. 512; s. c. 29 N. E. 556; *East St. Louis v. Albrecht*, 150 Ill. 506; s. c. 37 N. E. 934; *Pells v. City of Paxton*, 176 Ill. 318; s. c. 52 N. E. 64. ³⁴ *Lundberg v. City of Chicago*, 183 Ill. 572; s. c. 56 N. E. 415.

³⁵ *Bacon v. Mayor &c.*, 105 Ga. 62; s. c. 31 S. E. 127.

ordinance levying a tax to reconstruct a sidewalk is not essential to the validity of a tax bill in Missouri since amendments of 1893.³⁶ Under a valid ordinance an improvement by special taxation need not be submitted to a jury.³⁷ An ordinance reciting that the proper commissioners had submitted a petition of the owners of a majority of the frontage, and that the proper officials after investigation had found the petition contained such names is *prima facie* evidence of the sufficiency of the petition.³⁸ (b) *Petition for improvement*: Where the charter requires proceedings for paving a street to be based on a petition of abutting owners to the council, or a resolution of the council passed by a three-fourths vote, a special assessment without either of these prerequisites is void,³⁹ and where the statute requires, as a preliminary to a public improvement, the petition of a majority of the abutting owners, it is jurisdictional and must be complied with.⁴⁰ An assessment not based on a petition of property owners as required by law should be set aside.⁴¹ Where a charter authorizes village officers to construct sewers on written application of five or more freeholders and legal voters, the petition must show on its face that the requisite number of signers were freeholders and legal voters.⁴² The council or board of aldermen are not required to grant all the sidewalks prayed for in the petition. They may lawfully grant part and refuse other parts.⁴³ Where a corporate name is signed to a petition the authority to sign will be presumed.⁴⁴ On a petition for a special assessment for an improvement, reference in the ordinance to a plane of low-water-mark previously established by commissioners is sufficient without proof of such plane.⁴⁵ Under Milwaukee's city charter an alley may be improved without petition on the passage of a resolution of the common council showing why such improvement is necessary.⁴⁶ (c) *Notice*

³⁶ *City of Marionville v. Henson*, 65 Mo. App. 397.

³⁷ *Davis v. City of Litchfield*, 155 Ill. 384; s. c. 46 N. E. 354.

³⁸ *Cummings v. West Chicago Park Com'rs*, 181 Ill. 136; s. c. 34 N. E. 941.

³⁹ *Dieckmann v. Sheboygan Co.*, 89 Wis. 571; s. c. 62 N. W. 410.

⁴⁰ *Grant v. Bartholomew*, 58 Neb. 839; s. c. 80 N. W. 45; *Town of Roswell v. Dominice*, 9 N. M. 624; s. c. 58 Pac. 342. Cf. *Holland v. Mayor &c.*, 11 Md. 186; *Mulligan v. Smith*, 59 Cal. 206; *Zeigler v. Hopkins*, 117 U. S. 683; s. c. 6 S. Ct. 919;

Keese v. City of Denver, 10 Colo. 112; s. c. 15 Pac. 825; *Miller v. City of Amsterdam*, 149 N. Y. 288; s. c. 43 N. E. 632.

⁴¹ *Whaples v. City of Waukegan*, 179 Ill. 310; s. c. 53 N. E. 618.

⁴² *Kent v. Village of Enosburg Falls*, 71 Vt. 255.

⁴³ *City of Marshall v. Rainey*, 78 Mo. App. 416.

⁴⁴ *State v. Mayor &c.*, 62 N. J. L. 621; s. c. 43 Atl. 578.

⁴⁵ *Chicago & C. R. Co. v. City of Chicago*, 184 Ill. 154; s. c. 56 N. E. 410.

⁴⁶ *Kersten v. City of Milwaukee*, 106 Wis. 200; s. c. 81 N. W. 948. As

of improvement.^{46a} Where the statute authorizes objecting property owners to file an appeal with the city council, on the filing of which the city shall publish notice of the time and place of hearing, the duty is imperative on the city to set a time for hearing and give notice without request by appellant.⁴⁷ If the statute requires notice of an improvement served on the owner, and that he be allowed to make the improvement himself, an assessment without such notice being given and such privilege of construction being accorded is void.⁴⁸ The objection that the notice of an improvement did not exactly conform to the specifications is unavailing if the objector is not injured thereby.⁴⁹ Where notice is required by publication in a newspaper "as often as the same is issued," it means the regular issues of the paper.⁵⁰ (d) *What the*

to the sufficiency of the petition, see *Ferris v. City of Chicago*, 162 Ill. 111; s. c. 44 N. E. 436; *Adcock v. City of Chicago*, 160 Ill. 611; s. c. 43 N. E. 589; *Keller v. People*, 160 Ill. 179; s. c. 43 N. E. 342; *Doremus v. People*, 161 Ill. 26; s. c. 43 N. E. 701; *Dunne v. West Chicago Park Com'rs*, 159 Ill. 60; s. c. 42 N. E. 375.

^{46a} See post, § 1234.

⁴⁷ *Girvin v. Simon*, 127 Cal. 491; s. c. 59 Pac. 945.

⁴⁸ *Grant v. Bartholomew*, 58 Neb. 839; s. c. 80 N. W. 45. Cf. *Wakeley v. City of Omaha*, 58 Neb. 245; s. c. 78 N. W. 511; *Leavitt v. Bell*, 55 Neb. 57; s. c. 75 N. W. 524.

⁴⁹ *President &c. v. City of Buffalo*, 56 N. Y. S. 976; s. c. 39 App. Div. (N. Y.) 333.

⁵⁰ *Perine v. Lewis*, 128 Cal. 236; s. c. 60 Pac. 422, 772. A leading case upon the subject of notice in assessment proceedings is *Stuart v. Palmer*, 74 N. Y. 183. The facts in that case briefly stated were, that commissioners of assessment were authorized by statute to ascertain what lands were benefited by an improvement, and then to apportion and assess the cost upon such land in proportion to benefits. The assessment when made was declared to be a lien upon the land,

and its payment could be enforced by a sale thereof. No notice of any kind was provided in the law or ever made, issued, published or given to the property holders. In the course of an elaborate opinion, Earl, J., said: "I am of opinion that the constitution sanctions no law imposing such an assessment without a notice to, and a hearing or an opportunity of a hearing by, the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but what may, by its authority, be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it can not dispense with all notice." In *Ulman v. Mayor*, 72 Md. 587, the City of Baltimore was authorized by statute to provide for paving streets and for assessing the cost thereof,

record must show: The record must show affirmatively the compliance with all essential conditions to a valid exercise of the taxing

in whole or in part, pro rata upon the property abutting on the street, and for collecting such assessment as other taxes were collected. The entire cost of the work, the distribution of that cost between the city and the adjoining proprietors, and the establishment of a system—whether by the front-foot rule or by reference to the intrinsic value of each parcel of land abutting on the street, or by some other standard—were left by the statute to the discretion of the mayor and common council. An ordinance was passed directing a street to be paved and a certain portion of the expense to be assessed to abutting owners by the front-foot rule—"and the said tax shall be a lien upon such property." Upon petition for an injunction to restrain the collection of the tax, the question at issue was formulated by the court of appeals of Maryland as follows: "Can that discretion [in establishing the rule of assessment] be lawfully exercised by the municipality without notice to the individual whose property rights are directly involved?" The court held that those rights were under these conditions protected by the provisions of the federal and state constitutions, which in substance declare that no man shall be deprived of his life, liberty or property without due process of law. In support of this ruling the court relied especially upon *Stuart v. Palmer*, 74 N. Y. 183, and *Spencer v. Merchant*, 125 U. S. 345; s. c. 8 S. Ct. 921; and also cited *Walston v. Nevlin*, 128 U. S. 578; s. c. 9 S. Ct. 192; *Hagar v. Reclamation District*, 111 U. S. 701; s. c. 4 S. Ct. 663; *Davidson v. New Orleans*, 96 U. S. 97; *McMillen v. Anderson*, 95 U. S. 37; *Overing v.*

Foote, 65 N. Y. 263; *City of Philadelphia v. Miller*, 49 Pa. St. 440; *People v. Supervisors &c.*, 26 Mich. 22; *Thomas v. Gain*, 35 Mich. 155; *Patten v. Green*, 13 Cal. 325; *Darling v. Gunn*, 50 Ill. 424; *State v. Drake*, 33 N. J. L. 194; *Cooley Taxation* 265. "Some cases have held," said the court, "that where the apportionment has been made by the legislature it is final; but, without pausing to discuss this proposition, it is only necessary to say that these cases are not applicable here, for the reason that the [statute] has made no such apportionment." Two judges dissented, contending that the remark of Mr. Justice Gray, in *Spencer v. Merchant*, *supra*, that "when the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether these lands are benefited, and how much," did not apply. "Here," said they, "nothing is left to the determination of the city commissioners. The ordinance . . . itself determines what property is benefited and how much," and that the amount to be ascertained was "simply a matter of arithmetic." In *Amery v. City of Keokuk*, 72 Iowa 701, an Iowa statute provided that the cost of certain street improvements might be assessed "upon the lots or parcels of ground, or any part of either of the same, fronting or lying along said street." A city ordinance directed that the cost be charged to the lots, or parts of lots, according to the number of feet each had fronting or abutting on the street. In an action to recover from the city taxes paid for improving a street under the ordinance it appeared that the plaintiff did not own all of the lot

power, and if not shown no presumption will be indulged.⁵¹ But it will be presumed that the amounts were arrived at with reference to

which abutted on the street, but he was the owner of that part which bounded the street. He contended that his part of the lot was not chargeable with the whole of the tax, but that the interior part was also chargeable, and that he was entitled to notice of the equalization and assessment, which was not given, so that he might urge this claim. The court held it to be a case where the only act necessary to ascertain the amount of the assessment was a plain mathematical calculation, with no discretion in the city council, and that no notice was necessary. And see *Cleveland v. Tripp*, 13 R. I. 50; *Clapp v. City of Hartford*, 35 Conn. 66; *Mayor &c. v. Johns Hopkins Hospital*, 56 Md. 1; *Hagar v. Reclamation District*, 111 U. S. 701; s. c. 4 S. Ct. 663; *Gillette v. City of Denver*, 21 Fed. 822; distinguishing *Gatch v. City of Des Moines*, 63 Iowa 718; s. c. 18 N. W. 310; *Trustees &c. v. City of Davenport*, 65 Iowa 633; s. c. 22 N. W. 904; *Auer v. City of Dubuque*, 65 Iowa 650; s. c. 22 N. W. 914. The absence of any discretion in the city council appears by the statement of the court, that "there was no authority, under the law and ordinance, to institute an inquiry as to how far back from the street the rights of the abutting owners extended." If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law: *Spencer v. Merchant*, 125 U. S. 345; s. c. 8 S. Ct. 921; *McMillen v. Anderson*, 95 U. S. 37; *Davidson v. New Orleans*, 96 U. S. 97; *Hagar v. Reclamation District*, 111 U. S. 701; s. c.

4 S. Ct. 663. "To give each property owner the right to contest every step in such an undertaking would be, in effect, to prohibit the improvement, or render its execution practically impossible in many instances. If, therefore, the law provides for giving notice, and for a method whereby the property owner may ultimately challenge the correctness of the assessment made against his property, in respect to whether it was made in good faith, without intervening mistake or error, and according to the method and under the safeguards provided by law, the constitutional provision is to be deemed satisfied:" *Garvin v. Daussman*, 114 Ind. 429, 436; s. c. 16 N. E. 826; followed in *Law v. Johnston*, 118 Ind. 261; s. c. 20 N. E. 745, a case where the assessment could only be enforced by foreclosure proceedings, which, of course, could only be taken in pursuance of notice. In *Davidson v. New Orleans*, 96 U. S. 97, Mr. Justice Miller said: "Whenever by the laws of a state, or by state authority, a tax, assessment or servitude, or other burden, is imposed upon property for the public use, whether it be for the whole state, or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

⁵¹ *Medland v. Linton*, 60 Neb. 249; s. c. 82 N. W. 866.

the benefits accruing to the property; and that the amount required to be contributed by the owners is proportionate will also be presumed.⁵² The court will presume, in the absence of evidence, that all the prerequisites to a valid assessment have been complied with.⁵³ The omission of a recording officer to make the proper certificate where the certificate itself is correct will not invalidate an assessment.⁵⁴ (e) *Cost of improvement*: A preliminary estimate of cost as required by charter is essential to the validity of an assessment. This preliminary estimate is subject to review and correction by the board of public works, and when submitted to the council may be confirmed or modified by it.⁵⁵ Where consent of a majority of the property owners is required and such consent limits the cost to a certain sum per running foot the assessment is limited to that sum.⁵⁶ (f) *Drawings and specifications*: Where the law requires that before advertising for bids the board of public works shall prepare and place on file complete drawings and specifications of the work, it will be a compliance for the city engineer to prepare such drawings and specifications and file them in his office pursuant to the course of business prescribed by the board.⁵⁷ (g) *Compliance with preliminaries*: Conditions precedent to a public improvement must be complied with,⁵⁸ but a substantial compliance with the statutory requirements preliminary to an assessment is sufficient.⁵⁹

§ 1234. *Notice of improvement.*—As seen above, the statute or charter usually provides for notice of an improvement and intends thereby to afford an opportunity to be heard by the property owner affected by the improvement. The justice of such statutory provisions is not to be questioned, and they should not be rendered useless by judicial construction. As to the sufficiency of the notice it may be stated generally: If the statute requires six days' notice and only five are given the proceeding is void.⁶⁰ Where the statute requires notice to be given to objectors, and the clerk notifies an ob-

⁵² *Medland v. Linton*, 60 Neb. 249; s. c. 82 N. W. 866.

⁵³ *City of Springfield v. Baker*, 56 Mo. App. 637.

⁵⁴ *Moffitt v. Jordan*, 127 Cal. 622; s. c. 60 Pac. 123.

⁵⁵ *State v. Mayor &c.*, 88 Wis. 599; s. c. 60 N. W. 1001.

⁵⁶ *Barber Asphalt Pav. Co. v. Watt*, 51 La. An. 1345; s. c. 26 So. 70.

⁵⁷ *Barrett v. Falls City Artificial*

Stone Co., 21 Ky. L. 669; s. c. 52 S. W. 947.

⁵⁸ *Bowditch v. Superintendent of Streets &c.*, 168 Mass. 239; s. c. 46 N. E. 1026; *Moffitt v. Jordan*, 127 Cal. 622; s. c. 60 Pac. 123.

⁵⁹ Necessity of following the preliminary requirements,—see *Union Paving &c. Co. v. McGovern*, 127 Cal. 638; s. c. 60 Pac. 169.

⁶⁰ *Leonard v. Sparks*, 63 Mo. App. 585.

jector of the hour, but the council met an hour earlier and adjourned to the next night for want of a quorum, and the objector was present at the hour named but found the chamber closed, and had no actual notice of the adjournment, the action of the council at the adjourned meeting in overruling the objections is void.⁶¹ Notice of the meeting of the council for the purpose of equalizing a special assessment, correcting errors and hearing complaints is sufficient if it substantially complies with the statutory requirements.⁶² A notice to "all persons owners of property" is sufficient without specifying names to enable a charge for interest to be made on assessments under N. Y. Laws of 1882, section 916. In other respects the notice was held insufficient.⁶³ A trustee can not complain that a notice was addressed to the heirs instead of to himself, where the notice was actually received by him in time to protect his interests as fully as if addressed to him personally.⁶⁴ Notice to a life tenant is not notice to a remainder-man.⁶⁵ It may be sent by mail in the absence of statutory requirement,⁶⁶ but where objectors to an assessment desire to raise the question as to the sufficiency of the notice by mail it is waived by a general appearance,⁶⁷ and defective notice is cured by appearance and filing objections.⁶⁸ It is sometimes provided by statute that notice shall be given by publication in a newspaper, which perhaps so far as the validity of the assessment is concerned is sufficient, but practically so far as notice to the parties interested is concerned is a mere formality, and particularly so where the notice is published in some obscure publication enjoying municipal favor, or selected as a means of adjusting political debts. A certificate that a notice was published for five days does not show that notice was published for five successive days.⁶⁹ Where the return of the writ of certiorari shows, without contradiction, that notices were given, an objection that requisite notices were not given will be overruled.⁷⁰ In an action to enjoin a sale for a

⁶¹ *Gill v. City of Oakland*, 124 Cal. 335; s. c. 57 Pac. 150.

⁶² *Medland v. Linton*, 60 Neb. 249; s. c. 82 N. W. 866.

⁶³ *People v. Coler*, 65 N. Y. S. 44; s. c. 31 Misc. (N. Y.) 211.

⁶⁴ *Beals v. James*, 173 Mass. 591; s. c. 54 N. E. 245.

⁶⁵ *Chamberlin v. Gleason*, 163 N. Y. 214; s. c. 57 N. E. 487. Notice held sufficient in *West Chicago St. R. Co. v. People*, 155 Ill. 299; s. c. 40 N. E. 599; *City of Lawrence v. Webster*, 167 Mass. 513; s. c. 46 N.

E. 123; *Town of Tumwater v. Pix*, 15 Wash. 324; s. c. 46 Pac. 388.

⁶⁶ *City of Lawrence v. Webster*, 167 Mass. 513; s. c. 46 N. E. 123.

⁶⁷ *Bradford v. City of Pontiac*, 165 Ill. 612; s. c. 46 N. E. 794.

⁶⁸ *Haley v. City of Alton*, 152 Ill. 113; s. c. 38 N. E. 750; *Barlow v. City of Tacoma*, 12 Wash. 32; s. c. 40 Pac. 382.

⁶⁹ *Chandler v. People*, 161 Ill. 41; s. c. 43 N. E. 590; *Evans v. People*, 139 Ill. 552; s. c. 28 N. E. 1111.

⁷⁰ *State v. Town of West Hoboken* (N. J.), 43 Atl. 535.

special assessment the presumption is that notice was given, which must be overcome.⁷¹ Where the statute does not make provision for notice of hearing before an assessment is levied it is not taking property without due process of law,⁷² but not so where the statute provides for a hearing.⁷³ And where a hearing was had and a landowner put in evidence in reference to benefits he can not be heard to say that he was deprived of his property without due process of law.⁷⁴ Nor is a statute providing for personal judgment against a property owner for an assessment for street improvements unconstitutional although he was an actual non-resident and had no notice of the proceeding.⁷⁵

§ 1235. Hearing of property owners.—The right of parties affected by a special assessment to a hearing at some stage of the proceeding is universally recognized where the apportionment of the tax involves the exercise of an act judicial in character,—for instance, an assessment according to benefits.⁷⁶ It has been said, however, that when the apportionment of the assessment involves only a mathematical calculation the taxpayer is not entitled to be heard.⁷⁷ An assessment allowing property owners no opportunity to be heard is taking property without due process of law and void.⁷⁸ And so a statute which deprives a property owner of the right to contest the validity of an assessment after forty days from the commencement of proceedings is void where the proceedings are based on constructive notice.⁷⁹ It is essential to the validity of a special tax that the owner affected thereby shall have notice of the assessment and it is

⁷¹ *Hellman v. Shoutlers*, 114 Cal. 136; s. c. 44 Pac. 915; 45 Pac. 1057.

⁷² *English v. City of Wilmington*, 2 Marv. (Del.) 63; s. c. 37 Atl. 158.

⁷³ *Bradley v. Fall Brook I. D.*, 68 Fed. 948.

⁷⁴ *Chicago &c. R. Co. v. Village of Elmhurst*, 165 Ill. 148; s. c. 46 N. E. 437.

⁷⁵ *Dewey v. City of Des Moines*, 101 Iowa 416; s. c. 70 N. W. 605.

⁷⁶ *Rolph v. City of Fargo*, 7 N. D. 640; s. c. 76 N. W. 242; 42 L. R. A. 646, 658; *Ulman v. Mayor &c.*, 72 Md. 587; s. c. 20 Atl. 141; 21 Atl. 790; *Mayor &c. v. Ulman*, 79 Md. 469; s. c. 30 Atl. 43; *Mayor &c. v. Scharf*, 54 Md. 499; *Spencer v. Merchant*, 125 U. S. 345; s. c. 8 S. Ct. 921; *Lent v. Tillson*, 140 U. S. 316; s. c. 11 S. Ct. 825;

Violett v. City Council &c., 92 Va. 561; s. c. 23 S. E. 909; *Dietz v. City of Neenah*, 91 Wis. 422; s. c. 64 N. W. 299; 65 N. W. 500; *Spencer v. Merchant*, 100 N. Y. 585; s. c. 3 N. E. 682; *Stuart v. Palmer*, 74 N. Y. 183.

⁷⁷ *English v. Wilmington*, 2 Marv. (Del.) 63; s. c. 37 Atl. 158; *Cleveland v. Tripp*, 13 R. I. 50, 60; *Gillett v. City of Denver*, 21 Fed. 822; *Mayor &c. v. Scharf*, 56 Md. 50; *Mayor &c. v. Johns Hopkins Hospital*, 56 Md. 1; *Moale v. Mayor &c.*, 61 Md. 224.

⁷⁸ *Alberger v. Mayor &c.*, 64 Md. 1; s. c. 20 Atl. 988. But see contra, *Ulman v. Mayor &c.*, 72 Md. 587; s. c. 20 Atl. 141; 21 Atl. 709.

⁷⁹ *Bradley v. Fall Brook I. D.*, 68 Fed. 948.

not sufficient to notify him after the improvement has been made.⁸⁰ A special assessment law which gives no opportunity to the owner to be heard on the subject of benefits is void.⁸¹ It has been held, however, that where a general ordinance exists which provides that the cost of improvements shall be assessed against abutting owners, notice to such owners is not required.⁸² Where a hearing of property owners is provided for by the statute the council or committee before whom the hearing is had has power to grant relief and change the assessment to make it conform to the requirements of law.⁸³ Objections of different parties may be submitted to separate juries, but the objectors have no right to demand separate trials.⁸⁴

§ 1236. **What property assessable.**—(a) *Property enumerated in statute:* Special assessments being regulated wholly by statute only such property as the statute makes liable to special assessment may be reached.⁸⁵ The legislature may properly declare that property within a local taxing district shall be assessed on account of a local improvement.⁸⁶ The usual requirement of the statute is that the property abutting on the street where the improvement is made is subject to assessment.⁸⁷ (b) *Must be abutting property:* In estimating benefits no portion of a forty-acre tract of land not abutting on the improved street can be taken into consideration although benefited.⁸⁸ The owner of a corner lot may be required to make a sidewalk along the side of his lot although the lot has no opening on the street where the sidewalk is to be laid.⁸⁹ (c) *Must be on property benefited:* An assessment for an improvement based on the frontage without regard to the benefits or damages sustained is void, where the charter so requires.⁹⁰ Property can not be assessed for an im-

⁸⁰ *Hayes v. Douglas Co.*, 92 Wis. 429; s. c. 65 N. W. 482; *Dietz v. City of Neenah*, 91 Wis. 422; s. c. 64 N. W. 299; *Violett v. City Council, etc.*, 92 Va. 561; s. c. 23 S. E. 909; *People v. Dickinson*, 36 N. Y. S. 748; s. c. 1 App. Div. (N. Y.) 19; *Adams v. City of Shelbyville*, 154 Ind. 467; s. c. 57 N. E. 114; *Allman v. District of Columbia*, 3 App. D. C. 8; *People v. Village of New Rochelle*, 31 N. Y. S. 592; s. c. 83 Hun (N. Y.) 185.

⁸¹ *Hutcheson v. Storrie*, 92 Tex. 685; s. c. 51 S. W. 848; *Knecht v. City of Cincinnati*, 18 Ohio Cir. Ct. 875.

⁸² *Arnold v. City of Ft. Dodge*, 111 Iowa 152; s. c. 82 N. W. 495.

⁸³ *Adams v. City of Shelbyville*, 154 Ind. 467; s. c. 57 N. E. 114.

⁸⁴ *Browning v. City of Chicago*, 155 Ill. 314; s. c. 40 N. E. 565.

⁸⁵ *Indianapolis & C. R. Co. v. Capital Paving & C. Co.*, 24 Ind. App. 114; s. c. 54 N. E. 1076.

⁸⁶ *Adams v. City of Shelbyville*, 154 Ind. 467; s. c. 57 N. E. 114.

⁸⁷ *In re Fifty-fourth St.*, 165 Pa. St. 8; s. c. 30 Atl. 503.

⁸⁸ *Ryan v. Town of Sumner*, 17 Wash. 228; s. c. 49 Pac. 487.

⁸⁹ *Elder v. Cassily*, 21 Ky. L. 1274; s. c. 54 S. W. 836.

⁹⁰ *Kersten v. City of Milwaukee*, 106 Wis. 200; s. c. 81 N. W. 948.

provement where it can not be benefited except in case of subsequent work for which no provision is made,⁹¹ and the cost of a main sewer can not be assessed on property which has no present connection therewith,⁹² nor can property on a branch sewer be assessed for the main sewer.⁹³ (d) *Unplatted or unsubdivided property may be:* Property within the limits of a city which is unplatted is liable to special assessment for local improvements, as if laid off into blocks and lots;⁹⁴ and so farming lands within the limits of a town are subject to taxation by the town authorities and it is not essential that they receive benefits and protection.⁹⁵ Urban property may be assessed for a local improvement though not divided into lots, and though used for farm purposes, if the surrounding property is urban property.⁹⁶ It is sometimes difficult to determine whether property is city property and liable for local improvements or whether it is rural and not subject to assessment. No hard and fast rule on the subject can be laid down. It necessarily depends on the special circumstances of each case. If property on one side of a street is built up with houses, factories, etc., the vacant lots or farm land on the other side of the street should, as a rule, be considered as city property. It is not unfrequently the case that the owner of a large tract bordering on a street requiring improvement withholds subdividing and from sale with the sole purpose of permitting the improvements on surrounding property to enhance the value of his own without contributing anything himself towards improvements. In this there is neither justice nor good citizenship.⁹⁷ (e) *Public property not subject:* Public property lying within the district of the improvement, is not assessable for benefits.⁹⁸ A tax upon lots, blocks, tracts or parcels of land contiguous to the improvement, does not include streets which abut upon or intersect the street to be improved.⁹⁹ School property is not subject to special assessment in Indiana^{99a} and Kentucky.¹⁰⁰ While

⁹¹ Title Guarantee &c. Co. v. City of Chicago, 162 Ill. 505; s. c. 44 N. E. 832.

⁹² In re Park Ave. Sewer, 169 Pa. St. 433; s. c. 32 Atl. 574.

⁹³ Witman v. City of Reading, 169 Pa. St. 375; s. c. 32 Atl. 576.

⁹⁴ Medland v. Linton, 60 Neb. 249; s. c. 82 N. W. 866.

⁹⁵ Town of Central Covington v. Park, 21 Ky. L. 1847; s. c. 56 S. W. 650.

⁹⁶ City of McKeesport v. Soles, 178 Pa. St. 363; s. c. 35 Atl. 927.

⁹⁷ City of McKeesport v. Soles, 178 Pa. St. 363; s. c. 35 Atl. 927.

⁹⁸ City of St. Louis v. Brown, 155 Mo. 545; s. c. 56 S. W. 298; Smith v. City of Buffalo, 159 N. Y. 427; s. c. 54 N. E. 62.

⁹⁹ Cunningham v. City of Peoria, 157 Ill. 499; s. c. 41 N. E. 1014.

^{99a} Sutton v. School City of Montpelier, 28 Ind. App. 315; s. c. 62 N. E. 710.

¹⁰⁰ City of Louisville v. Leatherman, 99 Ky. 213; s. c. 18 Ky. L. 124; 35 S. W. 625. Public property is

the state may not authorize corporate authorities to levy special assessments upon property of the United States, as it would be an invasion of the rights of a distinct sovereignty, no such reason exists as between the several agencies of the state government which are subject to its control and direction, and a county may be compelled to pay a special assessment against its court-house for local improvements, although public property be exempt from taxation by express statute.¹⁰¹

(f) *Abutting property for lateral improvements:* Where the statute authorizes an assessment against abutting property owners for a local improvement the owners upon each side may be assessed for an improvement of a lateral half.¹⁰² (g) *Property at termination of street:* Where an improvement is made in a street which terminates in another street it is erroneous to assess the entire expense on the two quarter blocks adjacent to the street intersections.¹⁰³

(h) *Part of undivided tract may be:* One hundred and fifty-eight feet of a forty-acre tract may be assessed for an improvement and the owner is not permitted to say the forty-acre tract should have been assessed.¹⁰⁴ An entire square belonging to one person may be assessed for an improvement upon one side of it, where there are no di-

liable to special assessment in Louisiana: *New Orleans v. Warner*, 175 U. S. 120; s. c. 20 S. Ct. 44.

¹⁰¹ *McLean Co. v. City of Bloomington*, 106 Ill. 209, followed in *Adams Co. v. City of Quincy*, 130 Ill. 566; s. c. 22 N. E. 624, holding, however, that the property could not be sold without express authority, and that the remedy was by mandamus, after judgment at law, to compel payment of the charge. In *Lima v. Cemetery Ass'n*, 42 Ohio St. 128, it was held that, authority to assess being shown, whoever insists that his property is exempt from the burden will be required to support his claim by a provision equally clear; and although cemetery property was exempted from taxation and from sale under any legal process whatever, nevertheless payment could be secured by the appointment of a receiver, by sequestration, or by such other appropriate remedy as equity may afford. See also, *Louisville v. Nevin*, 10 Bush (Ky.) 549; s. c. 19 Am. R. 78; and as to the effect of exemption

from sale on execution, *Bloomington Cemetery Ass'n v. People*, 139 Ill. 16; s. c. 28 N. E. 1076. But in *Lowe v. Board &c.*, 94 Ind. 553, 554, it was held that under a general authority no assessment could be made against a public square of a county, *Elliott, J.*, saying that "while an assessment for improving a street is not in a strict sense a tax, yet it so far partakes of the nature of a tax as makes it operative only upon property subject to taxation;" reiterated in substantially the same language in *Elliott Roads & Streets* (2d ed.), § 550. See also, *Inhabitants &c. v. Mayor &c.*, 116 Mass. 193.

¹⁰² *Indianapolis &c. R. Co. v. Capitol Paving &c. Co.*, 24 Ind. App. 114; s. c. 54 N. E. 1076. Cf. *City of Muscatine v. Chicago &c. R. Co.*, 88 Iowa 291; s. c. 55 N. W. 100; *Morrison v. Hershire*, 32 Iowa 271, 276.

¹⁰³ *Perine v. Lewis*, 128 Cal. 236; s. c. 60 Pac. 422, 772.

¹⁰⁴ *Barber v. City of Chicago*, 152 Ill. 37; s. c. 38 N. E. 253.

vision lines and it is used as a whole.¹⁰⁵ (i) *Property on extended street*: Where the charter requires an assessment to be made upon all lands benefited by an improvement, the assessment should include the property on the street, as extended, where, at the time of the assessment, proceedings had been commenced to extend the street and the city had accepted land dedicated for the extension and contracted for a bridge thereon.¹⁰⁶ Where a charter requires all property benefited to be assessed it must include a proposed extension of the street,¹⁰⁷ although it has been held that only the property abutting on a street which has been opened can be assessed.¹⁰⁸ (j) *Title not involved*: Special assessments are not concerned with the title and being in rem are assessed against the property as a whole, irrespective of the several ownerships that may exist.^{108a} A special assessment may be levied against property an equitable claim to which is owned.¹⁰⁹ The assessment may be in gross though the property is subject to an undetermined life estate.¹¹⁰ In such case it is the corpus that is to be reached and not the titles.¹¹¹ (k) *Improvements on two streets not assessable on one*: The cost of improving two streets can not be assessed on property on one, though a single ordinance provides for improving both streets.¹¹²

§ 1237. **Exempt property liable to special assessments.**—There are many kinds of property which by statute are exempt from taxation, but the general rule is that such exemption does not apply to special assessment for local improvements.¹¹³ Where property is exempted from taxation it is construed to mean exemption from the burden of

¹⁰⁵ *City of Chester v. Eyre*, 181 Pa. St. 642; s. c. 37 Atl. 837.

¹⁰⁶ *People v. City of Buffalo*, 147 N. Y. 675; s. c. 44 N. E. 1128.

¹⁰⁷ *People v. City of Buffalo*, 57 N. Y. S. 263; s. c. 39 App. Div. (N. Y.) 651.

¹⁰⁸ *In re Orkney St.*, 194 Pa. St. 425; s. c. 45 Atl. 314.

^{108a} *Williams v. Bergin*, 127 Cal. 578; s. c. 60 Pac. 164.

¹⁰⁹ *Ottumwa &c. Co. v. Ainley*, 109 Iowa 386; s. c. 80 N. W. 510.

¹¹⁰ *Busenbark v. Clements*, 22 Ind. App. 557; s. c. 53 N. E. 665.

¹¹¹ *Village of St. Bernard v. Kemper*, 60 Ohio St. 244; s. c. 54 N. E. 267.

¹¹² *Willard v. Albertson*, 23 Ind. App. 166; s. c. 53 N. E. 1077; 54 N. E. 446.

¹¹³ *Illinois Cent. R. Co. v. City of Decatur*, 147 U. S. 190; s. c. 13 S. Ct. 293; *Mayor &c. v. Green Mount Cemetery*, 7 Md. 517; *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506; *City of Paterson v. Society for Manufacturers*, 24 N. J. L. 385; *City of Bridgeport v. New York &c. R. Co.*, 36 Conn. 255; *Canal Trustees v. City of Chicago*, 12 Ill. 403, 406; *City of Chicago v. Colby*, 20 Ill. 614; *City of Peoria v. Kidder*, 26 Ill. 351; *Town of Pleasant v. Kost*, 29 Ill. 490; *Illinois &c. R. Co. v. Commissioners*, 129 Ill. 477; s. c. 21 N. E. 925; *City of Philadelphia v. Union Burial Ground*, 178 Pa. St. 533; s. c. 36 Atl. 172; 36 L. R. A. 263.

ordinary taxation, taxes proper, and not from special assessments.¹¹⁴ It is competent, however, for the legislature, which has full control over the matter of general taxation and special assessments, to exempt any species of property from the burden of both.¹¹⁵ The legislature has power to exempt property from special assessments.¹¹⁶ The rule applies to exemptions of burying grounds from taxation,¹¹⁷ charitable institutions,¹¹⁸ church real estate,¹¹⁹ educational institutions and their real estate,¹²⁰ and public school property.¹²¹ Under the provisions of a statute exempting pensions from taxation, property purchased with exemption money is not exempt from assessments for local improvements.¹²²

¹¹⁴ *President &c. v. Board &c.*, 104 Mass. 470; *Brightman v. Kirner*, 22 Wis. 54; *Southern R. Co. v. City of Jackson*, 38 Miss. 334; *State v. Mayor &c.*, 27 N. J. L. 185; *City of Erie v. First Universalist Church*, 105 Pa. St. 278; *Olive Cemetery Co. v. City of Philadelphia*, 93 Pa. St. 129.

¹¹⁵ *City of Richmond v. Richmond &c. R. Co.*, 21 Gratt. (Va.) 604; *Milwaukee &c. Co. v. City of Milwaukee*, 95 Wis. 42; s. c. 69 N. W. 796; *Yates v. City of Milwaukee*, 92 Wis. 352; s. c. 66 N. W. 248; *St. Paul &c. R. Co. v. City of St. Paul*, 21 Minn. 526; *President &c. v. Board &c.*, 104 Mass. 470.

¹¹⁶ *Dyker &c. Improvement Co. v. Cook*, 38 N. Y. S. 222; s. c. 3 App. Div. (N. Y.) 164.

¹¹⁷ *Lima v. Cemetery Ass'n*, 42 Ohio St. 128; *Louisville v. Nevin*, 10 Bush (Ky.) 549. Under similar provisions such is the holding in New York: *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506.

¹¹⁸ "Exempted from taxation of every kind" was the language of the statute: *Sheehan v. Hospital*, 50 Mo. 155. "From all taxes either by state, parish or city:" *City of Lafayette v. Asylum*, 4 La. An. 1. "From all taxation by state or local laws for any purpose whatever:" *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89; s. c. 13 Ky. L.

385; 17 S. W. 212.

¹¹⁹ *City of Atlanta v. First Presbyterian Church*, 86 Ga. 730; s. c. 13 S. E. 252 (overruling *Trustees v. City of Atlanta*, 76 Ga. 181; s. c. 83 Ga. 448); *In re Mayor of New York*, 11 Johns. (N. Y.) 77; *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Boston &c. Society v. Mayor &c.*, 116 Mass. 181. See also, *City of Philadelphia v. Presbyterian Hospital*, 143 Pa. St. 367; s. c. 22 Atl. 744.

¹²⁰ *In re College Street*, 8 R. I. 474.

¹²¹ *St. Louis Pub. Schools v. City of St. Louis*, 26 Mo. 468; *Lockwood v. City of St. Louis*, 24 Mo. 20. Contra, *Board of Imp. v. School Dist.*, 56 Ark. 354; s. c. 19 S. W. 969, where the subject is thoroughly discussed; *City of Toledo v. Board &c.*, 48 Ohio St. 83; s. c. 26 N. E. 403. And in *City of Hartford v. West Middle District*, 45 Conn. 462, it was held that schoolhouse grounds could not be benefited by laying out a street. See also, *Sutton v. School City of Montpelier*, 28 Ind. App. 315; s. c. 62 N. E. 710. As to assessments against plank roads which are by law exempt from taxation, see *People v. Cummings*, 65 N. Y. S. 581; s. c. 53 App. Div. (N. Y.) 36.

¹²² *Tucker v. City of Utica*, 54 N. Y. S. 855; s. c. 35 App. Div. (N. Y.) 173.

§ 1238. **Assessments against elevated street railways.**—The property of an elevated street railway is subject to special assessment for local improvements.¹²³ They are placed upon the same footing as street railways.¹²⁴ The right of way, the right of user and occupancy of a street railway company, are property and may be assessed for local improvements of the street in the same manner as other property.¹²⁵ That portion of a street occupied by a street railway, benefited by a street improvement, and used as a roadbed and tracks, is liable for its proportionate share of the cost of an improvement.¹²⁶ Authority to assess "property" benefited will sustain an assessment for paving upon the rails, sleepers, ties and spikes of a street railway company.¹²⁷ It has been held that the right of way of a street railroad is not benefited by improving the grade of a street.¹²⁸

§ 1239. **Assessments against railroad right of way.**—Where the statute authorizes assessments for local improvements against abutting

¹²³ *Lake St. R. Co. v. City of Chicago*, 183 Ill. 75; s. c. 55 N. E. 712.

¹²⁴ *Cicero &c. R. Co. v. City of Chicago*, 176 Ill. 501; s. c. 52 N. E. 866; *West Chicago St. R. Co. v. City of Chicago*, 178 Ill. 339; s. c. 53 N. E. 112.

¹²⁵ *Cicero &c. R. Co. v. City of Chicago*, 176 Ill. 501; s. c. 52 N. E. 866; *City of Chicago v. Baer*, 41 Ill. 306; *Parmelee v. City of Chicago*, 60 Ill. 267; *Chicago City R. Co. v. City of Chicago*, 90 Ill. 573; *Kuehner v. City of Freeport*, 143 Ill. 92; s. c. 32 N. E. 372.

¹²⁶ *Lightner v. City of Peoria*, 150 Ill. 80; s. c. 37 N. E. 69; *Freeport St. R. Co. v. City of Freeport*, 151 Ill. 451; s. c. 38 N. E. 137; *Billings v. City of Chicago*, 167 Ill. 337; s. c. 47 N. E. 731; *City of Shreveport v. Prescott*, 51 La. An. 1895; s. c. 26 So. 664.

¹²⁷ *City of New Haven v. Fairhaven &c. R. Co.*, 38 Conn. 422. But *People v. Gilon*, 126 N. Y. 147; s. c. 27 N. E. 282, holds that the fact that the rails, ties and tracks of a street surface railroad are property and subject to taxation generally affords no sufficient reason for tax-

ing them for street improvements, when the law has not made them specially assessable for such purposes.

¹²⁸ *Davis v. City of Newark*, 54 N. J. L. 144, 595; s. c. 23 Atl. 276. "Such a benefit," said the court, ". . . is conferred upon the franchise and not upon the strip of land on which the cars run. The land, burdened with the public easement, would in no respect be increased in value thereby." The assessment contemplated by the statute was only upon real estate: *Matter of Com'rs of Public Parks*, 47 Hun (N. Y.) 302. See also, *State v. Duryea*, 45 N. J. L. 258; *City of Bloomington v. Chicago &c. R. Co.*, 134 Ill. 451; s. c. 26 N. E. 366. Contra, *Appeal of North Beach &c. R. Co.*, 32 Cal. 499, where a distinction is drawn between horse and steam railroads in respect of benefits in such cases. See also, *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159; *Providence &c. R. Co. v. Wright*, 2 R. I. 459; *City of Chicago v. Baer*, 41 Ill. 306; *Railroad Co. v. City of Chicago*, 90 Ill. 573; *Parmelee v. City of Chicago*, 60 Ill. 267.

property the right of way of a railroad company is assessable;¹²⁹ and it need not be made against the right of way as an entirety, but may be against that part only which fronts on the improvement.¹³⁰ A railroad right of way parallel to a street may be specially assessed for local improvements;¹³¹ but not where it is across the street;¹³² and so may lands used for a depot, warehouse, round house and shops.¹³³ In New Jersey a railroad is not assessable for the expense of widening a street on which its tracks are laid,¹³⁴ but might be assessed, where its roadbed runs through the center of a street, for the expenses of a sewer.¹³⁵ The right of way of a railroad company is subject to special taxation for a local improvement.¹³⁶ But it has

¹²⁹ *Indianapolis &c. R. Co. v. Capitol Paving &c. Co.*, 24 Ind. App. 114; s. c. 54 N. E. 1076; *Chicago &c. R. Co. v. City of Milwaukee*, 89 Wis. 506; s. c. 62 N. W. 417; *Peru &c. R. Co. v. Hanna*, 68 Ind. 562; *Pittsburgh &c. R. Co. v. Hays*, 17 Ind. App. 261; s. c. 44 N. E. 375; 45 N. E. 675; 46 N. E. 597; *State v. City of Passaic*, 54 N. J. L. 340; s. c. 23 Atl. 945; *Louisville &c. R. Co. v. State*, 8 Ind. App. 377; s. c. 35 N. E. 916; *Lake Erie &c. R. Co. v. Bowker*, 9 Ind. App. 428; s. c. 36 N. E. 864; *Louisville &c. R. Co. v. Boney*, 117 Ind. 501; s. c. 20 N. E. 432.

¹³⁰ *Lake &c. R. Co. v. City of Chicago*, 183 Ill. 75; s. c. 55 N. E. 721.

¹³¹ *Illinois &c. R. Co. v. City of Kankakee*, 164 Ill. 608; s. c. 45 N. E. 971.

¹³² *Chicago &c. R. Co. v. South Park Com'rs*, 11 Ill. App. 562; *South Park Com'rs v. Chicago &c. R. Co.*, 107 Ill. 105.

¹³³ *Atchison &c. R. Co. v. Peterson*, 5 Kan. App. 103; s. c. 48 Pac. 877; *Borough of Mt. Pleasant v. Baltimore &c. R. Co.*, 138 Pa. St. 365; s. c. 20 Atl. 1052 (sidewalk); *Chicago &c. R. Co. v. City of Chicago*, 140 Ill. 309; s. c. 29 N. E. 1109; *In re Alexander Ave.*, 17 N. Y. S. 933; s. c. 63 Hun (N. Y.) 630; *City of Ludlow v. Trustees*, 78 Ky. 357;

Chicago &c. R. Co. v. People, 120 Ill. 104; s. c. 11 N. E. 418. See also, *In re Hampshire County*, 143 Mass. 424; s. c. 9 N. E. 756.

¹³⁴ *State v. Mayor &c.*, 27 N. J. L. 185.

¹³⁵ *State v. City of Passaic*, 54 N. J. L. 340; s. c. 23 Atl. 945.

¹³⁶ *Chicago &c. R. Co. v. Village of Elmhurst*, 165 Ill. 148; s. c. 46 N. E. 437; *Chicago &c. R. Co. v. City of Joliet*, 153 Ill. 649; s. c. 39 N. E. 1077; *Chicago &c. R. Co. v. People*, 120 Ill. 104; s. c. 11 N. E. 418; *Payne v. Village of South Springfield*, 161 Ill. 285; s. c. 43 N. E. 1105; *Illinois &c. R. Co. v. City of Mattoon*, 141 Ill. 32; s. c. 30 N. E. 773; *Illinois &c. R. Co. v. City of Chicago*, 141 Ill. 509; s. c. 30 N. E. 1036; *Kuehner v. City of Freeport*, 143 Ill. 92; s. c. 32 N. E. 372; *Rich v. City of Chicago*, 152 Ill. 18; s. c. 38 N. E. 255; *Illinois &c. R. Co. v. Commissioners &c.*, 129 Ill. 417; s. c. 21 N. E. 925; *Drainage Com'rs v. Illinois &c. R. Co.*, 158 Ill. 353; s. c. 41 N. E. 1037; *Illinois &c. R. Co. v. City of Decatur*, 126 Ill. 92; s. c. 18 N. E. 315; *Illinois &c. R. Co. v. City of Decatur*, 147 U. S. 190; s. c. 13 S. Ct. 293; *Illinois &c. R. Co. v. City of Decatur*, 154 Ill. 173; s. c. 38 N. E. 626; *Chicago &c. R. Co. v. City of Quincy*, 136 Ill. 563; s. c. 27 N. E. 192; *Chicago &c. R. Co. v. City of*

been held that the roadbed of a railroad can not be assessed for paving a street crossing it, none of the company's buildings being within two blocks of the crossing;¹³⁷ but it may be assessed for a sewer in an adjoining street.¹³⁸ It has been said to be a conclusive presumption of law that the roadbed of a railroad company can derive no possible benefit from the improvement of a street contiguous to it, and it is beyond the power of the legislature to authorize an assessment upon it.¹³⁹ Land and buildings will not include the franchise.¹⁴⁰ But where the right of way is on an embankment twenty-five feet above an adjacent street and is not benefited by paving, it can not be assessed.¹⁴¹ It has been held that the right of way in and across a street is not contiguous property abutting on a street and therefore not liable for a public improvement.¹⁴² Another class of cases hold that a right of way can not be held liable for a public improvement unless it can be shown to be benefited by the improvement.¹⁴³ If, however, the land is owned by the railroad company in fee and used for railroad purposes generally and useful for mechanical and manufacturing purposes, it is liable for a sewer which bene-

Moline, 158 Ill. 64; s. c. 41 N. E. 877; Freeport St. R. Co. v. City of Freeport, 151 Ill. 451; s. c. 38 N. E. 137; Pittsburgh &c. R. Co. v. Hays, 17 Ind. App. 261; s. c. 44 N. E. 375. Contra, City of Erie v. Piece of Land &c., 175 Pa. St. 523; s. c. 34 Atl. 808.

¹³⁷ Detroit &c. R. Co. v. City of Grand Rapids, 106 Mich. 13; s. c. 63 N. W. 1007.

¹³⁸ Chicago &c. R. Co. v. City of Joliet, 153 Ill. 649; s. c. 39 N. E. 1077; Jacksonville R. Co. v. City of Jacksonville, 114 Ill. 562; s. c. 2 N. E. 478; Chicago &c. R. Co. v. People, 120 Ill. 104; s. c. 11 N. E. 418; Kuehner v. City of Freeport, 143 Ill. 92; s. c. 32 N. E. 372; Illinois &c. R. Co. v. City of Decatur, 126 Ill. 92; s. c. 18 N. E. 315; Lightner v. City of Peoria, 150 Ill. 80; s. c. 37 N. E. 69; Illinois &c. R. Co. v. City of Mattoon, 141 Ill. 32; s. c. 30 N. E. 773; Rich v. City of Chicago, 152 Ill. 18; s. c. 38 N. E. 255.

¹³⁹ City of Allegheny v. Western &c. R. Co., 92 Pa. St. 100; s. c. 21

Atl. 763; Philadelphia v. Philadelphia &c. R. Co., 33 Pa. St. 41; Louisville &c. R. Co. v. City of East St. Louis, 134 Ill. 656; s. c. 25 N. E. 962.

¹⁴⁰ Farmers' Loan &c. Co. v. Borough of Ansonia, 61 Conn. 76; s. c. 23 Atl. 705.

¹⁴¹ Chicago &c. R. Co. v. City of Milwaukee, 89 Wis. 506; s. c. 62 N. W. 417.

¹⁴² South Park Com'rs v. Chicago &c. R. Co., 107 Ill. 105.

¹⁴³ State v. City of Elizabeth, 37 N. J. L. 330; In re Public Parks Com'rs, 47 Hun (N. Y.) 302. And see City of Bloomington v. Chicago &c. R. Co., 134 Ill. 451; s. c. 26 N. E. 366; State v. Mayor &c., 27 N. J. L. 185; Mt. Pleasant Borough v. Baltimore &c. R. Co., 138 Pa. St. 365; s. c. 20 Atl. 1052; Illinois &c. R. Co. v. City of Chicago, 141 Ill. 509; s. c. 30 N. E. 1036; New York &c. R. Co. v. City of New Haven, 42 Conn. 279; City of Bridgeport v. New York &c. R. Co., 36 Conn. 255.

fits the property.¹⁴⁴ And so are depot grounds, or dock property,¹⁴⁵ or freight depots, repair shops, for opening of a street leading to them.¹⁴⁶ A railroad contiguous to a proposed street improvement may be specially taxed for the improvement,¹⁴⁷ and it has been held that the assessment could be collected as a personal liability.¹⁴⁸ In other cases it has been held that the track of a railroad can not be assessed for a local improvement, (1) because the railroad has simply an easement in the land, (2) it can not be said to be benefited in the sense that ordinary owners are in public improvements, and (3) on the ground that the remedy of enforcement is inadequate.¹⁴⁹ Land purchased for railroad purposes not essential to railroad functions in its present condition is assessable,¹⁵⁰ and lots owned by a railroad outside of its right of way.¹⁵¹ Where abutting property is subject to special assessment for street improvements it does not include a railroad right of way that lies wholly within the street.¹⁵² Where lands used for railroad purposes are exempted from assessments for local improvements it does not include portions of a two-hundred-acre tract of land owned by a railroad company but not used for railroad purposes.¹⁵³ Where by ordinance a street railway corporation is required to keep in repair, pave, macadamize and plank a specified

¹⁴⁴ *New York &c. R. Co. v. City of New Britain*, 49 Conn. 40.

¹⁴⁵ *Burlington &c. R. Co. v. Spearman*, 12 Iowa 112; *City of Nevada v. Eddy*, 123 Mo. 546; s. c. 27 S. W. 471; *In re Alexander Ave.*, 17 N. Y. S. 933; s. c. 63 Hun (N. Y.) 630.

¹⁴⁶ *In re Opening of Berks St.*, 12 W. N. C. (Pa.) 10.

¹⁴⁷ *Chicago &c. R. Co. v. City of Joliet*, 153 Ill. 649; s. c. 39 N. E. 1077; *Peru &c. R. Co. v. Hanna*, 68 Ind. 562. But subsequently it was held that the bed of a railroad could not be sold for a special assessment: *Louisville &c. R. Co. v. State*, 122 Ind. 443; s. c. 24 N. E. 350.

¹⁴⁸ *City of Muscatine v. Chicago &c. R. Co.*, 79 Iowa 645; s. c. 44 N. W. 909; *Pittsburgh &c. R. Co. v. Hays*, 17 Ind. App. 261; s. c. 44 N. E. 375; 45 N. E. 675; 46 N. E. 597. See § 1249, post.

¹⁴⁹ *Chicago &c. R. Co. v. City of Milwaukee*, 89 Wis. 506; s. c. 62 N. W. 417; 28 L. R. A. 249; *Phila-*

delphia v. Philadelphia &c. R. Co., 33 Pa. St. 41; *Junction R. Co. v. City of Philadelphia*, 88 Pa. St. 424; *Allegheny City v. Western &c. R. Co.*, 138 Pa. St. 375; s. c. 21 Atl. 763; *Sweaney v. Kansas City R. Co.*, 54 Mo. App. 265. For exhaustive note on the right to lay special assessments on railroad rights of way see *Chicago &c. R. Co. v. City of Milwaukee*, 89 Wis. 506; s. c. 62 N. W. 417, in 28 L. R. A. 249.

¹⁵⁰ *Morris &c. R. Co. v. Mayor &c.*, 64 N. J. L. 148; s. c. 44 Atl. 937.

¹⁵¹ *Morris &c. R. Co. v. Mayor &c.*, supra.

¹⁵² *Indianapolis &c. R. Co. v. Capitol Paving &c. Co.*, 24 Ind. App. 114; s. c. 54 N. E. 1076; *South Park Com'rs v. Chicago &c. R. Co.*, 107 Ill. 105; *O'Reilley v. City of Kingston*, 114 N. Y. 439; s. c. 21 N. E. 1004; *Oshkosh City R. Co. v. Winnebago Co.*, 89 Wis. 435; s. c. 61 N. W. 1107.

¹⁵³ *State v. District Court*, 68 Minn. 242; s. c. 71 N. W. 27.

width in streets occupied by it, the corporation is liable for its proportionate share of the cost of a sewer.¹⁵⁴ Land of a railroad company over and above what is necessary for the exercise of its corporate franchise may be sold as that of any other owner.¹⁵⁵ Land used for a coal yard is subject to assessments for street improvements,¹⁵⁶ and a graveyard is assessable for local improvements.¹⁵⁷

§ 1240. **Assessment districts.**—The legislature in the exercise of its power of taxation has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion;¹⁵⁸ and when it determines what lands which might be benefited by the improvement are in fact benefited, its determination is conclusive upon the owners and the courts.¹⁵⁹

¹⁵⁴ *Bickerdike v. City of Chicago*, 185 Ill. 280; s. c. 56 N. E. 1096.

¹⁵⁵ *City of Philadelphia v. Philadelphia &c. R. Co.*, 1 Pa. Sur. Ct. 236.

¹⁵⁶ *City of Philadelphia v. Philadelphia &c. R. Co.*, 177 Pa. St. 292; s. c. 35 Atl. 610.

¹⁵⁷ *Borough of Beltzhoover v. Heirs of Beltzhoover*, 173 Pa. St. 213; s. c. 33 Atl. 1047.

¹⁵⁸ *Mr. Justice Gray in Spencer v. Merchant*, 125 U. S. 345, 355; s. c. 8 S. Ct. 921; *Willard v. Presbury*, 14 Wall. 676; *Davidson v. New Orleans*, 96 U. S. 97; *Mobile Co. v. Kimball*, 102 U. S. 691; *Hagar v. Reclamation District*, 111 U. S. 701; s. c. 4 S. Ct. 663.

¹⁵⁹ *Spencer v. Merchant*, 125 U. S. 345, 356; s. c. 8 S. Ct. 921. "In no part of the law of taxation has the practice of our state governments left the discretion of the legislature more entirely unfettered than in laying and apportioning such assessments, and the case must be most extraordinary and clearly exceptional to warrant any court in declaring that the discretion has been abused and the legislative authority exceeded." *Cooley Taxation* (2d ed.) 145; *People v. Mayor &c.*,

4 N. Y. 419, the leading case; *McFerron v. Alloway*, 14 Bush (Ky.) 580; *Shaw v. Dennis*, 10 Ill. 405; *Michener v. City of Philadelphia*, 118 Pa. St. 535; s. c. 12 Atl. 174; *Litchfield v. Vernon*, 41 N. Y. 123; *City of Philadelphia v. Field*, 58 Pa. St. 320; *Town of Macon v. Patty*, 57 Miss. 378; *Langhorne v. Robinson*, 20 Gratt. (Va.) 661; *Kelley v. City of Cleveland*, 34 Ohio St. 468; *Hoyt v. City of East Saginaw*, 19 Mich. 39; *Bigelow v. City of Chicago*, 90 Ill. 49; *Kingman &c., Petitioners*, 153 Mass. 566; s. c. 27 N. E. 778; *Nevin v. Roach*, 86 Ky. 492; s. c. 5 S. W. 546; *Meggett v. City of Eau Claire*, 81 Wis. 326; s. c. 51 N. W. 566; *City of Harrisburg v. McCormick*, 129 Pa. St. 213; s. c. 18 Atl. 126; *Chester City v. Black*, 132 Pa. St. 568; s. c. 19 Atl. 276; *City of St. Louis v. Excelsior Brewing Co.*, 96 Mo. 677; s. c. 10 S. W. 477; *Conwell v. President &c.*, 15 Ind. 150; *People v. Supervisors &c.*, 20 N. Y. 252, 255; *Malchus v. Highlands*, 4 Bush (Ky.) 547; *Town of Waterville v. County Com'rs*, 59 Me. 80; *Challis v. Parker*, 11 Kan. 394; *People v. Lawrence*, 41 N. Y. 137; *Hingham &c. Turnpike v. Norfolk Co.*, 6 Allen (Mass.) 353; *Parker v.*

§ 1241. **The same subject continued.**—The legislature, in the absence of constitutional prohibition, may delegate to the local authorities the power to establish the districts upon which the assessments shall be levied, and the rule as stated in the preceding section applies here, that their decision in the matter is conclusive.¹⁶⁰ But whether the legislature or the municipal authorities fix the district, there are many cases which hold that the power is subject to limitations; that if the property is so situated as to render it physically impossible for the improvement to benefit it, or the discretion is exercised so as to leave no public character whatever to the district, or if it clearly appears that there is no benefit which the property did not before possess, the assessment will be set aside.¹⁶¹

Challis, 9 Kan. 155; Mayor &c. v. Hughes, 1 Gill & J. (Md.) 480; Gordon v. Comes, 47 N. Y. 608; City of St. Louis v. Oeters, 36 Mo. 456; Arnold v. City of Cambridge, 106 Mass. 352; Cuming v. City of Grand Rapids, 46 Mich. 150; Scovill v. City of Cleveland, 1 Ohio St. 126; Hines v. City of Leavenworth, 3 Kan. 186; Terry v. City of Hartford, 39 Conn. 291; City of Fort Wayne v. Cody, 43 Ind. 197; Warren v. Henly, 31 Iowa 31; Hill v. Higdon, 5 Ohio St. 243; Williams v. Mayor &c., 2 Mich. 560; Motz v. City of Detroit, 18 Mich. 494; Halsey v. People, 84 Ill. 89; Wright v. People, 87 Ill. 582; Cook v. Slocum, 27 Minn. 509; s. c. 8 N. W. 755; Brown v. City of Denver, 3 Colo. 169; Burnett v. Mayor &c., 12 Cal. 76; Commonwealth v. Woods, 44 Pa. St. 113; Whiting v. Townsend, 57 Cal. 515; Petition of Brady, 85 N. Y. 268; City of Ludlow v. Trustees, 78 Ky. 357; In re Bassford, 50 N. Y. 509; City of St. Joseph v. O'Donoghue, 31 Mo. 345; Rogers v. City of St. Paul, 22 Minn. 494; Ex parte Mayor, 23 Wend. (N. Y.) 277. As to what property is "adjoining the locality to be affected" within a constitutional provision, see City of Little Rock v. Katzenstein, 52 Ark. 107; s. c. 12 S. W. 198.

¹⁶⁰ Elliott Roads & Streets (2d ed.), § 563; Cooley Taxation (2d

ed.), 640; Rogers v. City of St. Paul, 22 Minn. 494; Teegarden v. City of Racine, 56 Wis. 545; s. c. 14 N. W. 614; Meggett v. City of Eau Claire, 81 Wis. 326; s. c. 51 N. W. 566.

¹⁶¹ In Edwards v. City of Chicago, 140 Ill. 440; s. c. 30 N. E. 350, it was contended that an assessment for an underground sewer upon all lands within a given district was valid, because the commissioners had found that they would be benefited by the improvement. But the court held that this clearly could not be imposed on lands which could not be connected with the sewer, or unless some provision for such connection was made in the ordinance. See also, State v. Mayor &c., 53 N. J. L. 299; s. c. 21 Atl. 453, a similar case; City of Bloomington v. Chicago &c. R. Co., 134 Ill. 451; s. c. 26 N. E. 366; Speer v. Mayor &c., 85 Ga. 49; s. c. 11 S. E. 802; Paulson v. City of Portland, 16 Or. 450; s. c. 19 Pac. 450; State v. City of Newark, 48 N. J. L. 101; s. c. 12 Atl. 770; City of Detroit v. Daly, 68 Mich. 503; s. c. 37 N. W. 11; Preston v. Roberts, 12 Bush (Ky.) 570; Keith v. Bingham, 100 Mo. 300; s. c. 13 S. W. 683; Hanscom v. City of Omaha, 11 Neb. 37; s. c. 7 N. W. 739. "In the absence of fraud, oppression or manifest mistake such determinations are conclusive:" Da-

§ 1242. Prescribed formalities must be strictly followed.—In order to charge the owners of property with the cost of an improvement, the power must not only be expressly conferred by law, but the provisions of the law must be strictly pursued. The successive steps to be taken preliminary to ordering the work done, the manner of letting the contract and the mode of constructing the improvement, when provided for in the law, are intended for the protection of the property owner and are his safeguards against the exercise of arbitrary power. Each act required to be done is essential to the exercise of the jurisdiction and each must be rigidly pursued. The courts can not say that the omission of some requirement is unimportant or that an act different from that directed is substantially as good. The effect of the proceeding being to charge the property of the citizen with a burden for the public benefit, the requirements of the law as to the exercise of the power should be deemed mandatory.¹⁶²

vies v. City of Saginaw, 87 Mich. 439; s. c. 49 N. W. 667; Thomas v. Gain, 35 Mich. 155, a leading case, affirming the right of the judiciary to pronounce an arbitrary determination invalid. See also, *In re* Washington Ave., 69 Pa. St. 352; Craig v. City of Philadelphia, 89 Pa. St. 265; Seeley v. City of Pittsburgh, 82 Pa. St. 360.

¹⁶² *Flewelling v. Proetzel*, 80 Tex. 191; s. c. 15 S. W. 1043; *Worthington v. City of Covington*, 82 Ky. 265; *Murphy v. City of Louisville*, 9 Bush (Ky.) 189; *City of Spokane Falls v. Browne*, 3 Wash. 84; s. c. 27 Pac. 1077; *Allen v. City of Galveston*, 51 Tex. 302; *Savage v. City of Buffalo*, 14 N. Y. S. 101; s. c. 59 Hun (N. Y.) 606; *Brophy v. Landman*, 28 Ohio St. 542; *City of Lowell v. Wheelock*, 11 Cush. (Mass.) 391; *City of Chicago v. Wright*, 32 Ill. 192; *City of St. Louis v. Ranken*, 96 Mo. 497; s. c. 9 S. W. 910; *Sewall v. City of St. Paul*, 20 Minn. 511; *In re Manhattan R. Co.*, 102 N. Y. 301; s. c. 6 N. E. 590; *Ziegler v. Flack*, 54 N. Y. Super. 69; *Newman v. City of Emporia*, 32 Kan. 456; s. c. 4 Pac. 815; *Lyon v. Alley*, 130 U. S. 177; s. c. 9 S. Ct. 480; *State v. Mayor &c.*, 49 N. J. L. 311;

s. c. 8 Atl. 295; *Zottman v. City of San Francisco*, 20 Cal. 96, 102 (Field, C. J., saying: "The mode in such cases constitutes the measure of the power"); *D'Antignac v. City Council*, 31 Ga. 700; *City of Lexington v. Headley*, 5 Bush (Ky.) 508; *Lott v. Ross*, 38 Ala. 156; *Welker v. Potter*, 18 Ohio St. 85; *Fitch v. Pinckard*, 5 Ill. 69; *Hawthorne v. City of East Portland*, 13 Or. 271; s. c. 10 Pac. 342; *Henderson v. Mayor &c.*, 8 Md. 352; *White v. City of Saginaw*, 67 Mich. 33; s. c. 34 N. W. 255; *Rathbun v. Acker*, 18 Barb. (N. Y.) 393; *Newman v. City of Emporia*, 32 Kan. 456; s. c. 4 Pac. 815; *Crane v. City of Janesville*, 20 Wis. 321; *Hurford v. City of Omaha*, 4 Neb. 336; *Knox v. Peterson*, 21 Wis. 247; *State v. City of Passaic*, 41 N. J. L. 90; *Collins v. City of Louisville*, 2 B. Mon. (Ky.) 134; *Merrill v. Abbott*, 62 Ind. 549; *State v. Mayor &c.*, 29 N. J. L. 104; *Cross v. Mayor &c.*, 18 N. J. Eq. 305; *Whalen v. City of La Crosse*, 16 Wis. 271; *State v. Crane*, 36 N. J. L. 394; *Finney v. City of Oshkosh*, 18 Wis. 209; *State v. City of Perth Amboy*, 38 N. J. L. 425; *Fletcher v. City of Oshkosh*, 18 Wis. 229; *Benton v.*

§ 1243. **The same subject continued.**—Thus, where the charter requires notice of intention to order an assessment, such notice is essential to its validity.¹⁶³ So, also, where preliminary estimates or surveys are required, these are regarded as conditions precedent to an assessment.¹⁶⁴ And where the charter provided “that whenever the common council shall determine that it is necessary to construct” a sewer, they shall cause plans and specifications to be made and filed, and bids are then to be advertised for, it was held that an assessment for the construction of a sewer the necessity for which had not been previously determined upon by the common council was invalid.¹⁶⁵

City of Milwaukee, 50 Wis. 368; s. c. 7 N. W. 241; Leach v. Cargill, 60 Mo. 316; Butler v. Nevin, 88 Ill. 575; Himmelman v. Danos, 35 Cal. 441; Churchman v. City of Indianapolis, 110 Ind. 259; s. c. 11 N. E. 301; Dougherty v. Hitchcock, 35 Cal. 512; Frost v. Leatherman, 55 Mich. 33; s. c. 20 N. W. 705; Hall v. City of Chippewa Falls, 47 Wis. 267; s. c. 2 N. W. 279; followed in Drummond v. City of Eau Claire, 79 Wis. 97; s. c. 48 N. W. 244; State v. Babcock, 20 Neb. 522; s. c. 31 N. W. 8; Eilert v. City of Oshkosh, 14 Wis. 637; Green v. Ward, 82 Va. 324; Smith v. City of Milwaukee, 18 Wis. 69; City of Fort Worth v. Davis, 57 Tex. 225; Bouldin v. Mayor &c., 15 Md. 18; In re Eager, 46 N. Y. 100; City of Columbus v. Storey, 35 Ind. 97; Hewes v. Reis, 40 Cal. 255; Massing v. Ames, 37 Wis. 645; Fulton v. City of Lincoln, 9 Neb. 358; s. c. 2 N. W. 724; Pound v. Supervisors &c., 43 Wis. 63; Starr v. City of Burlington, 45 Iowa 87; Merritt v. Village of Portchester, 71 N. Y. 309; People v. Maher, 56 Hun (N. Y.) 81; Elliott Roads & Streets (2d ed.), § 546; 1 Desty Taxation, § 106; 2 Dillon Munic. Corp. (4th ed.), § 769. That minor provisions will sometimes be deemed directory, or a substantial compliance sufficient, see Gearhart v. Dixon, 1 Pa. St. 224; Parish v. Golden, 35 N. Y. 462, 464; State v. Village of South Orange, 49 N. J. L. 104; s. c. 6 Atl. 312; Stebbins v. Kay, 4 N. Y. S.

566; s. c. 51 Hun (N. Y.) 589; Strauss v. City of Cincinnati, 23 Wk. Law Bul. (Ohio) 359; Jenkins v. Stetler, 118 Ind. 275; s. c. 20 N. E. 788. Directory constructions deprecated in Elliott Roads & Streets (2d ed.), § 546. In Flewellin v. Proetzel, 80 Tex. 191; s. c. 15 S. W. 1043, it is said that, after an improvement has been regularly made, it may be doubted whether a more liberal rule should not be extended to the acts which are subsequently to be performed in order to perfect the remedy of the contractor for the collection of his debt. See also, Davies v. City of Saginaw, 87 Mich. 439; s. c. 49 N. W. 667; Wewell v. City of Cincinnati, 45 Ohio St. 407; s. c. 15 N. E. 196.

¹⁶³ Tift v. City of Buffalo, 7 N. Y. S. 633; s. c. 27 N. Y. St. 72; Faysoux v. De Chaurand, 36 La. An. 547. See also, Welker v. Potter, 18 Ohio St. 85; Smith v. City of Toledo, 24 Ohio St. 126.

¹⁶⁴ Brady v. King, 53 Cal. 44; In re Garvey, 77 N. Y. 523; Frosh v. City of Galveston, 73 Tex. 401; s. c. 11 S. W. 402; Dyer v. Heydenfeldt (Cal.), 4 Pac. 1187; s. c. 4 West Coast R. 585. See also, Mattingly v. City of Plymouth, 100 Ind. 545; City of Aurora v. Fox, 78 Ind. 1.

¹⁶⁵ White v. City of Saginaw, 67 Mich. 33; s. c. 34 N. W. 255. See also, Hoyt v. City of Saginaw, 19 Mich. 39. Cf. Beecher v. City of Detroit, 92 Mich. 268; s. c. 52 N. W. 731; City of Raleigh v. Peace, 110

§ 1244. **Ordinance or resolution.**—The proper municipal body may, in the absence of a statutory or charter provision requiring an ordinance, initiate proceedings by order or resolution.¹⁶⁶ But where the statute provided that “cities are authorized and empowered to enact ordinances,” etc., it was held that taxes levied for street improvements simply under a resolution of the city council were invalid, and could not be validated by a subsequent ordinance.¹⁶⁷ The ordinance must be enacted in the mode prescribed by law. If the concurrence of more than a majority of the members of a board is required, an assessment for improvements undertaken in accordance with a vote passed by less than the number specified can not be enforced.¹⁶⁸ The same

N. C. 32; s. c. 14 S. E. 521. A declaration of the necessity does not involve the enumeration of details: *Davis v. City of Saginaw*, 87 Mich. 439; s. c. 49 N. W. 667. See also, *Young v. City of St. Louis*, 47 Mo. 492; *Stuyvesant v. Mayor &c.*, 7 Cow. (N. Y.) 588; *Jackson v. State*, 104 Ind. 516; s. c. 3 N. E. 863; *Fisher v. Municipal Council &c.*, 10 Up. Can. Q. B. 492. Omissions in the preliminary steps which are mere matters of form will not vitiate the assessment: *Knell v. City of Buffalo*, 7 N. Y. S. 233; s. c. 26 N. Y. St. 607. See also, *Illinois &c. R. Co. v. City of Decatur*, 126 Ill. 92; s. c. 18 N. E. 315; *Wood v. Strother*, 76 Cal. 545; s. c. 18 Pac. 766. An assessment for grading an alleged street which has never been laid out, opened or in any way made a public highway by competent authority is illegal: *Copcutt v. City of Yonkers*, 59 Hun (N. Y.) 212; s. c. 13 N. Y. S. 452. See also, *City of Philadelphia v. Ball*, 147 Pa. St. 243; s. c. 23 Atl. 564. But it was held in *Maywood Co. v. Village of Maywood*, 140 Ill. 216; s. c. 29 N. E. 704 (following *Village of Hyde Park v. Borden*, 94 Ill. 26), that an ordinance for the construction of a sewer by special assessment may be passed before title to the land to be taken for the sewer has been acquired.

¹⁶⁶ *Moberry v. City of Jeffersonville*, 38 Ind. 198; *Harney v. Heller*, 47 Cal. 15; *Emery v. Gas Co.*, 28 Cal. 345.

¹⁶⁷ *Newman v. City of Emporia*, 32 Kan. 456; s. c. 4 Pac. 815. See also, *Barron v. Krebs*, 41 Kan. 338; s. c. 21 Pac. 235; *City of Scranton v. Barnes*, 147 Pa. St. 461; s. c. 23 Atl. 777; *Elliott Roads & Streets* (2d ed.), § 515. The law in force at the time of the passage of the ordinance should govern the manner of assessment and rights and liabilities of owners: *City of Cincinnati v. Seasongood*, 46 Ohio St. 296; s. c. 21 N. E. 630.

¹⁶⁸ *Town of Albuquerque v. Zeiger*, 5 N. M. 674; s. c. 27 Pac. 315; *Wood v. City of Galveston*, 76 Tex. 126; s. c. 13 S. W. 227, holding the petition to collect the assessment insufficient to support a judgment by default, for failure to allege that the vote was passed by two-thirds as there required; *Price v. Grand Rapids &c. R. Co.*, 13 Ind. 58; *City of Logansport v. Legg*, 20 Ind. 315; *Chamberlain v. City of Cleveland*, 34 Ohio St. 551; *Petition of De Pieris*, 82 N. Y. 243; *Town of Danville v. Shelton*, 76 Va. 325; *Matter of the Metropolitan Gas Light Co.*, 85 N. Y. 526. See also, *Holt v. City Council &c.*, 127 Mass. 408; and as to quorums and majorities, ch. 9, vol. 1, on Public Boards.

rule was applied where the resolution was not submitted to the mayor for his approval in compliance with the provisions of the charter.¹⁶⁹

§ 1245. **Petition.**—Unless the statute so requires, a petition by property owners is not a necessary preliminary to the institution of the proceedings.¹⁷⁰ But where a petition of a certain number or proportion of the owners of property is necessary to set the machinery of the statute authorizing the improvement in motion, a petition meeting all the requirements is an indispensable prerequisite to the jurisdiction of the municipal authorities.¹⁷¹ One whose land is sold

¹⁶⁹ *Twiss v. City of Port Huron*, 63 Mich. 528; s. c. 30 N. W. 177. See also, as to requirements of several readings of an ordinance, *State v. Mayor &c.*, 30 N. J. L. 303; *Weill v. Kenfield*, 54 Cal. 111; *Cutcomp v. Utt*, 60 Iowa 156; s. c. 4 N. W. 214. Cf. *Barton v. City of Pittsburgh*, 4 Brews. (Pa.) 373. It sufficiently appears that the proceedings of a council in referring a petition for street improvement were presented to the mayor for approval, when it is shown that the documents were given to the mayor's clerk, who, in accordance with his custom, was at the office to receive such papers, and that the mayor afterwards attempted to approve them: *Knell v. City of Buffalo*, 7 N. Y. S. 233. "There is some conflict in the authorities as to when the provisions of a statute concerning the adoption of ordinances shall be considered mandatory and when directory, but we believe the only safe rule in assessment cases is to consider all such provisions mandatory unless there is an exceedingly strong reason for holding them to be directory." *Elliott Roads & Streets* (2d ed.), § 519, p. 533, n. 6, and cases cited.

¹⁷⁰ *Farrar v. City of St. Louis*, 80 Mo. 379; *Dennison v. Kansas City*, 95 Mo. 416; s. c. 8 S. W. 429; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. An. 251; s. c. 5 So. 848.

¹⁷¹ *Zeigler v. Hopkins*, 117 U. S.

683; s. c. 6 S. Ct. 919, holding that if the requisite number do not apply the whole proceedings are null and void; *Holland v. Mayor &c.*, 11 Md. 186; *Mayor &c. v. Eschbach*, 18 Md. 276; *Miller v. Mayor &c.*, 47 Ala. 163; *People v. City of Rochester*, 21 Barb. (N. Y.) 656; *In re Sharp*, 56 N. Y. 257; *People v. City of Brooklyn*, 71 N. Y. 495; *In re Kiernan*, 62 N. Y. 457; *Boyle v. City of Brooklyn*, 71 N. Y. 1; *Zimmerman v. Snowden*, 88 Mo. 218; *Jefferson Co. v. Cowan*, 54 Mo. 234; *Thorn v. West Chicago Park Com'rs*, 130 Ill. 594; s. c. 22 N. E. 520; *State v. Nelson*, 57 Wis. 147; s. c. 15 N. W. 14; *Wells v. Burnham*, 20 Wis. 112; *Town of Albuquerque v. Zeiger*, 5 N. M. 674; s. c. 27 Pac. 315; *State v. Mayor &c.*, 32 N. J. L. 49; *Carron v. Martin*, 26 N. J. L. 594; *State v. City Council &c.*, 31 N. J. L. 547; *State v. Mayor &c.*, 37 N. J. L. 415; reversing s. c. 35 N. J. L. 168; *Treasurer &c. v. Mulford*, 26 N. J. L. 49; *State v. City of Elizabeth*, 37 N. J. L. 432; *In re Royal St.*, 16 La. An. 393; *Daniel v. City of New Orleans*, 26 La. An. 1; *McGuinn v. Peri*, 16 La. An. 326; *McKee v. Brown*, 23 La. An. 306; *City of Lexington v. Headley*, 5 Bush (Ky.) 508; *City of Louisville v. Hyatt*, 2 B. Mon. (Ky.) 177. A board being authorized to make assessments on a petition of two-thirds of the owners of adjoining lots, or without a petition by a two-thirds vote of the board, the

for non-payment of an assessment for benefits may show, in ejectment to recover back the land, that the petition was not signed by the requisite majority although the improvement was ordered on the basis of the petition as presented.¹⁷²

§ 1246. **The same subject continued.**—But a special assessment, invalid only for the insufficiency of the petition and of the number of signatures thereto required, may be cured by an act of the legislature;¹⁷³ and it has been held that slight changes and modifications may be made in the course of the work without a petition therefor, where it does not appear that such changes increase the cost.¹⁷⁴ The petitioners are not estopped to deny the validity of the tax levy on

fact that there was an insufficient petition will not avoid assessments made by a two-thirds vote: *McEneney v. Town of Sullivan*, 125 Ind. 407; s. c. 25 N. E. 540. But in such a case either one or the other of the conditions must be complied with: *City of Covington v. Casey*, 3 Bush (Ky.) 698; *Tallant v. City of Burlington*, 39 Iowa 543; *Mulligan v. Smith*, 59 Cal. 206; *Burnett v. Mayor &c.*, 12 Cal. 76; *Turrill v. Grattan*, 52 Cal. 97; *Welsford v. Weidlein*, 23 Kan. 601; *Shaffer v. Weech*, 34 Kan. 595; s. c. 9 Pac. 202; *Miller v. Mayor &c.*, 47 Ala. 163; *James v. Pine Bluff*, 49 Ark. 199; s. c. 4 S. W. 760; *Kyle v. Malin*, 8 Ind. 34; *Moberry v. City of Jeffersonville*, 38 Ind. 198; *Forsyth v. Kreuter*, 100 Ind. 27; *City of Delphi v. Evans*, 36 Ind. 90; *Hager v. City of Burlington*, 42 Iowa 661; *Henry v. Thomas*, 119 Mass. 583; *Maguire v. Smock*, 42 Ind. 1 (signatures obtained by bribery). See also, *Dennison v. Kansas City*, 95 Mo. 416; s. c. 8 S. W. 429; *Meyer v. Fromm*, 108 Ind. 208; s. c. 9 N. E. 84.

¹⁷² *Zeigler v. Hopkins*, 117 U. S. 683; s. c. 6 S. Ct. 919. Cf. *In re Michie &c.*, 11 Up. Can. C. P. 379; *Wright v. City of Tacoma*, 3 Wash. T. 410; s. c. 19 Pac. 42.

¹⁷³ *People v. Wilson*, 3 N. Y. S. 326; s. c. 21 N. Y. St. 120; *Whitney v. City of Pittsburgh*, 147 Pa. St.

351; s. c. 23 Atl. 395; *Bingaman v. City of Pittsburgh*, 147 Pa. St. 353; s. c. 23 Atl. 395.

¹⁷⁴ *O'Reilley v. City of Kingston*, 114 N. Y. 439; s. c. 21 N. E. 1004. Under the charter of *Kansas City* (Acts Mo. 1875, p. 250), which provides that streets shall not be improved at the expense of property holders thereon until a majority of them, in front feet, petition for it, after which such petition shall be published, and persons liable for the expense of the proposed improvement may make objections which the council shall hear and decide, and that when the ordinance for such improvement declares that the requirements as to petition and notice have been complied with, such declaration shall be conclusive for all purposes, if the council refuse a hearing when demanded, to interested persons making objections, the execution of the ordinance will be restrained until such hearing is had: *Dennison v. City of Kansas City*, 95 Mo. 416; s. c. 8 S. W. 429. That the legislature may make the determination of the council conclusive, see *Dolan v. Mayor &c.*, 62 N. Y. 472; *In re Kiernan*, 62 N. Y. 457. Petition need not follow the statute literally: *Wahlgreen v. City of Kansas City*, 42 Kan. 243; s. c. 21 Pac. 1068.

the ground that the statute was not complied with in making the improvement.¹⁷⁵

§ 1247. **Description of improvement and property.**—It is frequently provided that the ordinance shall set out the nature, character, locality, description, etc., of the improvement.¹⁷⁶ Upon the principle that *id certum est quod certum reddi potest*, ordinances have been upheld which, though insufficient and incomplete in themselves, referred to specifications on file in a public office or to maps or other accessible data for a more particular description.¹⁷⁷ And an

¹⁷⁵ *McLauren v. City of Grand Forks*, 6 Dak. 397; s. c. 43 N. W. 710. Cf. *City of Burlington v. Gilbert*, 31 Iowa 356. In an action to foreclose an assessment lien the complaint is sufficient without setting forth the specifications which form part of the contract: *Greenwood v. Hassett*, 128 Cal. xviii (mem.); s. c. 61 Pac. 173. The complaint to enjoin assessment held insufficient in *Shannon v. City of Portland*, 38 Or. 382; s. c. 62 Pac. 50. Complaint held not to state any question arising under federal constitution, in *Allen v. City of Portland*, 35 Or. 420; s. c. 58 Pac. 509. Requirements of petition,—see *Hays v. City of Cincinnati*, 62 Ohio St. 116; s. c. 56 N. E. 658. Upon an application for judgment and an order of sale when objections are filed, the hearing is summary and without pleadings: *People v. McWethy*, 177 Ill. 334; s. c. 52 N. E. 479. It is not necessary in a petition to anticipate and avoid any defenses the answer might set up: *Barber Asphalt Pav. Co. v. Lampton*, 79 Mo. App. 286. Cf. *Perine v. Moran*, 127 Cal. 18; s. c. 60 Pac. 1130. Matter which constitutes an affirmative defense must be pleaded in the answer: *Adkins v. Quest*, 79 Mo. App. 36.

¹⁷⁶ Ordinance fatal because of an insufficient description of the "exterior boundaries" of the district to be assessed: *Dehail v. Morford*, 95 Cal. 457; s. c. 30 Pac. 593. Ordi-

nances for a brick sewer "with necessary man-holes" is not defective because of failure to specify the location of the man-holes: *City of Springfield v. Sale*, 127 Ill. 359; s. c. 20 N. E. 86; following *City of Springfield v. Mathus*, 124 Ill. 88; s. c. 16 N. E. 92. See also, *Pearce v. Village of Hyde Park*, 126 Ill. 287; s. c. 18 N. E. 824; *Taber v. Grafmiller*, 109 Ind. 206; s. c. 9 N. E. 721; *Ross v. Stackhouse*, 114 Ind. 200; s. c. 16 N. E. 501; *Main v. Fort Smith*, 49 Ark. 480; s. c. 5 S. W. 801; *Village of Hyde Park v. Carton*, 132 Ill. 100; s. c. 23 N. E. 590 (insufficient description. See also, *Ogden v. Town of Lake View*, 121 Ill. 422; s. c. 13 N. E. 159); *Doane v. Houghton*, 75 Cal. 360; s. c. 17 Pac. 426; *Blair v. Luning*, 76 Cal. 134; s. c. 18 Pac. 153.

¹⁷⁷ *State v. Mayor &c.*, 32 N. J. L. 49; *Pearce v. City of Hyde Park*, 126 Ill. 287; s. c. 18 N. E. 824; *State v. Mayor &c.*, 34 N. J. L. 445; *Stone v. City of Cambridge*, 6 Cush. (Mass.) 270; *Galbreath v. Newton*, 30 Mo. App. 380; *Moran v. Lindell*, 52 Mo. 229; *Carlin v. Cavender*, 56 Mo. 286. See also, *Kimble v. City of Peoria*, 140 Ill. 157; s. c. 29 N. E. 723; *City of Sterling v. Galt*, 117 Ill. 11, 17; s. c. 7 N. E. 471; *McChesney v. Village of Hyde Park*, 151 Ill. 634; s. c. 28 N. E. 1102; *Green v. City of Springfield*, 130 Ill. 515; s. c. 22 N. E. 602. Must be capable of being identified. Neither

assessment for a street improvement was sustained, although the resolution deciding to make the improvement according to plans to be prepared by the city surveyor, and calling for proposals, was adopted before the plans and specifications for the work were filed, where the plans were filed and approved before adopting the final ordinance providing for the improvement; the statute not requiring a separate approval of the plans and specifications before publishing for bids.¹⁷⁸ Property assessed must be described in such way as to be capable of identification, in some lawful mode.¹⁷⁹ An assessor's plat not made by the county surveyor is not sufficient to authorize a judgment for taxes.¹⁸⁰ If the property affected by an assessment is properly described an error in the name of the owner is immaterial.¹⁸¹ In order to make an assessment a lien on property benefited it must sufficiently describe the property so it may be identified.¹⁸² Where the description in a tax bill would be sufficient to pass title in a deed it is sufficient to create a lien on the property enforceable by sale.¹⁸³ Where the plans show the location and extent of an improvement, the heading of the specification "except where good walks now exist" will not render the assessment void.¹⁸⁴ Where an ordinance provides that the material used in a certain improvement shall be equal to that found in three localities it is sufficiently definite.¹⁸⁵ The property for paving purposes may be described as it appears of record.¹⁸⁶ The notice of application for judgment must be such

the court nor property owner is chargeable with judicial notice of city map: *Labs v. Cooper*, 107 Cal. 656; s. c. 40 Pac. 1042. A notice of a proposed sewer improvement must describe the size of the sewer: *City of Atlanta v. Gabbett*, 93 Ga. 266; s. c. 20 S. E. 306. It may refer, however, to plans and specifications, which will be sufficient: *Clinton v. City of Portland*, 26 Or. 410; s. c. 38 Pac. 407. Where a plat to be valid must be recorded, an assessment based on a reference to an unrecorded plat is invalid: *People v. Clifford*, 166 Ill. 165; s. c. 46 N. E. 770.

¹⁷⁸ *Gilmore v. City of Utica*, 131 N. Y. 26; s. c. 29 N. E. 841.

¹⁷⁹ *People v. Chicago & C. R. Co.*, 96 Ill. 369; *People v. Dragstran*, 100 Ill. 286; *People v. Eggers*, 164 Ill.

515; s. c. 45 N. E. 1074; *Upton v. People &c.*, 176 Ill. 632; s. c. 52 N. E. 358; *People v. Clifford*, 166 Ill. 165; s. c. 46 N. E. 770.

¹⁸⁰ *Upton v. People*, *supra*; *People v. Reat*, 107 Ill. 581.

¹⁸¹ *Smith v. City of Des Moines*, 106 Iowa 590; s. c. 76 N. W. 836.

¹⁸² *Cleveland & C. R. Co. v. O'Brien*, 24 Ind. App. 547; s. c. 57 N. E. 47, and cases cited. In such case the insufficient description is not cured by a valid description in the complaint to enforce the lien.

¹⁸³ *Adkins v. Quest*, 79 Mo. App. 36.

¹⁸⁴ *People v. Board &c.*, 63 N. Y. S. 445; s. c. 50 App. Div. (N. Y.) 54.

¹⁸⁵ *Hintze v. City of Elgin*, 186 Ill. 251; s. c. 57 N. E. 856.

¹⁸⁶ *Roberts v. First Nat. Bank*, 8 N. D. 504; s. c. 79 N. W. 1049.

as to identify the land.¹⁸⁷ An ordinance which does not sufficiently describe the nature of the improvement may be attacked on application for a judgment.¹⁸⁸

§ 1248. Delegation of matters of detail.—The authority to make improvements can not be delegated by the municipal body to whom it is confided, but the rule does not extend to matters of mere detail,¹⁸⁹ or forbid the transaction of the business by the methods commonly used by legislative bodies. Thus, where the mayor appointed a committee to make the assessment, and the common council adopted the report of such committee, the assessment was held to be valid, as it came into existence by virtue of the creative power of the vote of the common council in adopting the report.¹⁹⁰ Authority to a common council to assess upon certain property so much of the expense “as they shall deem just and equitable” was held to be too vague to sustain the proceeding.¹⁹¹

§ 1249. Personal liability of landowner.^{191a}—It is quite clear that unless the landowner be made personally liable by statute for the amount of the assessment it can be collected only out of the property assessed.¹⁹² But such provisions are not uncommon, and in a large number of cases their validity has been tacitly or expressly recognized.¹⁹³ It is contended, however, by eminent text-writers that this

¹⁸⁷ *Nicholes v. People*, 165 Ill. 502; s. c. 46 N. E. 237.

¹⁸⁸ *Cass v. People*, 166 Ill. 126; s. c. 46 N. E. 729. What not sufficient,—see *Becker v. Baltimore & C. R. Co.*, 17 Ind. App. 324; s. c. 46 N. E. 685; 17 Ind. App. 324; s. c. 46 N. E. 685. *Hurd's Rev. St. Ill.*, ch. 120, §§ 58, 191, in relation to description of property, apply to special assessments: *Zeigler v. People*, 164 Ill. 531; s. c. 45 N. E. 965.

¹⁸⁹ *Elliott Roads & Streets* (2d ed.), § 518.

¹⁹⁰ *Bartram v. City of Bridgeport*, 55 Conn. 122; s. c. 10 Atl. 470. Appointment by the board of trustees, who are authorized to make an assessment for widening a street, of a committee to prepare the assessment, consisting of two trustees and the clerk of the board, is not an unauthorized delegation of power to the clerk where the assessment prepared by the committee is reported to and passed on by the board:

People v. Lohnas, 54 Hun (N. Y.) 604; s. c. 8 N. Y. S. 104. See also, *Shreve v. Town of Cicero*, 129 Ill. 226; s. c. 21 N. E. 815; *Davies v. City of Saginaw*, 87 Mich. 439; s. c. 49 N. W. 667; *Ray v. City of Jeffersonville*, 90 Ind. 567; *Hitchcock v. Galveston*, 96 U. S. 341.

¹⁹¹ *State v. Commissioners*, 38 N. J. L. 190; *Barnes v. Dyer*, 56 Vt. 469.

^{191a} See § 1239, ante.

¹⁹² *Green v. Ward*, 82 Va. 324, holding that authority to assess “lands” will not sustain a personal charge; *Wolf v. City of Philadelphia*, 105 Pa. St. 25.

¹⁹³ *Litchfield v. McComber*, 42 Barb. (N. Y.) 288; *People v. Nearing*, 27 N. Y. 306; *Mayor & C. v. Colgate*, 12 N. Y. 141; *Brewster v. City of Syracuse*, 19 N. Y. 116; *Bennett v. City of Buffalo*, 17 N. Y. 383; *Sharp v. Johnson*, 4 Hill (N. Y.) 92; *People v. Mayor & C.*, 4 N. Y. 419; *In re Vacation of Center St.*,

doctrine is opposed to the very definition of a local assessment, which is a burden imposed upon property exactly (as near as may be) commensurate with the benefit conferred, and that other property can not be seized without violating the constitutional provision which forbids the taking of property without compensation.¹⁹⁴ And according to the weight of judicial authority the legislature has no power to make an assessment a personal charge against the owner of the property.¹⁹⁵ A personal judgment against defendants is not necessary.¹⁹⁶ A statute attempting to make a non-resident lot owner personally liable for a local improvement is void.¹⁹⁷

115 Pa. St. 247; *Clemens v. Mayor &c.*, 16 Md. 208; *Echsbach v. Pitts*, 6 Md. 71; *Dashiell v. Mayor &c.*, 45 Md. 615; *Lovell v. City of St. Paul*, 10 Minn. 290; *Creighton v. Scott*, 14 Ohio St. 438; *Bonsall v. Mayor &c.*, 19 Ohio 418; *City of Lowell v. French*, 6 Cush. (Mass.) 223; *City of New Orleans v. Wire*, 20 La. An. 500; *City of Burlington v. Quick*, 47 Iowa 222; *Hazzard v. Heacock*, 39 Ind. 172. Some of the considerations in favor of this view are urged in the dissenting opinions in *Taylor v. Palmer*, 31 Cal. 240. *Sawyer, J.*, said: "The property assessed is still the foundation upon which the assessment is based, and the rest relates to the remedy for collecting the amount which the land or the owner is liable to pay. Nor do I understand that this view would necessarily authorize the collection of an amount greater than the real value of the property assessed. The amount for which the property actually sells under the sheriff's hammer is not conclusive of its real value. Under the rules of evidence such amount is not the measure of the value." *Shafter, J.*, said: "It is obvious that it would be oppressive to the contractor if he could not collect assessments except by foreclosure of the lien upon the land assessed. The expenses of collecting a medley of small assessments in that way would not only be burdensome to the contractor,

but still more so to the lot-owner—these evils of personal consequence leading on to another of general consequence, namely, enhanced expense in making street improvements coming of the fact that bids are graduated to some extent with reference to the facility with which dues may be collected." See also, *Litchfield v. McComber*, 42 Barb. (N. Y.) 288, *Where Brown, J.*, said: "It is not land the government needs; it is money. The tax is assessed in money to be paid by the owner in money."

¹⁹⁴ *Elliott Roads & Streets* (2d ed.), § 568; *Cooley Taxation* (2d ed.) 674.

¹⁹⁵ *Taylor v. Palmer*, 31 Cal. 240 (followed in *Manning v. Den*, 90 Cal. 610; s. c. 27 Pac. 435); *City of Raleigh v. Peace*, 110 N. C. 32; s. c. 14 S. E. 521; *Higgins v. Ausmuss*, 77 Mo. 351; *Neenan v. Smith*, 50 Mo. 525; *Macon v. Patty*, 57 Miss. 378; *Craw v. Village of Tolono*, 96 Ill. 255; *City of Virginia v. Hall*, 96 Ill. 278; *Gaffney v. Gough*, 36 Cal. 104; *City of Seattle v. Yesler*, 1 Wash. Ter. 571, 576; *Broadway Baptist Church v. McAtee*, 8 Bush (Ky.) 508; *City of Burlington v. Quick*, 47 Iowa 222; *Green v. Ward*, 82 Va. 324. See also, *Davidson v. New Orleans*, 96 U. S. 97.

¹⁹⁶ *Higgins v. Bordayes*, 88 Tex. 458; s. c. 28 S. W. 350.

¹⁹⁷ *Dewey v. City of Des Moines*, 173 U. S. 193; s. c. 19 S. Ct. 379.

§ 1250. **Recovery of money paid on illegal assessments.**—An assessment may be void for jurisdictional or constitutional reasons apparent upon its face, or valid upon its face and void for matters dehors the record, or again it may be merely erroneous and subject to be reversed for the error or to be set aside in appropriate proceedings for that purpose. Payment of assessments may be voluntary or under coercion in fact or in law. Where the assessment is absolutely void upon its face,¹⁹⁸ and the property owner pays it without coercion in fact,¹⁹⁹

¹⁹⁸ A letter from the commissioners of public works accompanying the transmission to the assessors of the assessment list, map and certificate of costs of a local improvement, is no part of the record, as the statute relating to the subject makes it the duty of the commissioners simply to certify to the total amount of expenses incurred; and hence, in an action to recover back the payment of such assessment, the letter is not admissible to show that the assessment is void on its face because the work was done by the day and not by contract: *Tripler v. Mayor &c.*, 125 N. Y. 617; s. c. 26 N. E. 721; reversing s. c. 6 N. Y. S. 48.

¹⁹⁹ "By coercion in fact is meant that duress of person or goods where present liberty of person or possession of goods is so needful and desirable as that an action or proceeding at law to recover them will not at all answer the purpose. Duress of person is exemplified in *Forshay v. Ferguson*, 5 Hill (N. Y.) 154; *Eadie v. Slimmon*, 26 N. Y. 9. The cases of *Maxwell v. Newbold*, 18 How. 511, and *Harmony v. Bingham*, 12 N. Y. 99, illustrate what is duress of goods." Per *Folger, J.*, in *Peyser v. Mayor &c.*, 70 N. Y. 497. See also, *Robertson v. Frank Bros. Co.*, 132 U. S. 17; s. c. 10 S. Ct. 5, a case of duress of goods. It is generally held that there must be an actual or threatened seizure of the person or divestiture of his goods: *Phelps v. Mayor &c.*, 112 N. Y. 216; s. c. 19 N. E. 408. A mere protest is

of no avail: *Bepler v. City of Cincinnati*, 23 Wk. Law Bul. (Ohio) 229; s. c. 10 Ohio Dec. R. 737, and cases there cited; *Wilson v. Pelton*, 40 Ohio St. 306; *City of Jackson v. Newman*, 59 Miss. 385; *Forbes v. Appleton*, 5 Cush. (Mass.) 115; *Commissioners v. Walker*, 8 Kan. 431; *Clafin v. McDonough*, 33 Mo. 412. In Nebraska it is provided by statute that any person aggrieved by an assessment may pay the same under protest with notice in writing that he intends to sue to recover it, "which notice shall particularly state the alleged grievance and ground thereof." Certain lots were assessed for the cost of grading the street on which they abutted. The owner paid the taxes so assessed, accompanying the payment with the following notice: "Truman Buck, Treasurer: I this day pay you, under protest, \$2,181.23, for special grading tax on property fronting on Fifteenth street, south of Williams street. This is paid to save penalty; and, as it is believed that the tax is illegal, I shall collect the same back. Augustus Kountze." It was held that the notice was insufficient: *City of Omaha v. Kountze*, 25 Neb. 60; s. c. 40 N. W. 597. Payment to prevent a levy on lands is not under compulsion: *Wills v. Austin*, 53 Cal. 152; *City of Detroit v. Martin*, 34 Mich. 170. Contra, *Seeley v. Town of Westport*, 47 Conn. 294. See also, *Cooley Taxation* (2d ed.) 611. In an action against a municipal corporation to recover the amount of a

it is deemed to be a payment under mistake of law, and he can obtain no relief.²⁰⁰

§ 1251. The same subject continued.—There is a broad distinction between an assessment which is illegal by reason of the existence of some fact outside of the record, but not void, and one void on the face of the record for lack of jurisdiction of the person or property, or by reason of the unconstitutionality of the statute under which the assessment is made. In the latter case if money is exacted by coercion in fact, it may be recovered from the municipality in an action at law brought by the wronged taxpayer.²⁰¹ But in case money is collected under an illegal (not void) assessment it can not be recovered until the assessment is set aside.²⁰²

void assessment alleged to have been made under coercion, it appeared that at the time of the payment plaintiff was under contract to sell the land assessed. Defendant refused to accept a deposit of the assessment as indemnity, or to delay the sale until the validity of the assessment could be determined, and ordered the property to be advertised for sale. The receiver of taxes notified plaintiff, who was at the time seriously ill, that her property would be sold unless the assessment was paid. The court ruled that the assessment was not paid voluntarily, and gave judgment for the plaintiff: *Vaughn v. Village of Portchester*, 15 N. Y. S. 474. In the absence of proof, payment is presumed to be voluntary: *People v. Carter*, 119 N. Y. 557; s. c. 23 N. E. 926.

²⁰⁰ *Peyser v. Mayor &c.*, 70 N. Y. 497; *Phelps v. Mayor &c.*, 112 N. Y. 216; s. c. 19 N. E. 408.

²⁰¹ "When the facts which render an assessment, apparently a lien upon land, invalid for want of jurisdiction to make it, are de hors the record, the person paying the assessment may recover back the money paid without first vacating the assessment:" *Pooley v. City of Buffalo*, 122 N. Y. 592; s. c. 26 N. E. 16, 624; s. c. affirmed 124 N. Y.

206; 26 N. E. 624; *Diefenthaler v. Mayor &c.*, 111 N. Y. 331; s. c. 19 N. E. 48. But in Massachusetts the only remedy in such a case is by certiorari: *Foley v. City of Haverhill*, 144 Mass. 352; s. c. 11 N. E. 554.

²⁰² *Trimmer v. City of Rochester*, 130 N. Y. 401; s. c. 29 N. E. 746; *Horn v. Town of New Lots*, 83 N. Y. 100; *Pursell v. Mayor*, 85 N. Y. 330; *Strusburgh v. Mayor*, 87 N. Y. 452; *Bruecher v. Village of Port Chester*, 101 N. Y. 240; s. c. 4 N. E. 272; *Jex v. Mayor*, 103 N. Y. 536; s. c. 9 N. E. 39. "The rights of persons from whom money is collected under such assessments are like those of persons from whom money is collected under judgments void, for example, for lack of jurisdiction, and those which are reversible for error. Money collected under void judgments may be recovered without first setting them aside, but that collected under judgments erroneously obtained can not be until they are reversed:" *Trimmer v. City of Rochester*, supra. The reversal of the assessment and the declaration that it was illegal and void is conclusive that the money was obtained without primary right, and ex æquo et bono belongs to the person who made the payment, and that it is held for his use: *Peyser*

§ 1252. The same subject continued—"Coercion in law."—But one upon whose land an assessment is laid apparently valid, although in truth utterly void by reason of facts outside of the record, who pays it in ignorance of those facts, may recover the amount in an action against the municipality. Such a payment is made under circumstances which constitute what is termed "coercion in law."²⁰³

v. Mayor &c., 70 N. Y. 497; Brehm v. Mayor &c., 39 Hun (N. Y.) 533. One who has paid an assessment for a local municipal improvement, and afterwards has successfully instituted legal proceedings to vacate the assessment, may recover back the money paid, although the fact of payment would have afforded ground for a refusal to vacate the assessment: Jones v. Mayor &c., 37 Hun (N. Y.) 513.

²⁰³ Coercion by law is where the court having jurisdiction of the person and the subject-matter has rendered a judgment which is collectible in due course. There the party cast in judgment may not resist the execution of it. His only remedy is to obtain a reversal, if he may, for error in it. As he can not resist the execution of it when execution is attempted he may as well pay the amount at one time as at another and save the expense of delay." Per Folger, J., in Peyser v. Mayor &c., 70 N. Y. 497, where it was further said that coercion of law exists where there are adjudications of inferior tribunals when their proceedings are regular on their face and make out a right to have and demand an amount to be levied or collected in due course of law by a sale of goods or a municipal lease of real estate. Unless void on their face, they have the force of a judgment, and the party is legally bound to pay and has no lawful mode of resisting. Where a judgment foreclosing a mortgage directs payment of a municipal assessment from the proceeds of the

referee's sale, and payment is made accordingly, the payment is made under coercion in the sense that the mortgagor may maintain an action against the city for the recovery of the amount, after the assessment is vacated: Brehm v. Mayor &c., 39 Hun (N. Y.) 533. Where by an assessment the entire cost of a street pavement was imposed on the property fronting on the avenue, though a former ordinance required a railroad company to pay for twenty-five feet of the pavement in the middle of the avenue, a property owner who had paid the assessment in ignorance of the ordinance was entitled to recover back the excess over and above that amount for which his property was liable: Burchell v. Mayor &c., 9 N. Y. S. 196; s. c. 56 Hun (N. Y.) 640. See also, Delano v. Mayor &c., 32 Hun (N. Y.) 144. Coercion in fact, however, is necessary to sustain a recovery where the payment is made with knowledge of the circumstances which destroy the validity of the assessment: Lott v. Swezey, 29 Barb. (N. Y.) 87, 92; Peyser v. Mayor &c., 70 N. Y. 497; Tripler v. Mayor &c., 125 N. Y. 617; s. c. 26 N. E. 721, where the evidence was held sufficient to create a presumption of notice of the facts. But it was said in the same case that the rule would not apply if the proceedings were so far valid that they could not be set aside in any other way than by reversal for error. The facts must be of such a character as to render the judgment void.

§ 1253. **Apportionment of assessment.**—There is a total lack of harmony in the decisions in regard to the subject of apportionment of the assessment, and virtually no general rules, recognized by the courts, exist. (a) *Assessment only to extent of benefits:* As elsewhere seen a fundamental principle in special assessments is that the assessment against each lot or parcel is limited by the extent of the benefits received by it from the improvement. Each parcel of contributing property for local improvements is to be assessed only to the extent of the special benefit,²⁰⁴ and an assessment of each front foot of property equally irrespective of the benefits to each lot is not proper.²⁰⁵ The method most frequently used in this country is based upon an assessment upon the property benefited in proportion to the special benefit that an examination of each estate shows that it has received. "The legislature in such cases makes the rule and the proper officers give effect to it in a manner corresponding to the ordinary assessment for a taxation by values. The right thus to assess by benefits has been often affirmed and can no longer be regarded as a controverted question."²⁰⁶ (b) *Excess over benefits to be paid by city:* Where the cost of a local improvement exceeds the special benefits such excess must be paid by the city at large, from the general fund.²⁰⁷ It has been held in a sewer case that where an improvement is constructed with a view of the needs of others than the abutting owners, or by mistake or otherwise it is larger than the abutting properties require, the city is liable for the excess in cost over such improvement as would meet the necessities of abutting properties.²⁰⁸ Where an ordinance provides that an improvement shall be made by special assessment, and it turns out that the costs of the improvement are greater than the benefits, it is implied that the excess shall be paid by general taxation.²⁰⁹ (c) *Where costs in*

²⁰⁴ *Adams v. City of Shelbyville*, 154 Ind. 467; s. c. 57 N. E. 114.

²⁰⁵ *McKee v. Town of Pendleton*, 154 Ind. 652; s. c. 57 N. E. 132.

²⁰⁶ *Cooley Taxation* (2d ed.) 639; citing (among other cases) *McMasters v. Commonwealth*, 3 Watts (Pa.) 292; *Fenelon's Petition*, 7 Pa. St. 173; *Weber v. Reinhard*, 73 Pa. St. 370; *People v. Mayor &c.*, 4 N. Y. 419; *Jones v. Board &c.*, 104 Mass. 461; *Nichols v. City of Bridgeport*, 263 Conn. 189; *Village of Marion v. Epler*, 5 Ohio St. 250; *Howard v. First Independent Church*, 18 Md. 451; *Howell v. Bristol*, 8 Bush (Ky.) 493; *State v. Fuller*, 34 N. J. L. 227;

Brevoort v. City of Detroit, 24 Mich. 322; *City of Chicago v. Baer*, 41 Ill. 306; *Matter of Dorrance St.*, 4 R. I. 230; *Uhrig v. City of St. Louis*, 44 Mo. 458; *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Appeal of Piper*, 32 Cal. 530; *City of LaFayette v. Fowler*, 34 Ind. 140.

²⁰⁷ *Adams v. City of Shelbyville*, 154 Ind. 467; s. c. 57 N. E. 114.

²⁰⁸ *State v. Mayor &c.*, 63 N. J. L. 202; s. c. 42 Atl. 773; *In re Construction of Sewer &c.*, 30 Pittsb. L. J. (N. S.) 18.

²⁰⁹ *Newman v. City of Chicago*, 153 Ill. 469; s. c. 38 N. E. 1053; *Walters v. Town of Lake*, 129 Ill. 23; s. c. 21

some blocks greater than in others: Where an assessment is made for a sidewalk and the cost in some blocks is twice as much as in others, it is not proper to assess the abutting property at an average price for the entire length of the street. This is based upon equality, as to cost.²¹⁰ (d) *Equality must be basis of assessment:* No statute, charter or rule can be made to secure absolute equality where the benefits are so problematical and where the cost of an improvement varies frequently with each block and in some cases with each lot. The principle upon which local assessments are made for sewers is that the assessment upon each parcel of contributing property shall be according to the special benefits which the particular parcel receives. If, however, the lots are small and similarly situated an assessment may be made on the basis of frontage generally instead of an actual estimate. This mode is not authorized where it must inevitably operate with inequality.²¹¹ An assessment by the frontage is not so unequal as to amount to extortion and confiscation where the frontage lots are unequal as to depth.²¹² An assessment equaling the value of the lots is not void as amounting to confiscation, nor is it void where by reason of the change in the grade some of the lots are rendered worthless unless filled at a considerable cost.²¹³ (e) *The frontage rule:* When the property consists of lots of substantially equal depth abutting a local improvement and there is nothing in the nature and circumstances of the particular case showing that an assessment in proportion to the frontage of the lots upon the improvement would work manifest injustice, such a mode of assessment will be upheld. Rules of apportionment according to value, area and frontage of the property benefited have in turn been approved and disapproved under varying circumstances. Absolute equality is not to be expected. A reasonable approximation thereto is all that can be required; and where the proper legislative body prescribes in good faith a rule by which this may be attained with reasonable certainty it should not be overthrown.²¹⁴ A special assessment by the front foot is not a violation of the constitution in

N. E. 556; *Kimble v. City of Peoria*, 140 Ill. 157; s. c. 29 N. E. 723.

²¹⁰ *Barker v. Southern Const. Co.*, 20 Ky. L. 796; s. c. 47 S. W. 608.

²¹¹ *Weed v. Mayor &c.*, 172 Mass. 28; s. c. 51 N. E. 204; 42 L. R. A. 642.

²¹² *Hutcheson v. Storrie* (Tex. Civ. App.), 48 S. W. 785.

²¹³ *Bullitt v. Selvage*, 20 Ky. L. 599; s. c. 47 S. W. 255.

²¹⁴ *City of Pueblo v. Robinson*, 12 Colo. 593, 599; s. c. 21 Pac. 899; *Thomas v. Gain*, 35 Mich. 155. Frontage assessments have been sustained in *Ulman v. Mayor &c.*, 72 Md. 587; *City of Raleigh v. Peace*, 110 N. C. 32; s. c. 14 S. E. 521; *Pen-nock v. Hoover*, 5 Rawle (Pa.) 291; *Magee v. Commonwealth*, 46 Pa. St. 358; *Wilbur v. City of Springfield*, 123 Ill. 395; s. c. 14 N. E. 871; *City*

regard to uniformity.²¹⁵ An assessment which is based on the front foot rule need not have an element of proportion between the public and lot owner, or between different lot owners in the same taxing district.²¹⁶ Difference in value of property fronting an improvement does not render an assessment of the same amount per front foot invalid.²¹⁷ Frontage has reference to the situation at the time the improvement is made and not subsequent changes.²¹⁸ A lot on a corner is chargeable with its proportionate share of the expense on both streets.²¹⁹

of *Covington v. Boyle*, 6 Bush (Ky.) 204; *Davis v. City of Lynchburg*, 84 Va. 861; s. c. 6 S. E. 230; *State v. City Council*, 30 N. J. L. 365; *O'Reilley v. City of Kingston*, 114 N. Y. 439; s. c. 21 N. E. 1004; *State v. Fuller*, 34 N. J. L. 227; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. An. 251; s. c. 5 So. 848; *Wilder v. City of Cincinnati*, 26 Ohio St. 284; *Jennings v. Le Breton*, 80 Cal. 8; s. c. 21 Pac. 1127; *Parker v. Chalis*, 9 Kan. 155; *Neenan v. Smith*, 50 Mo. 525; *Whiting v. Quackenbush*, 54 Cal. 306; *Palmer v. Stumpf*, 29 Ind. 329; *Stebbins v. Kay*, 51 Hun (N. Y.) 589; *Allen v. Drew*, 44 Vt. 174; *City of Denver v. Knowles*, 17 Colo. 204; s. c. 30 Pac. 1041; *Motz v. City of Detroit*, 18 Mich. 495; *State v. Reis*, 38 Minn. 371; s. c. 38 N. W. 97; *King v. City of Portland*, 2 Or. 146; *Cleveland v. Tripp*, 13 R. I. 50; *White v. People*, 94 Ill. 604; *Winona &c. R. Co. v. City of Watertown*, 1 S. D. 46; s. c. 44 N. W. 1072; *Sheley v. City of Detroit*, 45 Mich. 431; s. c. 8 N. W. 52. That lots vary in depth was held immaterial in *Bacon v. Mayor &c.*, 86 Ga. 301; s. c. 12 S. E. 580; *Beaumont v. City of Wilkesbarre*, 142 Pa. St. 198; s. c. 21 Atl. 888; and *Amery v. City of Keokuk*, 72 Iowa 701; s. c. 30 N. W. 780. The Illinois constitution of 1848 requiring uniformity of taxation and providing for levying a tax by valuation was construed to forbid frontage assessments for the improvement of streets and sidewalks: *City of Chicago v. Larned*,

34 Ill. 203; *City of Ottawa v. Spencer*, 40 Ill. 211. After that interpretation of the constitution the latter was radically changed for the very purpose of avoiding inconveniences which had been found to result from those decisions. Under the present constitution of 1870 frontage assessments are valid under the power of special taxation provided for in that instrument: *White v. People*, 94 Ill. 604; *Craw v. Village of Tolono*, 96 Ill. 255; *Bigelow v. City of Chicago*, 90 Ill. 49, 53; *Fagan v. City of Chicago*, 84 Ill. 227, 234; *Enos v. City of Springfield*, 113 Ill. 65; *City of Galesburg v. Searles*, 114 Ill. 217; s. c. 29 N. E. 686; *Watson v. City of Chicago*, 115 Ill. 78; s. c. 3 N. E. 430; *City of Sterling v. Galt*, 117 Ill. 11, 15; s. c. 7 N. E. 471; *City of Springfield v. Green*, 120 Ill. 269; s. c. 11 N. E. 261. In the latter case Mr. Justice Mulkey said that if it were a new question he and perhaps other members of the court would adhere to the former view.

²¹⁵ *Hilliard v. City of Ashville*, 118 N. C. 845; s. c. 24 S. E. 738. And see *Violett v. City Council &c.*, 92 Va. 561; s. c. 23 S. E. 909; *Roberts v. First Nat'l Bank*, 8 N. D. 504; s. c. 79 N. W. 1049.

²¹⁶ *Harrell v. Storrie* (Tex.), 47 S. W. 838.

²¹⁷ *Witman v. City of Reading*, 169 Pa. St. 375; s. c. 32 Atl. 576.

²¹⁸ *Sandroek v. Columbus*, 51 Ohio St. 317; s. c. 42 N. E. 255.

²¹⁹ *Anderson v. Bitzer*, 20 Ky. L. 1450; s. c. 49 S. W. 442.

Where an assessment is on frontage it means frontage on the street of the usual dimensions according to the subdivisions in that part of the city and squares not subdivided shall be assessed as if subdivided in the usual width.²²⁰ An assessment on the frontage according to land values which excludes improvements is void.²²¹ If an assessment is to be according to frontage an assessment otherwise is void.²²² It has been maintained by a line of decisions that an assessment by frontage will not be sustained where it appears that the assessment against abutting property is greater than the benefits derived from the improvement. This contention if carried out in its logical effects would invalidate all species of taxation or assessment where it is shown that an individual's tax is disproportionate to the benefits derived. If the legislature in the exercise of its prerogative power of taxation provides for the levy of an assessment for local improvements upon abutting property by the frontage, as long as the legislation is not in violation of constitutional restrictions it is not the province of a co-ordinate branch of government to question the propriety of such legislation or the inequality growing out of its application to individual cases. It is contrary to the theory of taxation, in general, that each taxpayer is to receive a money equivalent capable in each case of exact measure for measure.²²³ The legislature has power to direct that all the expense of paving a street shall be assessed against the abutting property in proportion to its frontage.²²⁴ The lots may be so situated and of such size that an assessment according to the frontage will be grossly disproportionate to the benefits to the land received from the improvement and in such case the assessment will be unreasonable.²²⁵

²²⁰ Barber Asphalt Pav. Co. v. Watt, 51 La. An. 1345; s. c. 26 So. 70.

²²¹ Walker v. City of Ann Arbor, 118 Mich. 251; s. c. 76 N. W. 394.

²²² Ware v. City of Jerseyville, 158 Ill. 234; s. c. 41 N. E. 736.

²²³ Rolph v. City of Fargo, 7 N. D. 640; s. c. 76 N. W. 242; 42 L. R. A. 646; Emery v. San Francisco Gas Co., 28 Cal. 345; Wallace v. Shelton, 14 La. An. 498; Goodrich v. Winchester &c. Tpk. Co., 26 Ind. 119; Edgerton v. Mayor &c., 19 Fla. 140; Motz v. City of Detroit, 18 Mich. 495; Hines v. City of Leavenworth, 3 Kan. 186; Daily v. Swope, 47 Miss. 367; Williams v. Cammack, 27 Miss. 209; Garrett v. City of St. Louis, 25 Mo. 505; Cain v. Com-

missioners, 86 N. C. 8; Hill v. Higdon, 5 Ohio St. 243; King v. City of Portland, 2 Or. 146; Hayden v. Atlanta, 70 Ga. 817; Violett v. City Council &c, 92 Va. 561; s. c. 23 S. E. 909; City of Raleigh v. Peace, 110 N. C. 32; s. c. 14 S. E. 521; Hilliard v. City of Asheville, 118 N. C. 845; s. c. 24 S. E. 738; Dorgan v. City of Boston, 12 Allen (Mass.) 223; Norfolk City v. Ellis, 26 Gratt. (Va.) 224; Richmond &c. v. City of Lynchburg, 81 Va. 473.

²²⁴ Rolph v. City of Fargo, 7 N. D. 640; s. c. 76 N. W. 242; 42 L. R. A. 646.

²²⁵ Weed v. Mayor &c., 172 Mass. 28; s. c. 51 N. E. 204; 42 L. R. A. 642.

Where a principal street is improved and in doing so it becomes necessary to improve a portion of the lateral streets, in making an apportionment of the cost of the improvements as an entirety each of the lateral streets is to be assessed separately and the owners thereon must be assessed their proportionate share according to the width of the abutting street.²²⁶ If the frontage is correct but the interior incorrect the assessment is valid. The basis of the assessment is the frontage upon the improvement, and the frontage of each lot determines the amount of the assessment against the lot irrespective of the shape, size and depth. There is no requirement that the lots shall be rectangular with the street.²²⁷ (f) *Apportionment by superficial area*: Apportionment of benefits by superficial area of the property affected by an improvement is sometimes provided. This method has been sustained in levee cases,²²⁸ and for the construction of sewers.²²⁹ Where the charter provides that the whole amount of assessment shall be upon the parcels of land benefited by the work, act, or improvement, in proportion to such benefit, the assessment may be at a uniform rate per square foot over the entire district. In arriving at the amount of assessment against each lot, the share of each is the proportionate share of the cost of improvement as a whole, and evidence of the cost of the improvement abutting each lot should not be admitted.²³⁰ Uniformity in most cases is secured by basing the assessment upon the frontages,²³¹ and yet an assessment of a specific amount against each lineal foot of adjacent property owners, according to frontage, is not necessarily proportionate to the benefit received

²²⁶ *Mayor &c. v. Weed*, 96 Ga. 670; s. c. 23 S. E. 900.

²²⁷ *Diggins v. Hartshorne*, 108 Cal. 154; s. c. 41 Pac. 283.

²²⁸ *Crowly v. Copely*, 2 La. An. 329; *Wallace v. Shelton*, 14 La. An. 498; *Yeatman v. Crandall*, 11 La. An. 220; *Bishop v. Marks*, 15 La. An. 147; *Daily v. Swope*, 47 Miss. 367; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Richardson v. Morgan*, 16 La. An. 429; *McGehee v. Mathis*, 21 Ark. 40; *Smith v. Corporation of Aberdeen*, 25 Miss. 458; *O'Reilly v. Holt*, 4 Woods 645; *Williams v. Cammack*, 27 Miss. 209; *Alcorn v. Hamer*, 38 Miss. 652; *Cooley Taxation* (2d ed.) 648. "And the same principle must obtain in cases affecting rural highways:" *Elliott Roads & Streets* (2d ed.), § 560.

²²⁹ *Keese v. City of Denver*, 10

Colo. 112; s. c. 15 Pac. 825. See also, *Clapp v. Hartford*, 35 Conn. 66; *Grimmell v. City of Des Moines*, 57 Iowa 144; s. c. 10 N. W. 330; *City of St. Joseph v. Farrell*, 106 Mo. 437; s. c. 17 S. W. 497; *Gillette v. City of Denver*, 21 Fed. 822. But where the act made no provision by which parties might avail themselves of the benefit, and no distinction between lots directly and those remotely benefited, and did not confine the assessment to lands upon the street in which the sewer was laid, this basis of assessment was repudiated as unjust: *Thomas v. Gain*, 35 Mich. 155.

²³⁰ *People v. City of Buffalo*, 57 N. Y. S. 1144.

²³¹ *Farrell v. West Chicago Park Com'rs*, 182 Ill. 250; s. c. 55 N. E. 325.

from the improvement and is therefore void.²³² In Arkansas under a constitution requiring all property to be taxed by a uniform rule "according to its true value in money," assessments for paving can not be laid according to frontage,²³³ and under a similar provision in the constitution of Tennessee, frontage assessments for paving are declared invalid.²³⁴ The property is liable for its proportion of the total cost of the improvement and not for its proportional share of the cost along the front of the square on which it is situated.²³⁵

(g) *Rule in absence of statutory mode*: In the absence of a statutory mode of apportioning an assessment any mode may be adopted which is fair and legal.²³⁶ In such case the levy in proportion to the value of the lots without the improvements is valid.²³⁷ (h) *Apportionment between city and property owners*: In the apportionment of

²³² *Dexter v. City of Boston*, 176 Mass. 247; s. c. 57 N. E. 379; *Sears v. Board &c.*, 173 Mass. 71; s. c. 53 N. E. 138; *Sears v. Street Com'rs &c.*, 173 Mass. 350; s. c. 53 N. E. 876; *City of Boston v. Boston &c. R. Co.*, 170 Mass. 95; s. c. 49 N. E. 95; *Norwood v. Baker*, 172 U. S. 269; s. c. 19 S. Ct. 187; *Weed v. Mayor &c.*, 172 Mass. 28; s. c. 51 N. E. 204.

²³³ *Peay v. City of Little Rock*, 32 Ark. 31; *Town of Monticello v. Banks*, 48 Ark. 251; *McBean &c. Co. v. Chandler*, 9 Heisk. (Tenn.) 349; s. c. 24 Am. R. 308; distinguishing *Mayor &c. v. Mayberry*, 6 Humph. (Tenn.) 368, 371.

²³⁴ *Washington v. Mayor &c.*, 1 Swan (Tenn.) 177 (sidewalk case). See also, *City of Lexington v. McQuillan*, 9 Dana (Ky.) 513. And cf. *Joyes v. Shadburn*, 11 Ky. L. 892; s. c. 13 S. W. 361. Sewer assessments by frontage condemned as unreasonable in *Clapp v. City of Hartford*, 35 Conn. 66. See also, *State v. Mayor &c.*, 37 N. J. L. 415. And cf. *Warren v. City of Grand Haven*, 30 Mich. 24; *Seelley v. City of Pittsburgh*, 82 Pa. St. 360; *Hoyt v. City of East Saginaw*, 19 Mich. 39. "It would seem to the author that the frontage rule whenever admissible is better adapted to sidewalks and sewers than to paving and grading;" 2 Dil-

lon's Munic. Corp., § 809, n. 1, p. 990. Frontage assessments held inapplicable to rural districts: *City of Allentown v. Adams* (Pa.), 8 Atl. 430; *Washington Ave.*, 69 Pa. St. 352; *City of Philadelphia v. Rule*, 93 Pa. St. 15; *Craig v. City of Philadelphia*, 89 Pa. St. 266; *Town of Parkland v. Ganis*, 88 Ky. 563; s. c. 11 Ky. L. 64; 11 S. W. 649. Test of rural or urban character of property: *Stewart v. Philadelphia* (Pa.), 7 Atl. 192; *Keith v. City of Philadelphia*, 126 Pa. St. 575; s. c. 17 Atl. 883. Assessment of corner lots by double frontage permissible: *Morrison v. Hershire*, 32 Iowa 271; *Wolf v. City of Keokuk*, 48 Iowa 129; *City of Springfield v. Green*, 120 Ill. 269; s. c. 11 N. E. 261; *Walker v. City of Aurora*, 140 Ill. 402; s. c. 29 N. E. 741. Practical frontage not the mode. Officials must be guided by plats and records: *Scott Co. v. Hinds*, 50 Minn. 204; s. c. 52 N. W. 523. Estimate of frontage where street is intersected by alleys: *Kennett Square v. Entriiken*, 7 Pa. Co. Ct. R. 469.

²³⁵ *Moody & Co. v. Chadwick*, 52 La. An. 1888; s. c. 28 So. 361.

²³⁶ *Douglas v. Craig*, 4 Kan. App. 99; s. c. 46 Pac. 197.

²³⁷ *Douglas v. Craig*, 4 Kan. App. 99; s. c. 46 Pac. 197.

benefits to the city, the public generally, and to individual property, such benefits are to be considered as are direct, certain and proximate.²³⁸ Where an ordinance for local improvement directed that the improvement should be paid for wholly, or in part, by special taxation and the statute provides that the court shall direct the superintendent of special assessment to apportion the assessment between the municipality and the property benefited, the ordinance was held not illegal because it apportioned the cost of an improvement between the city and property instead of requiring the superintendent of special assessments to do so.²³⁹ Where an ordinance apportions the cost of an improvement between the city and property owners, in the absence of a statute there is no power of review in the courts.²⁴⁰ The power of review exists by statute as to special assessments but not as to special taxation.²⁴¹ (i) *Both sides of street must be assessed:* Where the statute provides that an assessment for a street improvement shall be apportioned on the lands abutting on the street where the improvement is located, it is a good defense that one side of the street only is assessed.²⁴² Where the cost of grading is to be assessed against the lots fronting on a street, it must be against the lots fronting on both sides of the street and not one side though the improvement is upon one side.²⁴³ (j) *City can not subdivide property, etc.:* For the purposes of a special assessment of abutting property it is not the duty of the city council to subdivide property not previously laid out in lots.²⁴⁴ A charter provision that two-thirds of the expense of paving and all the expense of a sewer be assessed against the property owner is constitutional.²⁴⁵ Where a street which is paved is widened so as to include a portion of the sidewalk, and thereafter a repaving is ordered, the abutting owner is liable only for the additional widening.²⁴⁶ An engineer directed by an ordinance to assess

²³⁸ *Kansas City v. Bacon*, 157 Mo. 450; s. c. 57 S. W. 1045.

²³⁹ *Birket v. City of Peoria*, 185 Ill. 369; s. c. 57 N. E. 30.

²⁴⁰ *Bigelow v. City of Chicago*, 90 Ill. 49; *Fagan v. City of Chicago*, 84 Ill. 227; *Watson v. City of Chicago*, 115 Ill. 78; s. c. 3 N. E. 430; *City of Sterling v. Galt*, 117 Ill. 11; s. c. 7 N. E. 471; *Billings v. City of Chicago*, 167 Ill. 327; s. c. 47 N. E. 731; *Walters v. Town of Lake*, 129 Ill. 23; s. c. 21 N. E. 556; *Hull v. People*, 170 Ill. 246; s. c. 48 N. E. 984; *Pfeiffer v. People*, 170 Ill. 347;

s. c. 48 N. E. 979. But see *City of Jacksonville v. Hamill*, 178 Ill. 235; s. c. 52 N. E. 949.

²⁴¹ *Birket v. City of Peoria*, 185 Ill. 369; s. c. 57 N. E. 30.

²⁴² *Drake v. Grout*, 21 Ind. App. 534; s. c. 52 N. E. 775.

²⁴³ *San Diego Inv. Co. v. Shaw*, 129 Cal. 273; s. c. 61 Pac. 1082.

²⁴⁴ *Schroder v. Overman*, 61 Ohio St. 1; s. c. 55 N. E. 158.

²⁴⁵ *City of Parkersburg v. Tavener*, 42 W. Va. 486; s. c. 26 S. E. 179.

²⁴⁶ *City of Philadelphia v. Yewdall*, 190 Pa. St. 412; s. c. 42 Atl. 956.

the cost of an improvement need not report to the council.²⁴⁷ In Pennsylvania the frontage rule of assessment for street improvements was applied to a long narrow strip of city property lying alongside a street, although the assessment was greater than the value of the lot. "If the objection were to prevail," said the court, "it would be very easy for the owners of a valuable lot to convey a narrow strip of the front to a convenient friend and thus escape altogether."²⁴⁸

§ 1254. Report of commissioners—When conclusive.—As a rule commissioners appointed to make an assessment and apportion the same should be disinterested and wholly free from any bias, or other cause that might cast suspicion on their acts. An assessment is not rendered invalid by reason of the fact that the son of one of the commissioners is an abutting property owner, he having paid his assessment before the hearing.²⁴⁹ The judgment of commissioners as to the amount of benefits is conclusive unless clearly shown to be erroneous.²⁵⁰ Assessors appointed to make an assessment have no right to follow the unauthorized direction of the city council.²⁵¹ Where the law requires a commissioner to lay out streets to be a resident freeholder, the fact that one commissioner owned property about 100 feet beyond the area of benefit does not disqualify him and the assessment is legal.²⁵² It is within the discretion of the legislature to commit the ascertainment of the lands to be assessed and the apportionment of the assessment to different parcels to commissioners to be appointed as provided for by law.²⁵³ Where the amount to be paid by the city for an improvement has been fixed and determined in the mode provided by law the action of the commissioner in so fixing it is final and conclusive and the court has no power at a subsequent stage to increase the amount so fixed.²⁵⁴ The report of only two commissioners out of three to estimate the cost of an improvement is fatal as an objection, where there is nothing to indicate that the third took any part

²⁴⁷ *City of Harrisburg v. Shepler*, 190 Pa. St. 374; s. c. 42 Atl. 893.

²⁴⁸ *McCormick's Estate v. City of Harrisburg*, 129 Pa. St. 213; s. c. 18 Atl. 126. Cf. *Stifel v. Brown*, 24 Mo. App. 102; *Preston v. Rudd*, 84 Ky. 150.

²⁴⁹ *Sowles v. Village of St. Albans*, 71 Vt. 418.

²⁵⁰ *State v. Mayor &c.*, 63 N. J. L. 61; s. c. 42 Atl. 805.

²⁵¹ *Alvord v. City of Syracuse*, 58 N. Y. S. 854; s. c. 27 Misc. (N. Y.) 392.

²⁵² *State v. Mayor &c.*, 63 N. J. L. 61; s. c. 42 Atl. 805.

²⁵³ *Bauman v. Ross*, 167 U. S. 548; s. c. 17 S. Ct. 966; *In re Brook Ave.*, 40 N. Y. S. 949; s. c. 8 App. Div. (N. Y.) 294.

²⁵⁴ *City of Jacksonville v. Hamill*, 178 Ill. 235; s. c. 52 N. E. 949. Cf. *City of Sterling v. Galt*, 117 Ill. 11; s. c. 7 N. E. 471; *Billings v. City of Chicago*, 167 Ill. 337; s. c. 47 N. E. 731.

in the estimate.²⁵⁵ Where the statute requires park commissioners to make and certify an assessment roll, an order of court appointing commissioners to make such roll is not required.²⁵⁶ The report of the commissioners that all proceedings against abutting property were according to law is conclusive evidence of such fact.²⁵⁷

§ 1255. Objections to special assessment.—(a) *Necessity of filing:* At some stage of the assessment proceeding an opportunity is provided for hearing objections by those whose property is affected thereby. Where no objections are filed within the time prescribed, owners failing to object are concluded.²⁵⁸ Failure to object to an error in entering an assessment makes the judgment confirming conclusive.²⁵⁹ (b) *When objections are to be made:* Objection to one of the commissioners appointed to make assessment must be made in apt time, and where there is an opportunity to object and it is not done until the commissioners' report is filed the objection will be treated as waived.²⁶⁰ An objection of a variation in the place of construction of a public improvement should be made at the time assessment is confirmed and not at the time of judgment for a sale.²⁶¹ Where the statute fixes a time for filing objections to the assessment they must be filed within such time.²⁶² And so also a defense that the petition for a special assessment was not signed by a majority of the taxpayers must be made at the time of confirmation of the assessment and not at the time of application for judgment for delinquent taxes (see Ill. Laws 1897, § 66).²⁶³ Where the statute provides for a written protest by property owners against an assessment within a specified number of days the protest must be within that time.²⁶⁴ (c) *Sufficiency of objections:* Want of apportionment according to the statute is not a good defense unless the objector can show that the amount assessed against his property is greater than it would have been had the statute

²⁵⁵ *Phelps v. City of Mattoon*, 177 Ill. 169; s. c. 52 N. E. 288.

²⁵⁶ *Hull v. West Chicago Park Com'rs*, 185 Ill. 150; s. c. 57 N. E. 1.

²⁵⁷ *Sowles v. Village of St. Albans*, 71 Vt. 418. Probably the true construction to be given to this case is that the findings of fact which make the proceedings in accordance with statutory requirements are conclusive.

²⁵⁸ *State v. Norton*, 63 Minn. 497; s. c. sub nom. *Village of West Duluth v. Norton*, 65 N. W. 935.

²⁵⁹ *Thompson v. People*, 184 Ill. 17; s. c. 56 N. E. 333.

²⁶⁰ *City of St. Louis v. Brown*, 155 Mo. 545; s. c. 56 S. W. 298; *Farrington v. City of Mt. Vernon*, 64 N. Y. S. 863; s. c. 51 App. Div. (N. Y.) 250.

²⁶¹ *McManus v. People*, 183 Ill. 391; s. c. 55 N. E. 886.

²⁶² *City of New Whatcom v. Belington Bay Improv. Co.*, 16 Wash. 131; s. c. 47 Pac. 236.

²⁶³ *Pipher v. People*, 183 Ill. 436; s. c. 56 N. E. 84.

²⁶⁴ *Warren v. Russell*, 129 Cal. 381; s. c. 62 Pac. 75.

been complied with.²⁶⁵ Objection based on error in the apportionment must show that under the proper method of apportionment the apportioned amount required to be paid would have been less.²⁶⁶ A general objection in an assessment of benefits for a street improvement that the ordinance authorizing the improvement did not specify the nature, character, locality and description of the proposed improvement is sufficient, on appeal, although objectors could have been required to be more specific.²⁶⁷ An objection that several items of the estimate of cost of an improvement are not included in the general terms of an ordinance will not be considered when such items are not specified.²⁶⁸ It is not a good objection that a cotenant in common was not notified, since by paying his proportion his individual interest would be relieved.²⁶⁹ An objection that a special assessment and all proceedings therein are void is not sufficient. It is but a conclusion and no proper issue can be made thereon.²⁷⁰ A special assessment being a proceeding in rem an objection in behalf of others will not be entertained. Lot owners can not be permitted to find fault in matters that do not affect them injuriously.²⁷¹ The fact that the grade of a certain crossing outside of the improvements in question has not been determined and fixed is not a valid objection.²⁷² Where there is a statutory limitation as to the amount of assessment for local improvements the objection can not be raised unless it appears in fact that the limit has been extended.²⁷³ It is not an objection to an assessment for improving a street that a street railway company occupied the street for a distance of 300 feet in the absence of proof that the company had agreed to pave that part of the street occupied by it.²⁷⁴ It is not an objection to be interposed by a property owner that the work under the contract was not completed in the time speci-

²⁶⁵ *Levi v. Coyne*, 22 Ky. L. 493; s. c. 57 S. W. 790.

²⁶⁶ *Chawk v. Beville*, 21 Ky. L. 1769; s. c. 56 S. W. 414. Cf. *McHenry v. Selvage*, 99 Ky. 232; s. c. 35 S. W. 645; *Barret v. Falls City Stone Co.*, 21 Ky. L. 669; s. c. 52 S. W. 947.

²⁶⁷ *Mead v. City of Chicago*, 186 Ill. 54; s. c. 57 N. E. 824.

²⁶⁸ *Hull v. West Chicago Park Com'rs*, 185 Ill. 150; s. c. 57 N. E. 1.

²⁶⁹ *Berket v. City of Peoria*, 185 Ill. 369; s. c. 57 N. E. 30.

²⁷⁰ *Delamater v. City of Chicago*, 158 Ill. 575; s. c. 42 N. E. 444.

²⁷¹ *People v. Green*, 158 Ill. 594;

s. c. 42 N. E. 163; *White v. City of Alton*, 149 Ill. 626; s. c. 37 N. E. 96.

²⁷² *In re Beechwood Ave.*, 194 Pa. St. 86; s. c. 45 Atl. 127. Objections that the petition was not signed by a majority of the property owners can not be urged on a decree assessing benefits under Pennsylvania act of May 16, 1891, § 10, P. L. 75: *In re Beechwood Ave.*, supra.

²⁷³ *Warren v. Russell*, 129 Cal. 381; s. c. 62 Pac. 75; *Neff v. Covington Stone & Co.*, 21 Ky. L. 1454; s. c. 55 S. W. 697.

²⁷⁴ *State v. District Court &c.*, 80 Minn. 293; s. c. 83 N. W. 183.

fied. Failure to complete within the time may be waived by the city.²⁷⁵ Where the statute provides that an appeal to the city council shall be final and conclusive as to all errors, informalities and irregularities which it might have remedied and avoided, and an action is brought to enforce the assessment lien, the owner is entitled to show want of jurisdiction of the council, though that was one of the grounds of appeal.²⁷⁶ An objection interposed that an assessment was not based on benefits to the property assessed, and therefore violated the fourteenth amendment to the United States constitution and also the declaration of rights of Alabama, is not subject to demurrer for generality.²⁷⁷ The right given by statute to contest the amount of an assessment includes the right to show that the assessment exceeds the benefits received.²⁷⁸ (d) *When objection sustained*: It is a valid objection to an assessment for a sewer that the street named does not in fact exist, but where the defect does not appear on the face of the ordinance the objection must be made on application to confirm and not on application for judgment of sale.²⁷⁹ (e) *When objection not sustained*: An objection to an assessment not appearing on the face of the petition or other proceedings will not be considered after the time allowed by the statute for so doing.²⁸⁰ One who has not complained of his assessment will not be heard to say that the board of equalization was not regularly appointed or that its members were not eligible.²⁸¹ (f) *Failure to appeal*: A failure to appeal to the board of supervisors does not prevent an owner from objecting to an assessment where the assessment on its face appears to be in violation of the statute.²⁸² (g) *Waiver of defect in notice*: Appearance of property owners pursuant to notice of meeting to confirm an assessment, and the filing of objections to the merits, are a waiver of objection to the legality of the notice.²⁸³ The filing of general objections, or the adoption of objections filed by others, is a waiver of special objections to the jurisdiction of the court to confirm a special assessment.²⁸⁴ The appearance and filing of objections

²⁷⁵ *Levi v. Coyne*, 22 Ky. L. 493; Ky. L. 554; s. c. 52 S. W. 798. s. c. 57 S. W. 790.

²⁷⁶ *California Imp. Co. v. Moran*, 128 Cal. 373; s. c. 60 Pac. 969.

²⁷⁷ *City Council v. Birdsong*, 126 Ala. 632; s. c. 28 So. 522.

²⁷⁸ *City of Indianapolis v. Holt*, 155 Ind. 222; s. c. 57 N. E. 966, 988, 1100.

²⁷⁹ *Dempster v. City of Chicago*, 175 Ill. 278; s. c. 51 N. E. 710.

²⁸⁰ *City of Kansas City v. Kimball*, 60 Kan. 224; s. c. 56 Pac. 78.

²⁸¹ *Powell v. City of Louisville*, 21

When objection not sustained,—see *Lake St. & C. R. Co. v. City of Chicago*, 183 Ill. 75; s. c. 55 N. E. 721.

²⁸² *Perine v. Lewis*, 128 Cal. 236; s. c. 60 Pac. 422, 772.

²⁸³ *Hintze v. City of Elgin*, 186 Ill. 251; s. c. 57 N. E. 856.

²⁸⁴ *Porter v. City of Chicago*, 176 Ill. 605; s. c. 52 N. E. 318; *People v. Sherman*, 83 Ill. 165; *Nichols v. People*, 165 Ill. 502; s. c. 46 N. E. 237; *Mix v. People*, 106 Ill. 425.

to an application for judgment for sale for delinquent special assessments and the introduction of evidence thereunder are a waiver of defects in the notice of such application.²⁸⁵ It is proper to enter separate judgments where there are separate objections.²⁸⁶

§ 1256. **Confirmation of assessment.**—(a) *Want of notice:* The record not showing that notice to owners was mailed ten days before the return term, no affidavit appearing that they were so mailed, is such error as may be availed of by owners who did not appear and object to the confirmation.²⁸⁷ (b) *Jurisdiction to confirm:* A court has no jurisdiction to confirm an assessment which is void by reason of the ordinance on which it is based not complying with the law, in reference to a preliminary hearing.²⁸⁸ (c) *Evidence on hearing of confirmation:* The court may hear evidence on matters relating to the validity of the ordinance before the jury trial, as it is the province of the jury to pass upon the question of benefits as compared with the amount assessed.²⁸⁹ The fact that a contract for an improvement is for less than the assessment as a whole is not ground for refusing to confirm where the improvement has not been made.²⁹⁰ The approval of the mayor of a confirmation of a special assessment roll by the council will be presumed in the absence of evidence to the contrary.²⁹¹ (d) *Judgments—May be separate:* Separate judgments may be entered confirming an assessment as to the several tracts of land.²⁹² Thus the court may enter judgment by default as to some lots and on hearing at a subsequent term enter judgment for the remainder of the lots.²⁹³ Judgment of confirmation is conclusive as to the fact of notice when raised on application for judgment for a delinquent assessment.²⁹⁴ It should be noted in this connection that where the defend-

²⁸⁵ *McManus v. People*, 183 Ill. 391; s. c. 55 N. E. 886. As to an insufficient meeting of council to hear objections to a special assessment, see *Medland v. Linton*, 60 Neb. 249; s. c. 82 N. W. 866.

²⁸⁶ *Bliss v. City of Chicago*, 156 Ill. 584; s. c. 41 N. E. 160.

²⁸⁷ *Maxwell v. City of Chicago*, 185 Ill. 18; s. c. 56 N. E. 1101.

²⁸⁸ *Clarke v. City of Chicago*, 185 Ill. 354; s. c. 57 N. E. 15. Sufficiency of petition for confirmation, —see *Pearson v. City of Chicago*, 162 Ill. 383; s. c. 43 N. E. 702; *McChesney v. City of Chicago*, 161 Ill. 110; s. c. 45 N. E. 537.

²⁸⁹ *Village of Hammond v. Leavitt*, 181 Ill. 416; s. c. 54 N. E. 982.

²⁹⁰ *Danforth v. Village of Hinsdale*, 177 Ill. 579; s. c. 52 N. E. 877.

²⁹¹ *President &c. v. City of Buffalo*, 56 N. Y. S. 976.

²⁹² *Beach v. People*, 157 Ill. 659; s. c. 41 N. E. 1117; *Browning v. City of Chicago*, 155 Ill. 314; s. c. 40 N. E. 565.

²⁹³ *Delamater v. City of Chicago*, 158 Ill. 575; s. c. 42 N. E. 444.

²⁹⁴ *Chicago &c. R. Co. v. People*, 154 Ill. 256; s. c. 40 N. E. 342; *People v. Ryan*, 156 Ill. 620; s. c. 41 N. E. 180.

ant has been notified as required by the statute of the application for confirmation of the assessment and fails to appear the judgment would be conclusive as to any question that might properly have been raised on that application. But if he was not notified then the court would have no jurisdiction and the judgment would be void. In such case the notice is in effect process.²⁹⁵ And so where commissioners appointed to make an assessment were required to give notice and the notice was signed by two of them only, the court did not acquire jurisdiction to render a judgment of confirmation and the question can be raised in an application for judgment.²⁹⁶ The court can not set aside an order confirming a special assessment after the term at which it was rendered unless the judgment is void.²⁹⁷ The court, on a hearing for confirmation of a special assessment, can not change the number of installments as fixed by the ordinance.²⁹⁸ (c) *Collateral attack of:* Except for matters going to the jurisdiction the confirmation of an assessment can not be attacked collaterally,²⁹⁹ and so also as to the question of benefits.³⁰⁰ In an application for judgment for a delinquent special tax the sufficiency of the ordinance can not be attacked collaterally. In a proceeding to levy a special tax where the court has jurisdiction of the parties and the subject-matter and enters judgment thereon, it is conclusive unless reversed or annulled in a direct proceeding.³⁰¹

§ 1257. **Appeal from judgment confirming—Certiorari.**—(a) *Limitation of time:* Where the statute provides that proceedings for trying the validity of an assessment must be commenced within twenty days after the date of publication or be forever barred, the limitation relates to such errors and omissions only as relate to the passage and publication of the ordinance, and does not affect an action to enjoin the assessment for non-compliance with the law in the passage of the ordinance establishing the improvement district.³⁰² Where the charter provides for an appeal within ten days after public notice and no-

²⁹⁵ *Boynton v. People*, 155 Ill. 66; s. c. 39 N. E. 622; *Steenberg v. People*, 164 Ill. 478; s. c. 45 N. E. 970.

²⁹⁶ *McChesney v. People*, 148 Ill. 221; s. c. 35 N. E. 739; *Adcock v. City of Chicago*, 160 Ill. 611; s. c. 43 N. E. 589.

²⁹⁷ *Keeler v. People*, 160 Ill. 179; s. c. 43 N. E. 342.

²⁹⁸ *Phelps v. City of Mattoon*, 177 Ill. 169; s. c. 52 N. E. 288; *Michael v. City of Mattoon*, 172 Ill. 394; s. c. 50 N. E. 155.

²⁹⁹ *People v. Lingle*, 165 Ill. 65; s. c. 46 N. E. 10.

³⁰⁰ *People v. Ryan*, 156 Ill. 620; s. c. 41 N. E. 180.

³⁰¹ *People v. Green*, 158 Ill. 594; s. c. 42 N. E. 163; *Clark v. People*, 146 Ill. 348; s. c. 34 N. E. 941. Confirmation with reference to Greater N. Y. charter: *In re Munn*, 63 N. Y. S. 22; s. c. 49 App. Div. (N. Y.) 232.

³⁰² *Crane v. Siloam Springs*, 67 Ark. 30; s. c. 55 S. W. 955.

tice was published on February 18, 20 and 21, the owner may adopt any day of the three for purposes of appeal.³⁰³ (b) *Effect of appeal*: Where an appeal is allowed to the city council and the decision of the council declared to be final after proper notice, on all persons entitled to appeal, and the council fails to entertain an appeal properly taken by one property owner on objections which are fatal to the improvement as an entirety, no steps can be taken against any of the property owners so long as the appeal is undetermined.³⁰⁴ The right of an appeal from an assessment to the circuit court given by statute does not prevent the exercise of other remedies a party may be entitled to.³⁰⁵

(c) *Presumption on appeal*: Where an estimate of the cost of an improvement is a prerequisite to the passage of an ordinance, it will be presumed on appeal that the council had such estimate before it, where it appears that it was filed with the clerk.³⁰⁶ (d) *What considered on appeal*: The omission of a lot from an assessment can not be raised as a defense to an action on the assessment. The remedy in such case is appeal.³⁰⁷ But in some cases the appeal is not an adequate remedy.³⁰⁸ An act concerning public improvements which provides that the determination by the courts of the question of distribution of cost according to benefits received is conclusive and not subject to review on appeal or writ of error is constitutional, the right of appeal being within the control of the legislature.³⁰⁹ Property owners can not raise the question for the first time on appeal of inequality in the assessment.³¹⁰ Where only property benefited is to be assessed, what property is benefited is a question of fact for the jury and their finding will not be interfered with.³¹¹ Evidence that other property than abutting property was benefited and not assessed is not properly admissible on certiorari to review.³¹² Notice of appeal from an action to set aside a special assessment may be by one of several owners of separate tracts.³¹³

³⁰³ *Appeal of Fox*, 73 Conn. 68; s. c. 46 Atl. 277. is conclusive (Local Imp. Act, § 47).

³⁰⁴ *Girvin v. Simon*, 127 Cal. 491; s. c. 59 Pac. 945.

³⁰⁵ *Kersten v. City of Milwaukee*, 106 Wis. 200; s. c. 81 N. W. 948.

³⁰⁶ *City of Marshall v. Rainey*, 78 Mo. App. 416.

³⁰⁷ *Buckman v. Landers*, 111 Cal. 347; s. c. 43 Pac. 1125.

³⁰⁸ *Hayes v. Douglas Co.*, 92 Wis. 429; s. c. 65 N. W. 482.

³⁰⁹ *Bickerdike v. City of Chicago*, 185 Ill. 280; s. c. 56 N. E. 1096. The determination of the county court

³¹⁰ *Mead v. City of Chicago*, 186 Ill. 54; s. c. 57 N. E. 824; *Kansas City v. Bacon*, 157 Mo. 450; s. c. 57 S. W. 1045.

³¹¹ *Kansas City v. Bacon*, supra.

³¹² *Lincoln v. Board &c.*, 176 Mass. 210; s. c. 57 N. E. 356.

³¹³ *Mason v. City of Des Moines*, 108 Iowa 658; s. c. 79 N. W. 389. Construction of right of review in matters of special assessment in Illinois: *City of Bloomington v. Reeves*, 177 Ill. 161; s. c. 52 N. E.

§ 1258. **Remedy of property owner.**—(a) *By appeal:* Appellate tribunals will not interfere in assessment matters as to mere questions of amount unless the officials' acts were palpably unjust, or they were guilty of misconduct, or adopted an illegal rule or principle in making the assessment.³¹⁴ Failure to appeal to the city council to correct irregularities where such irregularities will render void an assessment for a street improvement does not deprive a person of his rights to an injunction against the assessment.³¹⁵ The California statute relating to street improvements provides a statutory remedy for all persons interested in assessments by appeal to the city council and makes the decision of that body conclusive, on all matters which the council can remedy. The failure to appeal is held to work an estoppel.³¹⁶ The remedy for an over assessment in California is an appeal from the assessment.³¹⁷ And so it has been held that where an injunction is allowed prior to the making of improvements, and an appeal by a property owner after proceedings to collect the assessment are instituted, one failing to appeal is not entitled to an injunction after the contract is made for the improvements unless the council is absolutely without jurisdiction to make the contract.³¹⁸ (b) *Remedy in equity.*^{318a} Parties induced to withdraw an objection to an assessment that there was no such street as that mentioned wherein the improvement was proposed to be made, on the promise of the city to condemn the land, and thus enable objectors to use the condemnation money to pay the assessment, are entitled to relief in equity against the assessment, where, after confirmation of the assessment, the city dismissed the condemnation proceedings. It was such a fraud as would entitle the defrauded parties to relief in equity.³¹⁹ An assessment not void on its face may be vacated as a cloud upon the title.³²⁰ Where there is a remedy by appeal provided by law, yet where the commissioners lose jurisdiction by a failure to include property liable and facts invalidating the assessment do not appear of record, the property owner may be

278. Appeal from action of city to superior court under Wash. laws of 1893, ch. 95, p. 226: *White v. City of Tacoma*, 20 Wash. 361; s. c. 55 Pac. 319.

³¹⁴ *In re Fifth Ave.*, 36 N. Y. S. 141; s. c. 91 Hun (N. Y.) 259.

³¹⁵ *Chase v. City Treasurer &c.*, 122 Cal. 540; s. c. 55 Pac. 414.

³¹⁶ *Girvin v. Simon*, 116 Cal. 604; s. c. 48 Pac. 720.

³¹⁷ *Wells v. Wood*, 114 Cal. 255; s. c. 46 Pac. 96.

³¹⁸ *Alley v. City of Lebanon*, 146 Ind. 125; s. c. 44 N. E. 1003.

^{318a} See post, § 1263.

³¹⁹ *Dempster v. City of Chicago*, 175 Ill. 278; s. c. 51 N. E. 710; *Holmes v. Village of Hyde Park*, 121 Ill. 128; s. c. 13 N. E. 540.

³²⁰ *Richter v. City of New York*, 54 N. Y. S. 150; s. c. 24 Misc. (N. Y.) 613.

entitled to a remedy to remove the cloud from his title.³²¹ Where the resolution and other preliminary proceedings were for grading a street and not for changing an existing grade, a suit to annul the assessment is the appropriate remedy and not certiorari.³²² Equity will not arrest the prosecution of an improvement though claimed to be unwarranted where ample remedy at law exists, or the legality can be tested in a special proceeding, under the charter.³²³ Whether work was done in accordance with the contract is not a question that can be raised on an application for judgment. In such case there is a remedy by mandamus, or by injunction.³²⁴ (c) *Remedy by statute*: If the making of an improvement is within the power of a city a property owner must follow the special statutory remedies given him.³²⁵ But a statutory remedy does not exclude jurisdiction in equity where the proceeding is void for want of jurisdiction to order the improvement.³²⁶ If a property owner fails to avail himself of the remedy provided by statute he waives his right to be heard.³²⁷ On the revision of a special assessment the petitioner must show by a fair preponderance of the evidence that the assessment is unjust.³²⁸ An error in an assessment is not available to a property owner where the council or courts have power to make necessary corrections.³²⁹ In some states a remedy by certiorari is provided by statute. Where relief may be granted and an assessment corrected by certiorari no relief will be granted in an action to determine the legality of the assessment.³³⁰ Where it is claimed that an assessment is void for non-compliance with statutory requirements certiorari is the proper remedy.³³¹ The remedy of a property owner, given by a city charter, be-

³²¹ *McKechnie Brew. Co. v. Trustees &c.*, 44 N. Y. S. 317; s. c. 15 App. Div. (N. Y.) 139; *Tredwell v. City of Brooklyn*, 43 N. Y. S. 458.

³²² *Niver v. Village of Bath*, 58 N. Y. S. 270; s. c. 27 Misc. (N. Y.) 605.

³²³ *Shulz v. City of Albany*, 59 N. Y. S. 235; s. c. 42 App. Div. (N. Y.) 437.

³²⁴ *People v. Green*, 158 Ill. 594; s. c. 42 N. E. 163; *Wisner v. People*, 156 Ill. 180; s. c. 40 N. E. 574.

³²⁵ *Nelson v. City of Saginaw*, 106 Mich. 659; s. c. 64 N. W. 499; *Harney v. Benson*, 113 Cal. 314; s. c. 45 Pac. 687.

³²⁶ *Armstrong v. Ogden City*, 12 Utah 476; s. c. 43 Pac. 119.

³²⁷ *Byram v. Foley*, 17 Ind. App. 629; s. c. 47 N. E. 351; *Arends v. City of Kansas City*, 57 Kan. 350; s. c. 46 Pac. 702.

³²⁸ *Beals v. Inhabitants &c.*, 174 Mass. 1; s. c. 54 N. E. 339.

³²⁹ *Gleason v. Barnett*, 20 Ky. L. 1694; s. c. 50 S. W. 67. What evidence is proper on a revision of an assessment,—see *Beals v. Inhabitants &c.*, 174 Mass. 1; s. c. 54 N. E. 339.

³³⁰ *Alvord v. City of Syracuse*, 58 N. Y. S. 584; s. c. 27 Misc. (N. Y.) 392.

³³¹ *Bowditch v. Superintendent &c.*, 168 Mass. 239; s. c. 46 N. E. 1026.

fore the city council, does not preclude a hearing before the city court.³³² (d) *Remedy may be lost*: It has been held that an owner's defense to an illegal assessment can not be made where he was served with notice and made no objection.³³³ The failure of a city clerk in his certificate to state that objections had been filed does not prejudice a landowner.³³⁴ A property owner under an assessment based on the cost of an improvement without regard to benefits, by failing to petition the council for correction is not estopped from asserting its invalidity by reason of not being based on benefits against the holder of certificates for making the improvement, where he had no opportunity of presenting his objection.³³⁵ Where there is a change of grade which increases the cost of an improvement and renders the contract inoperative, a failure to appeal does not validate the assessment.³³⁶ (e) *Tender—Jury trial*: A defense by a taxpayer that the work was not done in a good and substantial manner as required by the contract can be pleaded only by way of reduction of the amount, and he must make a tender of the amount justly due for the work actually performed.³³⁷ Objectors are entitled to a hearing before a jury on the question of benefits from an improvement.³³⁸ Where there have been legal proceedings pending for a reassessment laches will not be a bar to relief.³³⁹

§ 1259. **Defenses when available and when not available.**—In an action or proceeding to enforce payment of a special assessment it is sufficient that prior installments paid were sufficient to pay for the improvement and hence no further instalments are necessary.³⁷⁰ A lot owner may show as a defense that a railroad company occupying a street is by ordinance required to make the improvements for which he is assessed.³⁴¹ A new suit to enforce a special assessment can not be prosecuted when a former suit is still pending for the same purpose although reversed in an upper court.³⁴² In general it is not a defense to an assessment that the work was not performed according

³³² *City Council &c. v. Birdsong*, 126 Ala. 632; s. c. 28 So. 522.

³³³ *Busenbark v. Clements*, 22 Ind. App. 557; s. c. 53 N. E. 666.

³³⁴ *President &c. v. City of Buffalo*, 56 N. Y. S. 976; s. c. 39 App. Div. (N. Y.) 333.

³³⁵ *Hutcheson v. Storrie*, 92 Tex. 685; s. c. 51 S. W. 848.

³³⁶ *Warren v. Chandos*, 115 Cal. 382; s. c. 47 Pac. 132.

³³⁷ *Barber Asphalt Pav. Co. v. Ullman*, 137 Mo. 543; s. c. 38 S. W. 458.

³³⁸ *Illinois &c. R. Co. v. City of Wenona*, 163 Ill. 288; s. c. 45 N. E. 265; *Bradford v. City of Pontiac*, 165 Ill. 613; s. c. 46 N. E. 794.

³³⁹ *State v. Mayor &c.*, 63 N. J. L. 202; s. c. 42 Atl. 773.

³⁴⁰ *People v. McWethy*, 165 Ill. 222; s. c. 46 N. E. 187.

³⁴¹ *Philadelphia v. Bowman*, 166 Pa. St. 393; s. c. 31 Atl. 142.

³⁴² *Westall v. Altschul*, 126 Cal. 164; s. c. 58 Pac. 458.

to its terms, but the rule does not extend to cases when the municipal authorities, after contracting for one thing, have seen fit to accept something different in its place. In such case the city may be restrained by injunction from departing from the terms of the ordinance in material respects, or mandamus may be invoked to compel the city to complete the improvement in compliance with the ordinance.³⁴³ Where an assessment is erroneous in that only portions of certain lots are assessed it may be set aside as to such lots only, where the error does not impose an improper assessment on the other lots.³⁴⁴ It is not a defense to a special assessment that the work was not done according to contract.³⁴⁵ Nor is it a defense to a special assessment that the city has not provided means to pay for that portion of an improvement which is to be paid by general taxation,³⁴⁶ nor that the improvement in front of certain lots had not been completed or even begun when the work under the contract was accepted where such lots were not included in the contract by reason of the owners having agreed to make the improvements in front of such lots.³⁴⁷ The fact that an abutting owner has made such an improvement as he deems requisite for his purposes does not prevent the city from making an improvement and assessing therefor.³⁴⁸ In an action to collect an assessment the failure of the city to let the publication of notice to the lowest bidder can not be inquired into,³⁴⁹ nor can the defendant offset his damages for property taken.³⁵⁰ An assessment for laying a sidewalk can not be defeated at the time of application for confirmation on the ground that the city has not acquired the land upon which the improvement is made.³⁵¹ A charter requirement of payment or tender of all legal taxes unpaid as a condition precedent to an action to set aside an assessment may be waived by failure to demur or plead in

³⁴³ *Church v. People*, 174 Ill. 366; s. c. 51 N. E. 747; *Callister v. Kochersperger*, 168 Ill. 334; s. c. 48 N. E. 156; *Fisher v. People*, 157 Ill. 85; s. c. 41 N. E. 615.

³⁴⁴ *State v. Mayor &c.*, 63 N. J. L. 61; s. c. 42 Atl. 805.

³⁴⁵ *Haley v. City of Alton*, 152 Ill. 113; s. c. 38 N. E. 750.

³⁴⁶ *Hughes v. City of Mومence*, 163 Ill. 535; s. c. 45 N. E. 300.

³⁴⁷ *Middlesborough Town and Land Co. v. Knoll*, 21 Ky. L. 1399; s. c. 55 S. W. 205.

³⁴⁸ *President &c. v. City of Buffalo*,

56 N. Y. S. 976; s. c. 36 App. Div. (N. Y.) 333.

³⁴⁹ *Moffitt v. Jordan*, 127 Cal. 622; s. c. 60 Pac. 123.

³⁵⁰ *Hornung v. McCarthy*, 126 Cal. 17; s. c. 58 Pac. 303.

³⁵¹ *Boynton v. People*, 159 Ill. 553; s. c. 42 N. E. 842; *Village of Hyde Park v. Borden*, 94 Ill. 26; *Holmes v. Village of Hyde Park*, 121 Ill. 128; s. c. 13 N. E. 540; *Hunnerberg v. Village of Hyde Park*, 130 Ill. 156; s. c. 22 N. E. 486; *Leman v. City of Lake View*, 131 Ill. 388; s. c. 23 N. E. 346; *Goodwillie v. City of Lake View*, 137 Ill. 51; s. c. 27 N. E. 15.

abatement.³⁵² One contesting an assessment on the ground that it is void in toto is not required to either tender or offer to pay what may be found legal.³⁵³ No question as to the benefits or injury caused by an improvement can be raised in an action to enforce the lien.³⁵⁴ Where certain preliminaries are required before action by the council and the council have passed upon their sufficiency and made the improvement, the burden of showing that the council did not have jurisdiction rests upon the person who seeks to annul the assessment.³⁵⁵ A sole owner sought to be charged with a special assessment is a necessary party defendant in order to give the court jurisdiction or affect his interest.³⁵⁶ The wife is a necessary party in an action to foreclose a special assessment lien on community property.³⁵⁷ A demand is not required before suit to enforce.³⁵⁸ Proceedings to enforce the lien of a special assessment are in rem.³⁵⁹ Where awards are made for land taken and benefits by commissioners but the report is lost and its contents not shown, the proceedings will be set aside on certiorari.³⁶⁰ In a suit by a grantee against a grantor to recover an assessment paid by the former, the assessment can not be attacked by showing that the premises were not properly described or the improvement insufficiently set up.³⁶¹ Installments of assessments are collected the same as other taxes.³⁶²

§ 1260. **Assessments enjoined when.**^{362a}—Equity will enjoin the collection of a void local assessment, and appeal from the assessment is not the only remedy.³⁶³ A preliminary restraining order may be granted restraining the enforcement of an assessment where the statute under which the proceeding is had is of sufficiently doubtful validity under the federal constitution, and no construction has been given by the state supreme court.³⁶⁴ A preliminary injunction is proper where the bill makes out a probable cause entitling the plain-

³⁵² Wells v. Western Paving &c. Co., 96 Wis. 116; s. c. sub nom. Wells v. City of Milwaukee, 70 N. W. 1071.

³⁵³ Chase v. City Treasurer &c., 122 Cal. 540; s. c. 55 Pac. 414.

³⁵⁴ Moberly v. Hogan, 131 Mo. 19; s. c. 32 S. W. 1014.

³⁵⁵ Allen v. City of Portland, 35 Or. 420; s. c. 58 Pac. 509.

³⁵⁶ Heman v. McNamara, 77 Mo. App. 1.

³⁵⁷ City of Seattle v. Baxter, 20 Wash. 714; s. c. 55 Pac. 320.

³⁵⁸ Lewis v. Albertson, 23 Ind. App. 147; s. c. 53 N. E. 1071.

³⁵⁹ Rosetta Gravel &c. Co. v. Jollesaint, 51 La. An. 804; s. c. 26 So. 468.

³⁶⁰ Meredith v. City of Perth Amboy, 63 N. J. L. 520; s. c. 44 Atl. 971.

³⁶¹ Jebb v. Sexton, 84 Ill. App. 45.

³⁶² Makley v. Whitmore, 61 Ohio St. 587; s. c. 56 N. E. 461.

^{362a} See ch. 38, post, on Injunction.

³⁶³ Chicago &c. R. Co. v. Phillips, 111 Iowa 377; s. c. 82 N. W. 787.

³⁶⁴ Charles v. City of Marion, 98 Fed. 166.

tiff to final relief.³⁶⁵ Where the initial steps taken are such as to vest a city with jurisdiction to make an assessment, but the assessment is otherwise invalid, a court of equity will not restore the property to its original condition but may restrain the proceedings until a valid assessment can be made.³⁶⁶ In a suit to enjoin the enforcement of an assessment on the ground that all benefits are excluded a decree enjoining the whole assessment is the only appropriate decree.³⁶⁷ An injunction will lie where the proceeding is based on jurisdictional defects in the assessment proceedings,³⁶⁸ and so where the assessment creates a cloud upon the title,³⁶⁹ but it has been held that an injunction will not issue to restrain the sale of property for the non-payment of an assessment which is void. Such sale creates no cloud upon the title, nor does the granting of injunction prevent a multiplicity of suits.³⁷⁰ Where a property owner has notice of an application for judgment against his property, he is not entitled to an injunction as his common-law remedy is complete.³⁷¹ An injunction will not issue where the application is based solely on the ground that the proceedings of the council do not show affirmatively that the benefit to the land was taken into consideration in the levy.³⁷² An injunction restraining a municipal corporation in the performance of its general and ordinary business can not issue in Idaho without notice.³⁷³ An action to enjoin an assessment will not be sustained under § 212, ch. 32 of Gen. Stat. Kan., after the expiration of thirty days from the date when the amount of assessment was ascertained for each lot.³⁷⁴ In an action to enjoin an assessment by a property owner on the ground that it is unlawful as to him, contractors who are to perform the contract are not necessary parties.³⁷⁵

§ 1261. **Estoppel.**^{375a}—In a suit to compel a reassessment after a city has passed an ordinance reciting that the original assessment was void and has defended suits on that ground, it is estopped to deny

³⁶⁵ *Lyon v. Town of Tonawanda*, 98 Fed. 361.

³⁶⁶ *Kersten v. City of Milwaukee*, 106 Wis. 200; s. c. 81 N. W. 948.

³⁶⁷ *Norwood v. Baker*, 172 U. S. 269; s. c. 19 S. Ct. 187.

³⁶⁸ *Retreat v. City of Buffalo*, 53 N. Y. S. 1113.

³⁶⁹ *Alvord v. City of Syracuse*, 163 N. Y. 158; s. c. 57 N. E. 310; *Chase v. City Treasurer*, 122 Cal. 540; s. c. 55 Pac. 414.

³⁷⁰ *Byrne v. Drain*, 127 Cal. 663; s. c. 60 Pac. 433.

³⁷¹ *Smith v. Kockersperger*, 180 Ill. 527; s. c. 54 N. E. 614.

³⁷² *Schroder v. Overman*, 61 Ohio St. 1; s. c. 55 N. E. 158.

³⁷³ *Wilson v. City of Boise City (Idaho)*, 60 Pac. 84.

³⁷⁴ *City of Kansas City v. Gray*, 62 Kan. 198; s. c. 61 Pac. 746.

³⁷⁵ *Chicago &c. R. Co. v. Phillips*, 111 Iowa 377; s. c. 82 N. W. 787.

^{375a} See post, ch. 39.

the invalidity of the assessment.³⁷⁶ A landowner may estop himself from making objections to a special assessment.³⁷⁷ One who knowingly remains silent until an improvement is made will not be heard to question an assessment where there has been a substantial compliance with the charter provisions giving the council jurisdiction.³⁷⁸ The payment of several assessments does not estop a person from attacking the collection of the remainder.³⁷⁹ Petitioning for an improvement does not estop a person from contesting the validity of the assessment.³⁸⁰ The signing of a petition for an improvement in a specified manner does not estop an abutting owner from attacking an assessment on the grounds of non-compliance with the statute in making the levy.³⁸¹ A property owner is not estopped by mere silence from resisting the payment of an assessment rendered illegal by an unconstitutional legislative act.³⁸² And so where the assessment proceedings are void for want of jurisdiction.³⁸³

§ 1262. Reassessment—When made.—Generally the statute or charter provides for a reassessment where a former assessment is declared void or for other reason is not enforceable.³⁸⁴ Where a reassessment is made in lieu of one which has been annulled, payments made under the former assessment must be credited.³⁸⁵ Payment on a former assessment is not a defense to a reassessment, but the amount

³⁷⁶ *Phillips v. City of Olympia*, 21 Wash. 153; s. c. 57 Pac. 347; *Tacoma Land Co. v. City of Tacoma*, 15 Wash. 133; s. c. 45 Pac. 733.

³⁷⁷ *Fitzhugh v. City of Bay City*, 109 Mich. 581; s. c. 67 N. W. 904; *Richcreek v. Moorman*, 14 Ind. App. 370; s. c. 42 N. E. 945; *Cluggish v. Koons*, 15 Ind. App. 599; s. c. 43 N. E. 158; *People v. Many*, 35 N. Y. S. 78; s. c. 89 Hun (N. Y.) 138; *Wingate v. City of Tacoma*, 13 Wash. 603; s. c. 43 Pac. 874. But see *City of Bradford v. Fox*, 171 Pa. St. 343; s. c. 33 Atl. 85; *Kerr v. City of Corsicana*, 89 Tex. 461; s. c. 35 S. W. 694; *City of Dallas v. Atkins* (Tex. Civ. App.), 32 S. W. 780; *Ardrey v. City of Dallas*, 13 Tex. Civ. App. 442; s. c. 35 S. W. 726; *Alford v. City of Dallas* (Tex. Civ. App.), 35 S. W. 816.

³⁷⁸ *State v. Mayor &c.*, 101 Wis. 208; s. c. 77 N. W. 167.

³⁷⁹ *Wakeley v. City of Omaha*, 58 Neb. 245; s. c. 78 N. W. 511.

³⁸⁰ *Crawfordsville Music Hall Ass'n v. Clements*, 12 Ind. App. 464; s. c. 39 N. E. 540; *City of Dallas v. Ellison*, 10 Tex. Civ. App. 28; s. c. 30 S. W. 1128. And see *Fox v. Middleborough Town Co.*, 16 Ky. L. 455; s. c. 28 S. W. 776.

³⁸¹ *Wakeley v. City of Omaha*, 58 Neb. 245; s. c. 78 N. W. 511.

³⁸² *Andrew v. Settle*, 6 Ohio Dec. 160.

³⁸³ *Smith v. Minto*, 30 Or. 351; s. c. 48 Pac. 166.

³⁸⁴ *Philadelphia &c. Iron Co. v. City of Chicago*, 158 Ill. 9; s. c. 41 N. E. 1102. See *Tacoma Land Co. v. City of Tacoma*, 15 Wash. 133; s. c. 44 Pac. 106.

³⁸⁵ *Freeport Street R. Co. v. City of Freeport*, 151 Ill. 451; s. c. 40 N. E. 565.

must be refunded.³⁸⁶ In the absence of a statute prohibiting, a reassessment may be made from time to time to the extent of the benefits conferred except where abandonment or laches appears.³⁸⁷

§ 1263. **Injunction against illegal assessments.**^{387a}—It is a general rule that equity will not interfere by injunction with the collection of an assessment unless in addition to illegality, hardship or irregularity the case is brought within some one or more of the recognized heads of equity jurisdiction; and in no case will it interfere for mere errors or excess of valuation, hardship or injustice of the law, or other cause which can be redressed in a legal form.³⁸⁸ Injunc-

³⁸⁶ *State v. District Court &c.*, 68 Minn. 242; s. c. sub nom. *In re Re-assessment for Grading Prior Ave.*, and sub nom. *Minnesota &c. R. Co. v. District Court &c.*, 71 N. W. 27.

³⁸⁷ Reassessment held proper under statute in *Farrell v. West Chicago Park Com'rs*, 182 Ill. 250; s. c. 55 N. E. 325. Construction of New York laws of 1895 in relation to reassessment: *Jones v. Town of Tonawanda*, 158 N. Y. 438; s. c. 53 N. E. 280. Under statute of 1889, art. 9, § 46, Illinois, where an assessment has been set aside by a court, a new assessment may be made and returned and like proceedings had as required under the first: *People v. City of Pontiac*, 185 Ill. 437; s. c. 56 N. E. 1114. Cf. *West Chicago Park Com'rs v. Metropolitan &c. R. Co.*, 182 Ill. 246; s. c. 55 N. E. 344; *Smith v. City of Detroit*, 120 Mich. 572; s. c. 79 N. W. 808; *State v. District Court &c.*, 77 Minn. 248; s. c. 79 N. W. 971; *State v. District Court &c.*, 68 Minn. 242; s. c. sub nom. *In re Reassessment for Grading Prior Ave.*, and sub nom. *Minnesota &c. R. Co. v. District Court &c.*, 71 N. W. 27. Construction of Illinois act in relation to cities and villages in regard to reassessment: *Murray v. City of Chicago*, 175 Ill. 340; s. c. 51 N. E. 654. Construction of California statute in relation to second assessment: *Ede v. Cuneo* (Cal.), 55 Pac. 388; *Gray v. Richardson* (Cal.), 55 Pac. 603. Construction of charter

of Detroit as to reassessments: *Smith v. City of Detroit*, 120 Mich. 572; s. c. 79 N. W. 808. Charter of St. Paul construed with reference to reassessments: *State v. District Court*, 75 Minn. 292; s. c. 79 N. W. 971.

^{387a} See ch. 38, post, on Injunction.

³⁸⁸ *Strenna v. City Council &c.*, 86 Ala. 340; s. c. 5 So. 115, where the alleged "irregularities were not brought to the notice of the municipal tribunal, where they might have been corrected; *Dixon v. City of Detroit*, 86 Mich. 516; s. c. 49 N. W. 628; *Elyton Land Co. v. Ayres*, 62 Ala. 413; *Mayor &c. v. Baldwin*, 57 Ala. 61; *Rhea v. Umatilla Co.*, 2 Or. 300; *Mayor &c. v. Meserole*, 26 Wend. (N. Y.) 132; *Hovey v. Mayo*, 43 Maine 322; *Mooers v. Smedley*, 6 Johns. Ch. (N. Y.) 28; *Gage v. Evans*, 90 Ill. 569; *Heywood v. City of Buffalo*, 14 N. Y. 534; *Hoke v. Perdue*, 62 Cal. 545; *Susquehanna Bank v. Board &c.*, 25 N. Y. 312; *Douglas v. Town of Harrisville*, 9 W. Va. 162; *Board &c. v. Jenks*, 65 Ill. 275; *Lennon v. Mayor &c.*, 55 N. Y. 361; *Tucker v. Sellers*, 130 Ind. 514; s. c. 30 N. E. 531; *Old Colony &c. R. Co. v. City of Fall River*, 147 Mass. 455; s. c. 18 N. E. 425; *State v. District Court*, 47 Minn. 406; s. c. 50 N. W. 476; *Sunderland v. Martin*, 113 Ind. 411; s. c. 15 N. E. 689; *Hoffeld v. City of Buffalo*, 130 N. Y. 387; s. c. 29 N. E. 747; *People v. McCreery*, 34 Cal. 432; *Kennedy v. City of Troy*,

tion to restrain the collection of an assessment on account of irregularities in the proceedings will not issue where the parties seeking it have unreasonably delayed to ask relief, and where a reassessment can be ordered, especially where the assessment is void and a remedy exists at law.³⁸⁹ And it is a just and well settled rule that a property owner can not stand by in silence, with full knowledge of all the facts, and permit an expenditure of large sums of public money in the making of improvements which enhance the value of his property, and, after all the work has been completed, complain successfully of irregularities in order to defeat the collection of an assessment.³⁹⁰

77 N. Y. 493 (*Clark v. Village of Dunkirk*, 75 N. Y. 612, distinguished); *Tingue v. Village of Port Chester*, 101 N. Y. 294; s. c. 4 N. E. 625; *Williams v. Inhabitants &c.*, 21 Pick. (Mass.) 75; *Chinn v. Trustees*, 32 Ohio St. 236; *Loesnitz v. Seelinger*, 127 Ind. 422; s. c. 26 N. E. 887; *Chicago &c. R. Co. v. Siders*, 88 Ill. 320; *Sayre v. Tompkins*, 23 Mo. 443; *Ricketts v. Spraker*, 77 Ind. 371; *Barrow v. Davis*, 46 Mo. 394; *McCormack v. Patchin*, 53 Mo. 33; s. c. 14 Am. R. 440, and note; *McDonald v. Murphy*, 45 Miss. 705; *Cross v. Mayor &c.*, 18 N. J. Eq. 305. Cf. *Paulson v. City of Portland*, 16 Or. 450. Questions properly triable on appeal can not be tried on injunction: *Balfe v. Lammers*, 109 Ind. 347; s. c. 10 N. E. 92. Questions that go to the jurisdiction may be raised on injunction: *Wilson v. Poole*, 33 Ind. 443; *Goring v. McTaggart*, 92 Ind. 200; *City of Fort Wayne v. Shoaff*, 106 Ind. 66; s. c. 5 N. E. 403; *Curry v. Jones*, 4 Del. Ch. 559; *Keese v. City of Denver*, 10 Colo. 112; s. c. 15 Pac. 825; *Makemson v. Kauffman*, 35 Ohio St. 444; *Fremont v. Boling*, 11 Cal. 380; *Town of Covington v. Nelson*, 35 Ind. 532; *Cummins v. National Bank*, 101 U. S. 153; *Dinwiddie v. President &c.*, 37 Ind. 66. Fraudulent assessment may be enjoined: *Wright v. Southwestern &c. R. Co.*, 64 Ga. 782; *Merrill v. Humphrey*, 24 Mich. 170. See

also, *Hassen v. City of Rochester*, 65 N. Y. 516; *Hersey v. Board &c.*, 16 Wis. 198; *Matter of Livingston*, 121 N. Y. 94; s. c. 24 N. E. 209; *Mayor &c. v. Johnson*, 62 Md. 225; *Crabtree v. Gibson*, 78 Ga. 230; s. c. 3 S. E. 10; *Elliott Roads & Streets* (2d ed.), § 607. May be granted to prevent a cloud on title: *Town of Albuquerque v. Zeiger*, 5 N. M. 674; s. c. 27 Pac. 315. Cf. *Bork v. City of Buffalo*, 2 N. Y. S. 559. On injunction to restrain collection of an assessment for want of notice the abutting owner who has permitted the improvement to be made without objection must do equity by paying the amount to which his property was benefited: *Barker v. City of Omaha*, 16 Neb. 269; s. c. 20 N. W. 382. See also, *Appeal of Pittsburgh*, 118 Pa. St. 458; s. c. 12 Atl. 366; *City of Elkhart v. Wickwire*, 121 Ind. 331; s. c. 22 N. E. 342.

³⁸⁹ *Byram v. City of Detroit*, 50 Mich. 56; s. c. 12 N. W. 912; 14 N. W. 698, where the petitioners had not offered to pay any part of the tax but sought to avoid the whole of it. They were presumptively benefited and ought to pay their equitable proportion. See also, *Albany &c. Mining Co. v. Auditor-General*, 37 Mich. 393.

³⁹⁰ *Lundbom v. City of Manistee*, 93 Mich. 770; s. c. 53 N. W. 161; *Ritchie v. City of South Topeka*, 38 Kan. 368; s. c. 16 Pac. 332.

§ 1264. **Evidence in matters of special assessment.**—(a) *In application for judgment*: Where application is made for judgment against delinquents in special assessment proceedings it is not necessary for the people to put in evidence the ordinance or to prove that it was published as required by statute.³⁹¹ In such case the judgment of confirmation can not be attacked except for want of jurisdiction.³⁹² A confirmation judgment may be attacked on application for judgment on the ground that the ordinance provided, without authority, for payment in installments.³⁹³ It is only on matters relating to jurisdiction that the judgment for confirmation may be attacked,³⁹⁴ or fraud.³⁹⁵ On application for judgment, irregularities in the assessment can not be raised.³⁹⁶ On application for judgment on a special assessment evidence as to a reduction by agreement of an assessment against another property owner is not admissible.³⁹⁷ Evidence that property not assessed was benefited is not admissible.³⁹⁸ (b) *Presumptions*: Assessments for public improvements are presumed to be regular, and there must be some substantial reason for holding them invalid.³⁹⁹ It will be presumed that an assessment was made on contiguous property where the ordinance directing the improvements placed the cost on contiguous property and the order of court confirming the assessment directed the assessment to be made as specified in the petition and ordinance.⁴⁰⁰ In the absence of evidence to the contrary, the cost of reconstructing a sidewalk will be presumed to have been apportioned according to law.⁴⁰¹ (c) *Burden of proof*: When a taxpayer seeks to avoid an assessment on the ground of fraud and collusion between the officers and contractors in the passage of the ordinance, the burden rests upon him to show that an unauthorized charge was placed upon his property.⁴⁰² In an action to set aside a special assessment the burden is on the plaintiff

³⁹¹ *Illinois &c. R. Co. v. People*, 161 Ill. 244; s. c. 43 N. E. 1107.

³⁹² *Keeler v. People*, 160 Ill. 179; s. c. 41 N. E. 615.

³⁹³ *Culver v. People*, 161 Ill. 89; s. c. 43 N. E. 812.

³⁹⁴ *Doremus v. People*, 161 Ill. 26; s. c. 43 N. E. 710.

³⁹⁵ *Fisher v. People*, 157 Ill. 85; s. c. 41 N. E. 615; *People v. Green*, 158 Ill. 594; s. c. 42 N. E. 163; *Kimball v. People*, 160 Ill. 653; s. c. 43 N. E. 710.

³⁹⁶ *Kirchman v. People*, 159 Ill. 265; s. c. 42 N. E. 884.

³⁹⁷ *Thompson v. People*, 184 Ill. 17; s. c. 56 N. E. 387.

³⁹⁸ *Hughes v. City of Momence*, 163 Ill. 535; s. c. 45 N. E. 300. On admissibility of evidence, see *Williams v. Beryin*, 129 Cal. 461; s. c. 62 Pac. 59.

³⁹⁹ *Retreat v. City of Buffalo*, 53 N. Y. S. 1113; s. c. 31 App. Div. (N. Y.) 635.

⁴⁰⁰ *Cramer v. City of Charleston*, 176 Ill. 507; s. c. 52 N. E. 73.

⁴⁰¹ *Anderson v. Bitzer*, 20 Ky. L. 1450; s. c. 49 S. W. 442.

⁴⁰² *Seaboard Nat'l Bank v. Woesten*, 147 Mo. 467; s. c. 48 S. W. 939.

to establish the invalidity.⁴⁰³ (d) *Certificate of clerk*: The failure of a recording officer to annex the proper certificate at the conclusion of a record is not evidence that a document was not recorded.⁴⁰⁴ Where the existence of an ordinance was put in issue on an application to confirm an assessment but no evidence was offered, but at a subsequent term a certificate of the clerk of the passage of the ordinance was offered and asked to be filed nunc pro tunc, held that the order allowing the filing of the certificate was void.⁴⁰⁵ The assessment roll is not prima facie evidence of regularity of proceedings prior to its being made.⁴⁰⁶

§ 1265. **General principles as to validity of assessments.**—(a) If a special assessment is in violation of the constitution it is utterly void, and this may be shown at any time in any proceeding. The property owner may test the constitutionality in a proceeding for its enforcement and need not bring certiorari for its review.⁴⁰⁷ (b) A special assessment for a street improvement must be based on a strict compliance with the requirements of the statute,⁴⁰⁸ and must conform to the letter of the law,⁴⁰⁹ at least in all material respects.⁴¹⁰ Laws for special assessments are to be strictly pursued in favor of the property owner.⁴¹¹ An act enabling a city to assess property for a sewer, after prior assessments were held invalid, is retroactive and void.⁴¹² Where the statute requires all bids for street improvements to be opened and declared publicly it must be done to render the assessment valid.⁴¹³ Where the general law does not direct the manner of making assessments of benefits the board of street commissioners are authorized to levy a special assessment for the whole instead of each item.⁴¹⁴ (c) Property owners can not be compelled to pay for a pub-

⁴⁰³ *Lasbury v. McCague*, 56 Neb. 220; s. c. 76 N. W. 862.

⁴⁰⁴ *Perine v. Lewis*, 128 Cal. 236; s. c. 60 Pac. 422, 772.

⁴⁰⁵ *Springer v. City of Chicago*, 159 Ill. 515; s. c. 42 N. E. 868; *Ogden v. Town of Lake View*, 121 Ill. 422; s. c. 13 N. E. 159.

⁴⁰⁶ *Town of Hamilton v. Chopard*, 9 Wash. 352; s. c. 37 Pac. 472. Under Illinois Laws of 1897, p. 119, § 49, it is provided what shall be prima facie evidence of the correctness of the amount assessed against each owner: *Porter v. City of Chicago*, 176 Ill. 605; s. c. 52 N. E. 318.

⁴⁰⁷ *City Council &c. v. Birdsong*, 126 Ala. 632; s. c. 28 So. 522.

⁴⁰⁸ *Barker v. Southern Const. Co.*, 20 Ky. L. 796; s. c. 47 S. W. 608.

⁴⁰⁹ *Barber Asphalt Pav. Co. v. Watt*, 51 La. An. 1345; s. c. 26 So. 70.

⁴¹⁰ *Barber Asphalt Pav. Co. v. Watt*, 51 La. An. 1345; s. c. 26 So. 70. For validity of an assessment under Massachusetts Stat. 1895, ch. 186, see *Trustees of Phillips Academy v. Inhabitants &c.*, 175 Mass. 118; s. c. 55 N. E. 821.

⁴¹¹ *Barber Asphalt Pav. Co. v. Watt*, 51 La. An. 1345; s. c. 26 So. 70.

⁴¹² *Evans v. City of Denver*, 26 Colo. 193; s. c. 57 Pac. 696.

⁴¹³ *Edwards v. Berlin*, 123 Cal. 544; s. c. 56 Pac. 432.

⁴¹⁴ *Lincoln v. Board &c.*, 176 Mass.

lie improvement by way of special assessment unless an ordinance has been passed authorizing an improvement to be made,⁴¹⁵ but exact and literal compliance with the terms of an ordinance in order to fix the liability of a property holder is not required.⁴¹⁶ The deviation though slight must be such as to render the improvement less beneficial to the property assessed.⁴¹⁷ Non-compliance with the strict terms of an ordinance for improvement will not defeat an assessment if the property owners are not injured thereby.⁴¹⁸ But the grading of a street on a course different from that authorized and described will invalidate the assessment.⁴¹⁹ (d) A city council can not dispense with or disregard those things which are necessary to its jurisdiction to make the assessment.⁴²⁰ (e) Where plaintiff's agent is present during the progress of the work and the material and work are in substantial compliance with the contract, and the only change suggested by such agent was adopted, plaintiff will be estopped from claiming that the work is not in compliance with the specifications,⁴²¹ but estoppel does not apply to a contest by a property owner to test the validity of an assessment for local improvement based on abutting property.⁴²² (f) A subsequent purchaser of a lot affected by a special assessment may contest its validity.⁴²³ (g) The assessment can not exceed the amount of benefits derived from the improvement.⁴²⁴ An assessment beyond the benefits is taking property for public use without compensation.⁴²⁵ An assessment officially declared by commissioners not to be in excess of benefits will not be set aside as erroneous unless clearly shown to be erroneous and excessive.⁴²⁶ (h) An assessment must be for public improvements only, as distinguished from those which are personal and private.⁴²⁷ Lands assessed for local sewerage can not be assessed for general sewerage

210; s. c. 57 N. E. 356. Cf. *Norwood v. Baker*, 172 U. S. 269; s. c. 19 S. Ct. 187; *Sears v. Board &c.*, 173 Mass. 71; s. c. 53 N. E. 138; *Alden v. City of Springfield*, 121 Mass. 27.
⁴¹⁵ *Church v. People*, 174 Ill. 366; s. c. 51 N. E. 747.

⁴¹⁶ *Church v. People*, supra; *Rossiter v. City of Lake Forest*, 157 Ill. 489; s. c. 38 N. E. 359.

⁴¹⁷ *Rossiter v. City of Lake Forest*, supra.

⁴¹⁸ *City of Marionville v. Henson*, 65 Mo. App. 397.

⁴¹⁹ *Tredwell v. City of Brooklyn*, 43 N. Y. S. 458; s. c. 11 App. Div. (N. Y.) 224.

⁴²⁰ *California Imp. Co. v. Moran*, 128 Cal. 373; s. c. 60 Pac. 969.

⁴²¹ *Arnold v. City of Fort Dodge*, 111 Iowa 152; s. c. 82 N. W. 495.

⁴²² *Cowley v. City of Spokane*, 99 Fed. 840.

⁴²³ *Lasbury v. McCague*, 56 Neb. 220; s. c. 76 N. W. 862.

⁴²⁴ *Walsh v. Barron*, 61 Ohio St. 15; s. c. 55 N. E. 164.

⁴²⁵ *Cain v. City of Omaha*, 42 Neb. 120; s. c. 60 N. W. 368.

⁴²⁶ *Moran v. Mayor &c.*, 58 N. J. L. 653.

⁴²⁷ *Spaulding v. Wesson*, 115 Cal. 441; s. c. 47 Pac. 249.

throughout the city.⁴²⁸ (i) Where there is a constitutional provision requiring uniformity of taxation the great weight of authority by construction limits such provision to general taxation and excludes local assessments.⁴²⁹ One lot owner can not be made to bear the burden of another's default or exemption.⁴³⁰ (j) A special assessment may be based on an estimate of the cost, and must be where the statute makes it a prerequisite.⁴³¹ (k) An irregularity after a confirmation of a special assessment may be made the basis of an objection on application for judgment for sale.⁴³² (l) Assessments for repairing and maintaining sewers may take into consideration the value of the potential use of a sewer, although the owner has no building requiring the use of a sewer.⁴³³ (m) The conditions existing at the time an improvement is made and not at the time the ordinance authorizing it is passed determines the liability.⁴³⁴ (n) In order that an assessment may be valid it is not necessary that the city shall have acquired by a condemnation judgment an easement in all the property to be taken in order to make the improvements.⁴³⁵ (o) An assessment is not necessarily invalid by reason of an amount arbitrarily added where the added amount can be separated from the rest.⁴³⁶ (p) A material change of the contract after the opening of bids requires a new advertisement and bids, where the contract must be let to the lowest bidder.⁴³⁷ (q) The acceptance of work unauthorized by an ordinance does not authorize a levy of a special assessment to pay for same.⁴³⁸ The acceptance of the work by the council and city officials together with the apportionment of the warrants do not conclusively establish the liability of the property assessed.⁴³⁹ (r) Where a city council is vested with power to levy an assessment and does so, the exercise of such power is *prima facie* evidence that the

⁴²⁸ *Sears v. Board &c.*, 173 Mass. 71; s. c. 53 N. E. 876.

⁴²⁹ *Rolph v. City of Fargo*, 7 N. D. 640; s. c. 76 N. W. 242; 42 L. R. A. 646. Cf. *Hansen v. Hammer*, 15 Wash. 315; s. c. 46 Pac. 332; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495.

⁴³⁰ *Thornton v. City of Clinton*, 148 Mo. 648; s. c. 50 S. W. 295.

⁴³¹ *English v. Mayor &c.*, 2 Marv. (Del.) 63; s. c. 37 Atl. 158.

⁴³² *Church v. People*, 174 Ill. 366; s. c. 51 N. E. 747.

⁴³³ *Appeal of Hunter*, 71 Conn. 189; s. c. 41 Atl. 557.

⁴³⁴ *City of Philadelphia v. Gorgas*, 180 Pa. St. 296; s. c. 36 Atl. 868.

⁴³⁵ *Allen v. City of Chicago*, 176 Ill. 113; s. c. 52 N. E. 33; *Goodwillie v. City of Lake View*, 137 Ill. 51; s. c. 27 N. E. 15.

⁴³⁶ *Brennan v. City of Buffalo*, 162 N. Y. 491; s. c. 57 N. E. 81.

⁴³⁷ *Pells v. City of Paxton*, 176 Ill. 318; s. c. 52 N. E. 64.

⁴³⁸ *Pells v. City of Paxton*, 176 Ill. 318; s. c. 52 N. E. 64.

⁴³⁹ *City of Louisville v. Gosnell*, 104 Ky. 201; s. c. 20 Ky. L. 539; 47 S. W. 211.

facts existed warranting the levy.⁴⁴⁰ The legality of an assessment is to be presumed until it appears by record that a mistake of fact has been made, or fraud has been perpetrated, or an illegal principle or erroneous rule of law has been applied.⁴⁴¹ Thus where the board of public works found that the abutting property was specially benefited to the extent of the entire cost, that the benefits were confined to the abutting property, and that it was uniformly and equally benefited per front foot, the finding is conclusive.⁴⁴²

§ 1266. Special assessments held valid.—Where an ordinance provides that whenever a sidewalk is out of repair it may be repaired or replaced by a pavement of stone at the cost of the abutting owner as per the city charter, it is not oppressive merely because an owner's brick sidewalk can be repaired for \$7 and the stone pavement will cost \$300.⁴⁴³ The omission by commissioners to include property benefited by an improvement will not invalidate the assessment against property benefited and assessed.⁴⁴⁴ Under a statute providing that persons benefited may be assessed their just share of the cost of an improvement an assessment will not be vacated because an abutting property owner was omitted in the absence of proof that he would be benefited, or that the apportionment was inequitable.⁴⁴⁵ No recovery on a special assessment can be had where the improvement is not on the line designated in the ordinance in the absence of proof that the location was substantially correct and that the variance was not injurious to property owners.⁴⁴⁶ It is not a defense to a special assessment that theretofore such expense was paid out of the water-tax fund.⁴⁴⁷ An assessment is not void because the ordinance embraces an insignificant portion of the street not embraced in the resolution authorizing the improvement, the excess being easily ascertainable and separable.⁴⁴⁸ An ordinance is not void for failure to prescribe

⁴⁴⁰ *Nalle v. City of Austin*, 23 Tex. Civ. App. 595; s. c. 56 S. W. 954. Cf. *City of San Antonio v. Berry*, 92 Tex. 319; s. c. 48 S. W. 496.

⁴⁴¹ *State v. District Court &c.*, 80 Minn. 293; s. c. 83 N. W. 183.

⁴⁴² *State v. District Court &c.*, 80 Minn. 293; s. c. 83 N. W. 183. Under *Minnesota Stat. 1891, ch. 35, § 22*, a double assessment can not be placed on that part of a parcel of land remaining after part has been taken for public use: *State v. District Court*, 75 Minn. 292; s. c. 77 N. W. 968.

⁴⁴³ *Skinker v. Heman*, 148 Mo. 349; s. c. 49 S. W. 1026.

⁴⁴⁴ *Lincoln v. Board &c.*, 176 Mass. 210; s. c. 57 N. E. 356.

⁴⁴⁵ *Sowles v. Village of St. Albans*, 71 Vt. 418; s. c. 45 Atl. 1050.

⁴⁴⁶ *Church v. People*, 179 Ill. 205; s. c. 53 N. E. 554.

⁴⁴⁷ *McChesney v. City of Chicago*, 152 Ill. 543; s. c. 38 N. E. 767.

⁴⁴⁸ *Kansas Town Co. v. City of Argentine*, 59 Kan. 779; s. c. 54 Pac. 1131.

the precise mode of making an assessment.⁴⁴⁹ An addition of other property to a sewer district under certain conditions does not invalidate the assessment.⁴⁵⁰ It is not an objection to an assessment that some of the property owners paid less under a defective assessment than their proportionate share as fixed by an amended ordinance.⁴⁵¹ Where the bond accompanying a contractor's proposal is not as large as required it does not invalidate an assessment, the giving of bond being merely preliminary to entering into a contract upon the award being made.⁴⁵² An assessment is not invalid by reason of its including benefits accruing after the title vests in the city.⁴⁵³ The fact that a board of local improvement has power to make local improvements to be paid for by special assessment, with or without a petition, renders valid an assessment for an improvement differing from that for which a petition was filed.⁴⁵⁴ It is not necessary to the validity of an assessment that the city shall own all the street at the time the improvement is ordered.⁴⁵⁵ An ordinance for an assessment providing that the board of trustees reserves the right to reject any proposal at its discretion does not render it void.⁴⁵⁶ In a special assessment proceeding the fact that certain orders were made changing the improvement but which orders were void, and not followed, will not prevent the confirmation of the assessment.⁴⁵⁷ Where the installments in an assessment are proportioned as the law requires when made, the dismissal of the assessment proceedings as to part of the property subsequently, will not invalidate the assessment.⁴⁵⁸ A special assessment to pay for laying water mains and appurtenances thereto is valid as an assessment for local improvement.⁴⁵⁹ A joint assessment against separate parcels is illegal.⁴⁶⁰ The fact that the owner of the property is incorrectly described does not invalidate the assessment.⁴⁶¹ A statute conferring power to make special assessments for local improvements upon a city council is not illegal for

⁴⁴⁹ *Greenwood v. Morrison*, 128 Cal. 350; s. c. 60 Pac. 971.

⁴⁵⁰ *Heman v. Allen*, 156 Mo. 534; s. c. 57 S. W. 559.

⁴⁵¹ *Bacon v. Mayor &c.*, 105 Ga. 62; s. c. 31 S. E. 127.

⁴⁵² *Greenwood v. Morrison*, 128 Cal. 350; s. c. 60 Pac. 971.

⁴⁵³ *In re Opening of Whitlock Ave.*, 64 N. Y. S. 717; s. c. 51 App. Div. (N. Y.) 436.

⁴⁵⁴ *Rawson v. City of Chicago*, 185 Ill. 87; s. c. 57 N. E. 35.

⁴⁵⁵ *Lewis v. Albertson*, 152 Ind. 693; s. c. 53 N. E. 1071.

⁴⁵⁶ *Gross v. Village of Grossdale*,

176 Ill. 572; s. c. 52 N. E. 370; *Walker v. People*, 170 Ill. 410; s. c. 48 N. E. 1010.

⁴⁵⁷ *Galt v. City of Chicago*, 174 Ill. 605; s. c. 51 N. E. 653.

⁴⁵⁸ *Gross v. Village of Grossdale*, 176 Ill. 572; s. c. 52 N. E. 370.

⁴⁵⁹ *City of Philadelphia v. Union Burial G. Soc.*, 178 Pa. St. 533; s. c. 36 Atl. 172; *Hughes v. City of Muncie*, 164 Ill. 16; s. c. 45 N. E. 302.

⁴⁶⁰ *Becker v. Baltimore &c. R. Co.*, 17 Ind. App. 324; s. c. 46 N. E. 685.

⁴⁶¹ *Felker v. City of New Whatcom*, 16 Wash. 178; s. c. 47 Pac. 505.

failure to provide for a tribunal to determine the validity of the proceedings of the council. It is not taking property without due process of law.⁴⁶² Under a law requiring all contracts to be let to the lowest bidder and improvements paid for from the funds raised therefor, including in the assessment the cost of the engineer's services in overseeing the work, even though he is a salaried officer, does not invalidate the assessment.⁴⁶³ Where the charter provides that the sale shall be advertised thirty days, an advertisement of one insertion each week immediately preceding the day of sale, the first being at least thirty days preceding, is sufficient.⁴⁶⁴ Where a charter requires the issuance of a tax bill within twenty days from the acceptance of the work, and a tax bill is issued within the time, but is subsequently declared void after protracted litigation, a subsequent bill in lieu of the first is valid.⁴⁶⁵

§ 1267. **Special assessments held invalid.**—An assessment which is in part on personal property to pay for a sewer is void.⁴⁶⁶ Where an established grade is altered in an improvement of the street the contractor's certificate is absolutely void unless it show affirmatively that it was made in conformity with the authority conferred upon the board of public works by the provisions of the charter.⁴⁶⁷ Such proceedings are in invitum and all conditions must be strictly complied with.⁴⁶⁸ The city must have complied with every condition precedent required by the charter, or ordinance, in order to establish a valid levy;⁴⁶⁹ so where a charter grants power to levy a special tax and prescribes a mode of exercise, it must be strictly followed in all substantial particulars.⁴⁷⁰ In an action to enforce a lien for street improvements, while the statute does not allow the defense that the work was not done according to contract, it may be shown that the improvement was made at a point in the street not provided for in the ordinance.⁴⁷¹ An ordinance passed after an improvement is made is invalid and no legal assessment can be based thereon.⁴⁷² All assess-

⁴⁶² *Hutcheson v. Storrie* (Tex. Civ. App.), 48 S. W. 785.

⁴⁶³ *People v. Common Council &c.*, 56 N. Y. S. 606.

⁴⁶⁴ *Montford v. Allen*, 111 Ga. 18; s. c. 36 S. E. 305.

⁴⁶⁵ *Dollar Sav. Bank v. Ridge*, 79 Mo. App. 26.

⁴⁶⁶ *Chicago &c. R. Co. v. Phillips*, 111 Iowa 377; s. c. 82 N. W. 787.

⁴⁶⁷ *Saunderson v. Herman*, 95 Wis. 48; s. c. 69 N. W. 977; *Liebermann*

v. City of Milwaukee, 89 Wis. 336; s. c. 61 N. W. 1112.

⁴⁶⁸ *Gumotte v. Egelhoff*, 2 Mo. App. 963.

⁴⁶⁹ *Ardrey v. City of Dallas*, 13 Tex. Civ. App. 442; s. c. 35 S. W. 726.

⁴⁷⁰ *City of Westport &c. v. Mastin*, 62 Mo. App. 647.

⁴⁷¹ *Pelter v. Allen*, 21 Ky. L. 1122; s. c. 54 S. W. 174.

⁴⁷² *Connecticut &c. Ins. Co. v. City of Chicago*, 185 Ill. 148; s. c. 56 N. E. 1071.

ments must be reasonable and where an assessment amounts to a virtual confiscation it is void.⁴⁷³ Where an essential step to proceeding to levy a special tax is the fixing the amount of the tax, either by the ordinance or by data given by it, and it is so fixed or ascertained, it is conclusive on the property owners and likewise upon the city, and if commissioners levy a tax in excess of this estimate the levy is void.⁴⁷⁴ Where there appears to be great irregularity in an assessment as between different tracts the assessment will be set aside,⁴⁷⁵ and where an assessment is so gross as to amount to spoliation it will not be enforced.⁴⁷⁶ Gross inequality is not permitted.⁴⁷⁷ Where it appears that petitioner's property was assessed nearly nine times greater than owners of adjoining property similarly situated and more valuable, and no good reason appears for such discrimination, the assessment will not be sustained.⁴⁷⁸ An assessment for sewer purposes which is based on the prospect of future connections with a sewer can not be held valid unless a drainage district is created which will drain into it, or some provisions is made which will eventually effect such connection. Property can not be assessed for an improvement where it can not be benefited except in case of subsequent work for which no provision is made.⁴⁷⁹ It is a valid objection to an application for judgment of sale on an instalment that enough had been collected by prior instalments to pay all costs and expenses of the improvement.⁴⁸⁰ In such case it does not matter that the statute provides for refunding the excesses.⁴⁸¹ An assessment payable in instalments in the absence of a statute authorizing it is void.⁴⁸² The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.⁴⁸³ There can be no justification for any proceeding which charges land

⁴⁷³ *City of Atlanta v. Hamlein*, 96 Ga. 381; s. c. 23 S. E. 408. *of Chicago*, 162 Ill. 505; s. c. 44 N. E. 832.

⁴⁷⁴ *Payne v. Village of South Springfield*, 161 Ill. 285; s. c. 44 N. E. 1053.

⁴⁷⁵ *Monroe Co. v. City of Rochester*, 34 N. Y. S. 533; s. c. 88 Hun (N. Y.) 164.

⁴⁷⁶ *James v. City of Louisville*, 19 Ky. L. 447; s. c. 40 S. W. 912.

⁴⁷⁷ *City of Louisville v. Selva*, 21 Ky. L. 349; s. c. 51 S. W. 447.

⁴⁷⁸ *In re Munn*, 63 N. Y. S. 22; s. c. 49 App. Div. (N. Y.) 232.

⁴⁷⁹ *Title Guarantee & Co. v. City*

⁴⁸⁰ *People v. McWethy*, 165 Ill. 222; s. c. 46 N. E. 187.

⁴⁸¹ *People v. McWethy*, 165 Ill. 222; s. c. 46 N. E. 187.

⁴⁸² *German American Sav. Bank v. City of Spokane*, 17 Wash. 315; s. c. 47 Pac. 1103; 49 Pac. 542; *White v. Town of West Chicago*, 164 Ill. 196; s. c. 45 N. E. 495. Cf. *City of Charleston v. Cadle*, 166 Ill. 487; s. c. 46 N. E. 1120.

⁴⁸³ *Norwood v. Baker*, 172 U. S. 269; s. c. 19 S. Ct. 187.

with an assessment greater than the benefits; it is a plain case of appropriating private property to public uses without compensation.⁴⁸⁴ Whenever a local assessment upon an individual is not grounded upon and measured by the extent of his particular benefit, it is, pro tanto, a taking of his private property for public use without any provision for compensation.⁴⁸⁵ An act for assessment on frontage is void where benefits are not taken into consideration, and no hearing is provided,⁴⁸⁶ and where the assessment is clearly shown to exceed the benefits it will be set aside.⁴⁸⁷ It is taking property without adequate compensation and therefore unconstitutional.⁴⁸⁸ Under an ordinance requiring the work to be completed in a specified time after the execution of the contract, where it is not done the tax bill is void, notwithstanding the work may have been accepted afterward.⁴⁸⁹ An assessment of property abutting on a street for paving a street with brick, which is already paved with cedar blocks, in a good state of repair, is void where it does not appear that a brick pavement is required in the locality, and another piece of block pavement within the limits of the proposed improvement is omitted without apparent reason.⁴⁹⁰ After an assessment is made the passage of an ordinance reducing the width of the pavement renders the assessment void.⁴⁹¹ And in such case the consent of the property owner to a change in the width does not estop the property owner from insisting on the invalidity.⁴⁹² The construction of a sewer on a route different from that designated in the ordinance is unauthorized.⁴⁹³ The omission of property liable for an assessment pursuant to an illegal agreement between the city officers and the property owners renders the assessment void.⁴⁹⁴ The acceptance of work in violation of the contract by an unauthorized

⁴⁸⁴ *Cooley Taxation* (2d ed.), ch. 20; *Town of Macon v. Patty*, 57 Miss. 378, 386; *In re Canal St.*, 11 Wend. (N. Y.) 154; *McCormack v. Patchin*, 53 Mo. 33; *Zoeller v. Kellogg*, 4 Mo. App. 163; *State v. Mayor &c.*, 36 N. J. L. 291; *State v. Mayor &c.*, 37 N. J. L. 415; *Bogert v. City of Elizabeth*, 27 N. J. Eq. 568.

⁴⁸⁵ *Hammett v. Philadelphia*, 65 Pa. St. 146; *Barnes v. Dyer*, 56 Vt. 469, 471; *Thomas v. Gain*, 35 Mich. 155; *Tidewater Co. v. Coster*, 18 N. J. Eq. 518.

⁴⁸⁶ *Fay v. City of Springfield*, 94 Fed. 409.

⁴⁸⁷ *State v. Mayor &c.*, 63 N. J. L. 202; s. c. 42 Atl. 773.

⁴⁸⁸ *Hutcheson v. Storrie*, 92 Tex. 685; s. c. 51 S. W. 848.

⁴⁸⁹ *New England &c. Co. v. James*, 77 Mo. App. 616.

⁴⁹⁰ *McFarlane v. City of Chicago*, 185 Ill. 242; s. c. 57 N. E. 12.

⁴⁹¹ *Pells v. People*, 159 Ill. 580; s. c. 42 N. E. 784.

⁴⁹² *Pells v. People*, 159 Ill. 580; s. c. 42 N. E. 784.

⁴⁹³ *Scranton City v. Kingsbury*, 4 Pa. Dist. Rep. 555.

⁴⁹⁴ *McKechnie Brew. Co. v. Trustees &c.*, 44 N. Y. S. 317; s. c. 15 App. Div. (N. Y.) 139.

body does not render the assessment enforceable.⁴⁹⁵ Where a city paid money to a contractor for paving under a contract creating an indebtedness in excess of the constitutional limit, a special assessment to reimburse the city for the money so paid is invalid.⁴⁹⁶ Street sprinkling is not a local improvement, for which a special assessment is authorized.⁴⁹⁷ A contract for an improvement made nearly a month before the ordinance was passed renders void an assessment for such improvement.⁴⁹⁸ Abutting property owners are not chargeable with keeping streets in repair, and therefore an assessment will not be enforced for the ten per cent. retained by the city as security for the contractor's undertaking to keep the street in repair for five years.⁴⁹⁹ Where the constitution authorizes assessments against abutting owners for improvements but excepts the repairs, the city must pay for the latter, and can not levy the same by special assessment.⁵⁰⁰ Where a contractor is required to keep a pavement in repair for five years the assessment is not absolutely void, where the amount for repairs is separable from the amount authorized.⁵⁰¹ A sale of a forty-seven-foot lot where the fl. fa. directed a levy on only twenty feet is illegal,⁵⁰² and so is a sale of land for delinquent taxes on a day other than that fixed by law.⁵⁰³ The council can not make valid an assessment of a former council which was void for non-compliance with the preliminary proceedings.⁵⁰⁴

§ 1268. **Curative acts.**—Irregularities in an assessment may be cured where there is no want of jurisdiction to impose the tax and no constitutional rights are invaded.⁵⁰⁵ An erroneous or invalid assessment is subject to amendment and correction.⁵⁰⁶ The city may waive an irregularity in a contract where it had power originally to

⁴⁹⁵ *Haisch v. City of Seattle*, 10 Wash. 435; s. c. 38 Pac. 1131.

⁴⁹⁶ *Allen v. City of Davenport*, 107 Iowa 90; s. c. 77 N. W. 532.

⁴⁹⁷ *Pettit v. Duke*, 10 Utah 311; s. c. 37 Pac. 568. *Contra*, *State v. Reis*, 38 Minn. 371; s. c. 38 N. W. 97; and see *Tift v. City of Buffalo*, 7 N. Y. S. 633; s. c. 27 N. Y. St. 72.

⁴⁹⁸ *Thaler v. West Chicago Park Com'rs*, 174 Ill. 211; s. c. 52 N. E. 116.

⁴⁹⁹ *Bullitt v. Selva*, 20 Ky. L. 599; s. c. 47 S. W. 255.

⁵⁰⁰ *Robertson v. City of Omaha*, 55 Neb. 718; s. c. 76 N. W. 442.

⁵⁰¹ *Fehler v. Gosnell*, 18 Ky. L. 238; s. c. 35 S. W. 1125.

⁵⁰² *Brumby v. Harris*, 107 Ga. 257; s. c. 33 S. E. 49.

⁵⁰³ *Whittaker v. City of Deadwood*, 12 S. D. 608; s. c. 82 N. W. 202.

⁵⁰⁴ *California Imp. Co. v. Moran*, 128 Cal. 373; s. c. 60 Pac. 969.

⁵⁰⁵ *Smith v. City of Buffalo*, 159 N. Y. 427; s. c. 54 N. E. 62; *City of Chester v. Pennell*, 169 Pa. St. 300; s. c. 38 Atl. 408.

⁵⁰⁶ *Becker v. Baltimore & C. R. Co.*, 17 Ind. App. 324; s. c. 46 N. E. 685.

make it.⁵⁰⁷ A curative statute is as effective in an action to recover assessments paid as in an action to recover assessments.⁵⁰⁸

§ 1269. **Benefits—What are—How determined.**—(a) *What are benefits:* The fundamental idea in regard to benefits in matters of special assessments is that they relate to property in the vicinity, and usually abutting the improvement, the latter being local in its nature and character. A benefit common to all lands in the city is not a special benefit.⁵⁰⁹ The improvement in the sanitary condition of the neighborhood may be considered in estimating benefits.⁵¹⁰ (b) *Method of ascertaining:* The method of ascertaining benefits is immaterial so long as no property is assessed more than it is benefited or more than its just proportion of the cost,⁵¹¹ but the rules must not be arbitrary and illegal,⁵¹² and the assessment must be based on equality and equity.⁵¹³ The question of benefits to property from a local improvement is not determined by the particular use the owner may make of it.⁵¹⁴ And so it is not a defense that a particular piece of property is damaged rather than benefited by an improvement,⁵¹⁵ nor is it a defense that other property in the neighborhood is benefited but not assessed,⁵¹⁶ nor is the assessment defeated by the conveyance of a strip two feet wide along one side of a block and abutting on the improvement which is made after the contract is let for making the improvement where it appears that the sole purpose is to defeat the assessment on the remainder of the block and the grantee knew of the purpose and was paid to accept the deed.⁵¹⁷ (c) *Assessment not to exceed benefit:* The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is to the extent of such excess, a taking under the guise of taxation, of private property for public use without compensation, but the excess must be of a material character, because exact equality in taxation is not always

⁵⁰⁷ *In re Amberson Ave.*, 179 Pa. St. 634; s. c. 36 Atl. 354.

⁵⁰⁸ *Nottage v. City of Portland*, 35 Or. 539; s. c. 58 Pac. 883.

⁵⁰⁹ *Lincoln v. Board &c.*, 176 Mass. 210; s. c. 57 N. E. 356.

⁵¹⁰ *Beals v. Inhabitants &c.*, 174 Mass. 1; s. c. 54 N. E. 339.

⁵¹¹ *Pike v. City of Chicago*, 155 Ill. 656; s. c. 40 N. E. 567.

⁵¹² *State v. Brill*, 58 Minn. 152; s. c. 59 N. W. 989.

⁵¹³ *Palmer v. City of Danville*, 154 Ill. 156; s. c. 38 N. E. 1067.

⁵¹⁴ *Minnesota Trans. R. Co. v. Dis-*

trict Court &c., 68 Minn. 242; s. c. 71 N. W. 27; *Chicago &c. R. Co. v. Phillips*, 111 Iowa 377; s. c. 82 N. W. 787.

⁵¹⁵ *McQuiddy v. Smith*, 67 Mo. App. 205; *McKechnie Brewing Co. v. Trustees &c.*, 44 N. Y. S. 317; s. c. 15 App. Div. (N. Y.) 139.

⁵¹⁶ *Blair v. City of Charleston*, 43 W. Va. 62; s. c. 26 S. E. 341; 35 L. R. A. 852.

⁵¹⁷ *Eagle Mfg. Co. v. City of Davenport*, 101 Iowa 493; s. c. 70 N. W. 707.

attainable.⁵¹⁸ Special assessments must be founded on special and peculiar benefits and not extend beyond those benefits.⁵¹⁹ It has been held that assessments on frontage may be valid although the assessment exceeds the benefit.⁵²⁰ It is not an objection by an abutting owner that some of the improvements on his street were beneficial to property on other streets in the city.⁵²¹ The burden of proof to show a benefit is on the city.⁵²² (d) *Review of benefits by courts:* The decision of a city council that property was benefited by an improvement is conclusive in the absence of an abuse of the discretion.⁵²³ The question of benefits must be addressed to the city council and its decision is not generally open to review by courts, but is final. It is clear, however, both upon principle and authority, that for unreasonableness, arbitrary abuse of power, or a violation of the fundamental principles upon which the power of taxation rests, the validity of the ordinance, as well as the proceedings under it, may be attacked in and passed upon by the courts.⁵²⁴ The Nebraska constitution and Omaha charter, by implication, limit assessments for local improvements to the special benefits which accrue severally to the lots affected.⁵²⁵

§ 1270. Abutting owner and property—Liability.—The city council in making an assessment for a local improvement is not confined to abutting property, but may include property not fronting on the street improved.⁵²⁶ But it would seem that an assessment for a sewer on property in another street to which there is no access for more than half the distance, except through private property, and therefore no connection with the sewer, is not valid.⁵²⁷ Where a tract has been platted into lots the boundary lines as platted must control, and it makes no difference that the abutting lot is contigu-

⁵¹⁸ *Norwood v. Baker*, 172 U. S. 269, 279; s. c. 19 S. Ct. 187.

⁵¹⁹ *Sears v. Street Com'rs*, 173 Mass. 876; s. c. 53 N. E. 876; *Newman v. City of Chicago*, 153 Ill. 469; s. c. 38 N. E. 1053; *City of Sterling v. Galt*, 117 Ill. 11; s. c. 7 N. E. 471.

⁵²⁰ *Allen v. City of Davenport*, 107 Iowa 90; s. c. 77 N. W. 532.

⁵²¹ *Bacon v. Mayor &c.*, 105 Ga. 62; s. c. 31 S. E. 127.

⁵²² *Mayor &c. v. Smith*, 80 Md. 458; s. c. 31 Atl. 423.

⁵²³ *Chicago &c. R. Co. v. Village of Elmhurst*, 165 Ill. 148; s. c. 46 N. E. 437; *Davis v. City of Litchfield*, 155 Ill. 384; s. c. 40 N. E. 354; *Chicago*

&c. R. Co. v. City of Joliet, 153 Ill. 649; s. c. 39 N. E. 1077.

⁵²⁴ *Palmer v. City of Danville*, 154 Ill. 156; s. c. 38 N. E. 1067; *Craw v. Village of Tolono*, 96 Ill. 255; *City of Bloomington v. Chicago &c. R. Co.*, 134 Ill. 451; s. c. 26 N. E. 366; *Louisville &c. R. Co. v. City of East St. Louis*, 134 Ill. 656; s. c. 26 N. E. 366; *Davis v. City of Litchfield*, 145 Ill. 313; s. c. 33 N. E. 888.

⁵²⁵ *Smith v. City of Omaha*, 49 Neb. 883; s. c. 69 N. W. 402.

⁵²⁶ *Goodrich v. City of Detroit*, 123 Mich. 559; s. c. 82 N. W. 255.

⁵²⁷ *People v. Common Council &c.*, 65 N. Y. S. 590; s. c. 53 App. Div. (N. Y.) 58.

ous to another lot, both of which are used as one lot.⁵²⁸ An assessment for benefits to real estate upon abutting and adjacent property is not void because the public and other lands in the city are not required to share in the expense.⁵²⁹ An abutting property owner can not be required to pay an assessment for a local improvement which a railroad corporation is bound to make.⁵³⁰ Though an abutting owner may not be liable for an assessment for grading, the city may, in a paving assessment, assess the cost of excavating such as will reasonably prepare the surface for paving.⁵³¹ There can not be a paving assessment under the Iowa statute on abutters, when the only work done in grading is grading preparatory merely to paving.⁵³² Under a statute conferring the right to prevent a proposed improvement upon the owners of the majority of the frontage thereon, if their land is liable to be assessed therefor, the owner of land assessed, but not fronting the proposed street, or legally exempt from assessment, can not competently object.⁵³³ The exercise of the power conferred upon a town by the Indiana statute to narrow streets does not unconstitutionally deprive an abutter of his property without his consent and without compensation, the use being a public use, although, incidentally, it results in that part of the street cut off going into private hands.⁵³⁴ If the grade and width of a street have been officially established it may be ordered planked, although it has not been graded.⁵³⁵ One sustaining special damage, in Illinois, from a public improvement, for instance, a viaduct, is entitled to compensation based on the depreciation of the market value of his property.⁵³⁶ A city is liable for damages caused by raising the grade of the streets to an owner of houses erected before the grade was established.⁵³⁷ A statute providing for compensation where the grade of a street is changed should be construed to embrace a sidewalk as well as a street.⁵³⁸

§ 1271. **Legislative power with reference to assessments.**—The legislature may create, or authorize a municipality to create, a local

⁵²⁸ *Smith v. City of Des Moines*, 106 Iowa 590; s. c. 76 N. W. 836.

⁵²⁹ *Lincoln v. Board &c.*, 176 Mass. 210; s. c. 57 N. E. 356.

⁵³⁰ *McFarlane v. City of Chicago*, 185 Ill. 242; s. c. 57 N. E. 12.

⁵³¹ *Allen v. City of Davenport*, 107 Iowa 90; s. c. 77 N. W. 532.

⁵³² *Bucroft v. City of Council Bluffs*, 63 Iowa 646; s. c. 19 N. W. 807.

⁵³³ *State v. Inhabitants &c.*, 49 N. J. L. 401; s. c. 8 Atl. 107.

⁵³⁴ *Town of Rensselaer v. Leopold*, 106 Ind. 29; s. c. 5 N. E. 761.

⁵³⁵ *Knowles v. Seale*, 64 Cal. 377; s. c. 1 Pac. 159.

⁵³⁶ *Lehigh Valley Coal Co. v. City of Chicago*, 26 Fed. 415.

⁵³⁷ *Harmon v. City of Omaha*, 17 Neb. 548; s. c. 23 N. W. 503; 23 Am. R. 420.

⁵³⁸ *City of Kokomo v. Mahan*, 100 Ind. 242. Void assessment as to abutting owner,—see *Adams v. Green*, 74 Mo. App. 125.

taxing district, including a portion of the municipality.⁵³⁹ Where the legislature empowers a corporation to make a local improvement it has power to authorize the corporation to charge the cost against the owner benefited, or make it a lien on his property;⁵⁴⁰ it has the power, without notice to the owners, to fix a frontage or area assessment for an improvement.⁵⁴¹ The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street to be assessed upon the owners of lands benefited thereby.⁵⁴² The class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited.⁵⁴³ The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by the commissioners.⁵⁴⁴ According to the weight of authority the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the improvements.⁵⁴⁵ The power to determine when a special assessment shall be made, and on what basis it shall be apportioned, is wisely confided to the legislature and could not, without the introduction of some new principle in repre-

⁵³⁹ *Adams v. City of Shelbyville*, 154 Ind. 467; s. c. 57 N. E. 114.

⁵⁴⁰ *Storrie v. Cortes*, 90 Tex. 283; s. c. 38 S. W. 154; 35 L. R. A. 666; *Bauman v. Ross*, 167 U. S. 548; s. c. 17 S. Ct. 966.

⁵⁴¹ *English v. Mayor &c.*, 2 Marv. (Del.) 63; s. c. 37 Atl. 158.

⁵⁴² *Rolph v. City of Fargo*, 7 N. D. 640; s. c. 76 N. W. 242; 42 L. R. A. 646. Cf. *Davidson v. New Orleans*, 96 U. S. 97; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; s. c. 4 S. Ct. 663; *Spencer v. Merchant*, 125 U. S. 345; s. c. 8 S. Ct. 921; *Walston v. Nevin*, 128 U. S. 578; s. c. 9 S. Ct. 192; *Lent v. Tillson*, 140 U. S. 316; s. c. 11 S. Ct. 825; *Illinois &c. R. Co. v. Decatur*, 147 U. S. 190; s. c. 13 S. Ct. 293; *Paulsen v. Portland*, 149 U. S. 30; s. c. 13 S. Ct. 750.

⁵⁴³ *Spencer v. Merchant*, 125 U. S. 345; s. c. 8 S. Ct. 921; *Shoemaker v. United States*, 147 U. S. 282; s. c. 13 S. Ct. 361; *Fallbrook I. D. v. Bradley*, 164 U. S. 112; s. c. 17 S. Ct. 56; *Ulman v. Mayor &c.*, 165 U. S. 719; s. c. 17 S. Ct. 1001.

⁵⁴⁴ *Mattingly v. District of Columbia*, 97 U. S. 687; *Spencer v. Merchant*, 125 U. S. 345; s. c. 8 S. Ct. 921; *Walston v. Nevin*, 128 U. S. 578; s. c. 9 S. Ct. 192; *Shoemaker v. United States*, 147 U. S. 282; s. c. 13 S. Ct. 361; *Paulsen v. Portland*, 149 U. S. 30; s. c. 13 S. Ct. 750; *Fallbrook I. D. v. Bradley*, 164 U. S. 112; s. c. 17 S. Ct. 56.

⁵⁴⁵ *Norwood v. Baker*, 172 U. S. 269; s. c. 19 S. Ct. 187; *Williams v. Eggleston*, 170 U. S. 304; s. c. 18 S. Ct. 617.

sentative government, be placed elsewhere. With the wisdom or unwisdom of special assessments, when ordered in cases in which they are admissible at all, the courts have no concern unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion.⁵⁴⁶ Where the proper authorities determine the frontage to be the proper measure of benefits, this determination can be neither disputed nor disproved.⁵⁴⁷ The power to impose special assessments upon property specially benefited is not exhausted with one improvement unless restrained by the charter.⁵⁴⁸ The legislature has no power to confer upon a water board previously appointed, power it did not previously possess to impose on abutting property, either directly or indirectly, through the city council, the cost of pipes which it might lay.⁵⁴⁹ The legislature, while exercising the power of local assessments, is not limited to the actual increase in the value of the property assessed resulting from the improvement.⁵⁵⁰ Where the city council, under statute or charter, has determined that the benefits of an improvement are equal to the tax, it is not taking property without compensation.⁵⁵¹ Statutes which delegate power to make assessments for local improvements must be strictly construed.⁵⁵²

§ 1272. Collateral attack of assessment.—A judgment confirming an assessment is valid and binding until set aside or reversed in some direct proceeding.⁵⁵⁴ The validity of an assessment can not be attacked collaterally, as where it is alleged that the notice to property owners was not given the statutory period, in a proceeding for confirmation.⁵⁵⁵

⁵⁴⁶ *Cooley Taxation*, p. 622; *Rolph v. City of Fargo*, 7 N. D. 640; s. c. 76 N. W. 242; 42 L. R. A. 646; *Thomas v. Gain*, 35 Mich. 155, 162.

⁵⁴⁷ *White v. People*, 94 Ill. 604; *Craw v. Tolono*, 96 Ill. 255; *Enos v. Springfield*, 113 Ill. 65; *City of Sterling v. Galt*, 117 Ill. 11; s. c. 7 N. E. 471; *City of Springfield v. Green*, 120 Ill. 269; s. c. 11 N. E. 261.

⁵⁴⁸ *State v. District Court &c.*, 80 Minn. 293; s. c. 83 N. W. 183.

⁵⁴⁹ *Cook Farm Co. v. City of Detroit*, 124 Mich. 426; s. c. 83 N. W. 130.

⁵⁵⁰ *Webster v. City of Fargo*, 9 N. D. 208; s. c. 82 N. W. 732; *Atchison &c. R. Co. v. Peterson*, 5 Kan. App. 103; s. c. 48 Pac. 877.

⁵⁵¹ *Chicago &c. R. Co. v. Village of Elmhurst*, 165 Ill. 148; s. c. 46 N. E. 437.

⁵⁵² *Oshkosh &c. R. Co. v. Winnebago Co.*, 89 Wis. 435; s. c. 61 N. W. 1107. Under laws of N. Y. 1893, ch. 531, the city council of Syracuse held not to have power to levy an assessment on abutting property for the cost of connections with water or gas mains or sewers: *Alvord v. City of Syracuse*, 163 N. Y. 158; s. c. 57 N. E. 310.

⁵⁵⁴ *Johnson v. People*, 177 Ill. 64; s. c. 52 N. E. 308; *Meadowcroft v. People*, 154 Ill. 416; s. c. 40 N. E. 442; *Scotten v. City of Detroit*, 106 Mich. 564; s. c. 64 N. W. 579.

⁵⁵⁵ *Dickey v. People*, 160 Ill. 633;

§1273. **Lien of special assessment.**—A tax lien can not be created by a municipal corporation by ordinance, or otherwise, in the absence of a statute expressly authorizing it.⁵⁵⁶ In some jurisdictions special assessments are made liens on the property.⁵⁵⁷ The lien of an assessment under section 4290 of Burns' revised statutes of Indiana, 1901, relates back to the time of entering the order.⁵⁵⁸ Instalments not due remain a lien on the premises in the hands of purchasers at judicial sales or sales by administrators, executors, guardians or trustees.⁵⁵⁹ The lien attaches to the property without reference to the title,⁵⁶⁰ and may be enforced in equity.⁵⁶¹ The lien of a contractor will pass to an assignee on the completion of the work.⁵⁶²

§ 1274. **Recovery of money paid on illegal assessments.**—The right to recover from the municipality money paid to it under a void assessment, depends upon whether the payment was, in law, compulsory, the general principle being that money wrongfully paid, under protest, and involuntary, may be recovered. The payment of a void assessment, under protest, to prevent sale and clouding of title, is not voluntary.⁵⁶³ But he can not recover money paid on invalid assessments on the ground that at the time of payment the payer was ignorant of the facts which rendered the assessment invalid in case the invalidity arose from a non-compliance with the charter and statutes.⁵⁶⁴ The payment of an assessment to prevent a levy on realty is not under duress or involuntary where a legal remedy of the property owner exists.⁵⁶⁵ Where the work on an improvement is abandoned and the work done confers no benefit on the property, and the ordinance is revoked, and the charter amended so the work can not be completed, the money paid on the assessment may be recovered on the ground of a failure of consideration.⁵⁶⁶ A property

s. c. 43 N. E. 606; *Perry v. People*, 155 Ill. 307; s. c. 40 N. E. 468.

⁵⁵⁶ *Inhabitants &c. v. Grubbs*, 80 Mo. App. 433.

⁵⁵⁷ *Dressman v. Farmers' &c. Bank*, 100 Ky. 571; s. c. 18 Ky. L. 1013; 38 S. W. 1052.

⁵⁵⁸ *Adams v. City of Shelbyville*, 154 Ind. 467; s. c. 57 N. E. 114. But see *Burns Rev. Stat. Indiana 1901*, § 4292; *Indiana Bond Co. v. Shearer*, 24 Ind. App. 622; s. c. 57 N. E. 276.

⁵⁵⁹ *Makley v. Whitmore*, 61 Ohio St. 587; s. c. 56 N. E. 461.

⁵⁶⁰ *Rosetta Gravel &c. Co. v. Jolli-saint*, 51 La. An. 804; s. c. 25 So. 477.

⁵⁶¹ *Huff v. City of Jacksonville*, 39 Fla. 1; s. c. 21 So. 776.

⁵⁶² *Warren v. Russell*, 129 Cal. 381; s. c. 62 Pac. 75.

⁵⁶³ *Gill v. City of Oakland*, 124 Cal. 335; s. c. 57 Pac. 150; *Schultz v. City of Albany*, 57 N. Y. S. 965; s. c. 27 Misc. (N. Y.) 51.

⁵⁶⁴ *Palmer v. City of Syracuse*, 57 N. Y. S. 600; s. c. 26 Misc. (N. Y.) 561.

⁵⁶⁵ *Hoke v. City of Atlanta*, 107 Ga. 416; s. c. 33 S. E. 412.

⁵⁶⁶ *City of San Antonio v. Walker* (Tex. Civ. App.), 56 S. W. 952; *City of San Antonio v. Peters* (Tex. Civ.

owner's right to recover an assessment collected for improvements under a void statute is unaffected by its addition to the general taxes.⁵⁶⁷ The right to recover money under a void assessment given by statute is confined to the person who files a petition for that purpose and procures an order vacating. The order of vacation in one application does not give the right to recover the money paid by another person who has filed no petition.⁵⁶⁸ Payment of an assessment after a threatened sale is not voluntary, but is legal compulsion.⁵⁶⁹ In such case money paid on an illegal assessment may be recovered, notwithstanding section 962, Greater New York charter.⁵⁷⁰ The limitation to the right to recover money paid under an assessment for an improvement which has been abandoned, does not begin to run until the improvement is abandoned, or the ordinance is repealed.⁵⁷¹

§ 1275. Liability of the city in special assessments.—Where a contract provides that street improvements shall be paid for by railroad companies occupying the street the city is primarily liable for the improvements if the railroad companies do not pay.⁵⁷² The principle is that one who induces a contractor to perform labor or furnish materials on the promise that a third person shall pay the contractor the agreed price, can not enjoy the fruits of the contract and leave the contractor remediless, either because such third person does not pay, or did not owe anything.⁵⁷³ Upon like principle, where a city agrees to pay for certain improvements out of a fund to be raised by assessments upon abutting property, and which the property owners refused to pay, and the city was without authority to enforce, the city is primarily liable.⁵⁷⁴ And so if a city has power to make a con-

App.), 40 S. W. 827; *McConville v. City of St. Paul*, 75 Minn. 383; s. c. 77 N. W. 993; *Strickland v. City of Stillwater*, 63 Minn. 43; s. c. 65 N. W. 131.

⁵⁶⁷ *Dexter v. City of Boston*, 176 Mass. 247; s. c. 57 N. E. 379.

⁵⁶⁸ *Wallace v. City of New York*, 65 N. Y. S. 855; s. c. 53 App. Div. (N. Y.) 187.

⁵⁶⁹ *Pell v. City of New York*, 65 N. Y. S. 34; 31 Misc. (N. Y.) 664.

⁵⁷⁰ *Pell v. City of New York*, supra.

⁵⁷¹ *City of San Antonio v. Walker* (Tex. Civ. App.), 56 S. W. 952; *People v. Molloy*, 161 N. Y. 621; s. c. 55 N. E. 1099.

⁵⁷² *Barber Asphalt Pav. Co. v. City of Denver*, 72 Fed. 336; s. c. 19 C. C. A. 139.

⁵⁷³ *White v. Snell*, 5 Pick. (Mass.) 425; *City of Chicago v. People*, 56 Ill. 327; *Bucroft v. City of Council Bluffs*, 63 Iowa 646; s. c. 19 N. W. 807; *Cronan v. Municipality &c.*, 5 La. An. 537.

⁵⁷⁴ *Reilly v. City of Albany*, 112 N. Y. 30; s. c. 19 N. E. 508; *City of Memphis v. Brown*, 20 Wall. 289; *Hitchcock v. Galveston*, 96 U. S. 341; *Barber Asphalt Pav. Co. v. City of Harrisburg*, 64 Fed. 283; *Bucroft v. City of Council Bluffs*, 63 Iowa 646; s. c. 19 N. W.

tract for street improvements, and contracts for them and stipulates in the contract that the agreed price of the improvements shall be paid to the contractor out of funds to be realized by assessments on abutting property and the city has power to make the assessments, but fails to do so, or fails to make valid assessments and thereby to provide a fund out of which the contractor may receive his pay, the city is primarily and absolutely liable to pay the contract price itself.⁵⁷⁵ A city having authority to contract but no authority to make the cost a charge on abutting property is liable.⁵⁷⁶ Where a contract for improvements calls for payment from a special fund and the city makes a bona fide attempt to create such fund, the contractor can not compel payment from the general fund.⁵⁷⁷ This would not be true if the city were negligent in making the special assessment.⁵⁷⁸ Where the work was done under a valid contract and the corporation receives the benefit of it, and fails to make the assessment, it is liable.⁵⁷⁹ If, however, the contract recites that the work is done in consideration of warrants on a special fund to be raised by assessment and the contractor waives his right to demand payment in any other way, the negligence of the officers in making the assessment will not make the city liable.⁵⁸⁰ The city may become liable to a contractor where his work was stopped by the city.⁵⁸¹

807; *Scotfield v. City of Council Bluffs*, 68 Iowa 695; s. c. 28 N. W. 20; *City of Chicago v. People*, 56 Ill. 327; *Maher v. City of Chicago*, 38 Ill. 266; *Miller v. City of Milwaukee*, 14 Wis. 699; *Fisher v. City of Portland*, 24 Or. 188; s. c. 33 Pac. 532.

⁵⁷⁵ *Barber Asphalt Pav. Co. v. City of Denver*, 72 Fed. 336; *Bill v. City of Denver*, 29 Fed. 344; *Argenti v. City of San Francisco*, 16 Cal. 255; *Beard v. City of Brooklyn*, 31 Barb. (N. Y.) 142; *Commercial Nat'l Bank v. City of Portland*, 24 Or. 188; s. c. 33 Pac. 532; *City of Louisville v. Hyatt*, 5 B. Mon. (Ky.) 199; *City of Leavenworth v. Mills*, 6 Kan. 288; *Reilly v. City of Albany*, 112 N. Y. 20; s. c. 19 N. E. 508; *Michel v. Police Jury*, 9 La. An. 67.

⁵⁷⁶ *City of Louisville v. Leatherman*, 99 Ky. 213; s. c. 35 S. W. 625.

⁵⁷⁷ *Thomas v. City of Olympia*, 12 Wash. 465; s. c. 41 Pac. 191.

⁵⁷⁸ *Stephens v. City of Spokane*, 14 Wash. 298; s. c. 44 Pac. 541; 45 Pac. 31; *District of Columbia v. Lyon*, 161 U. S. 200; s. c. 16 S. Ct. 450.

⁵⁷⁹ *City of Memphis v. Brown*, 20 Wall. 289, 310; *Hitchcock v. Galveston*, 96 U. S. 341, 360; *City of Chicago v. People*, 56 Ill. 327; *Kearney v. City of Covington*, 1 Met. (Ky.) 339; *Cumming v. Mayor &c.*, 11 Paige (N. Y.) 596; *Reilly v. City of Albany*, 112 N. Y. 30; s. c. 19 N. E. 508; *Fisher v. City of St. Louis*, 44 Mo. 482; *Commercial Nat'l Bank v. City of Portland*, 24 Or. 188; s. c. 33 Pac. 532; *Cole v. City of Shreveport*, 41 La. An. 839; s. c. 6 So. 638; *Morgan v. City of Dubuque*, 28 Iowa 575; *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 302; s. c. 14 S. Ct. 339.

⁵⁸⁰ *Thomas v. City of Olympia*, 12 Wash. 465; s. c. 41 Pac. 191.

⁵⁸¹ *Steffen v. City of St. Louis*, 135 Mo. 44; s. c. 36 S. W. 31.

§ 1276. Miscellaneous matters relating to special assessment.—

(a) *Repairing and repairs*: A charter which authorizes a city in repaving a street to require the contractor to keep it in repair for a number of years is constitutional. Such a requirement does not place the burden on the property owners.⁵⁸² Where a charter provides that the paving of streets shall be charged to the adjoining property owners and repairs shall be paid by the city, a contract which provides for the reconstruction and maintenance of a street and that the adjoining property owners shall pay for a portion of the repairs for a long period is valid.⁵⁸³ The word "maintenance" is equivalent to the word "repairs."⁵⁸⁴ Where about one-half the paving is worn out and in restoring the street the old concrete was used as a base for the new, a special assessment is proper, as it was a repaving and not a repair.⁵⁸⁵ A charter authorizing assessments on property specially benefited for paving streets confers power to repave streets.⁵⁸⁶ Where ten per cent. of the contract price is reserved for repairs, the contractor can recover from the property owner but ninety per cent.⁵⁸⁷ (b) *Sale in special assessments*: The purchaser of certificates of sale under an assessment can not recover the amount paid therefor if it does not appear that the money paid has not all been legally and honestly paid out in the general scheme of improvements, and this, too, although the particular lot on which the tax is levied was not benefited.⁵⁸⁸ The purchaser of a lot in a tract subdivided pending proceedings for special assessment is a purchaser *lis pendens*.⁵⁸⁹ An action to vacate a sale under an assessment is not an action to set aside an assessment, which must be brought under the charter in twelve months.⁵⁹⁰ (c) *Double taxation*: A special assessment for the benefit of an improvement, and general assessment for the excess of the cost of an improvement over and above the special assessment, is not double taxation.⁵⁹¹ Under the Illinois constitution special taxation of contigu-

⁵⁸² *People v. City of Buffalo*, 65 N. Y. S. 163.

⁵⁸³ *Barber Asphalt Pav. Co. v. Hezel*, 155 Mo. 391; s. c. 56 S. W. 449.

⁵⁸⁴ *Barber Asphalt Pav. Co. v. Hezel*, *supra*.

⁵⁸⁵ *People v. City of Buffalo*, 65 N. Y. S. 163.

⁵⁸⁶ *State v. District Court &c.*, 80 Minn. 293; s. c. 83 N. W. 183.

⁵⁸⁷ *Kentucky Public Elevator Co. v. Colston (Ky.)*, 56 S. W. 981.

⁵⁸⁸ *Germania Bank v. City of St.*

Paul, 79 Minn. 29; s. c. 81 N. W. 542.

⁵⁸⁹ *Philadelphia v. Nock*, 12 Pa. Super. Ct. 44. In Kentucky a sale to satisfy an assessment for street improvements must be subject to redemption: *Martin's Executor v. Slaughter*, 20 Ky. L. 1743; s. c. 50 S. W. 27; *District of Clifton &c. v. Schneider*, 21 Ky. L. 212; s. c. 51 S. W. 13.

⁵⁹⁰ *Brennan v. City of Buffalo*, 162 N. Y. 491; s. c. 57 N. E. 81.

⁵⁹¹ In *re Beechwood Ave. &c.*, 194 Pa. St. 86; s. c. 45 Atl. 127.

ous property is regarded as a branch of taxation and the power to levy and collect such assessments does not have its source in the constitutional provisions relating to eminent domain.⁵⁹² Special assessment is not taxation.⁵⁹³ (d) *Deposit of bonds by contractor*: A requirement that the contractor shall deposit bonds amounting to ten per cent. of the contract price to secure the necessary repairs for five years and providing that the guaranty should not include any repairs made necessary by any cause other than defective work or materials used, and therefore the assessment of the entire cost on the property owners, does not burden them with an expense which ought to be borne by the city.⁵⁹⁴ (e) *Stay of improvement—Effect of*: The passage of an order by the council staying all proceedings on a municipal improvement, in a case where a contract has been let and all necessary steps taken for an assessment including confirmation by the county court, does not set aside the assessment nor does it annul the contract.⁵⁹⁵ When the cost of an improvement has been conclusively determined the court may properly stay further collection.⁵⁹⁶ (f) *Payment—By cotenant—By city*: The payment of a proportionate share of an assessment by one of several co-owners releases no part of the lot.⁵⁹⁷ Where its finances will permit, a city may pay for an improvement from its general fund.⁵⁹⁸ (g) *Repeal of ordinance—Effect of*: The repeal of an ordinance for a special assessment pending an appeal from a judgment confirming is not ground for setting aside the judgment of confirmation at a subsequent term. The judgment remained in full force and effect and all parties are bound by it.⁵⁹⁹ (h) *What are public improvements*: A bridge spanning a river crossing a street is a public improvement,⁶⁰⁰ and so is the planting of shade trees.⁶⁰¹ A public park is a local improvement and authorizes a special assessment therefor.⁶⁰² (i) *Liability of city in*: If city fails to make the assessment the contractor may

⁵⁹² *Chicago &c. R. Co. v. Village of Elmhurst*, 165 Ill. 148; s. c. 46 N. E. 437; *Chicago &c. R. Co. v. City of Joliet*, 153 Ill. 649; s. c. 39 N. E. 1077.

⁵⁹³ *McGuire v. Brockman*, 58 Mo. App. 307.

⁵⁹⁴ *City of Louisville v. Mehler*, 22 Ky. L. 62; s. c. 56 S. W. 712.

⁵⁹⁵ *Clingman v. People*, 183 Ill. 339; s. c. 55 N. E. 727.

⁵⁹⁶ *People v. McWethy*, 177 Ill. 334; s. c. 52 N. E. 479.

⁵⁹⁷ *Williams v. Bergin*, 127 Cal. 578; s. c. 60 Pac. 164.

⁵⁹⁸ *Ottumwa Brick &c. Co. v. Ainley*, 109 Iowa 386; s. c. 80 N. W. 510.

⁵⁹⁹ *People v. McWethy*, 165 Ill. 222; s. c. 46 N. E. 187.

⁶⁰⁰ *Berlin Iron Bridge Co. v. City of San Antonio (Tex.)*, 50 S. W. 408.

⁶⁰¹ *Heller v. City of Garden City*, 58 Kan. 263; s. c. 48 Pac. 841.

⁶⁰² *Kansas City v. Bacon*, 147 Mo. 259; s. c. sub nom. *In re North Terrace Park*, 48 S. W. 860.

sue the city.⁶⁰³ But it is not liable when the law is held to be unconstitutional.⁶⁰⁴ The city can not negligently delay the assessment, and the cause of action is *ex delicto* and not *ex contractu*.⁶⁰⁵ Where a city in an improvement contract limits liability to one-third of the cost and provides that the contractor shall look to the abutting owners for the remainder of the cost, the city can not afterwards make an assessment for such remainder.⁶⁰⁶ (j) *Liability of abutter*: Where abutting property is liable only for the first paving, it is not liable for paving a highway which has been macadamized and has been recognized and treated as a paved street afterwards.⁶⁰⁷ (k) *Personal judgment not proper*: A personal judgment can not be rendered against an owner of the property for the amount of the tax.⁶⁰⁸ Where a right of way is assessed for a local improvement of a street, and a suit is provided for by statute in favor of a contractor, a personal judgment may be rendered.⁶⁰⁹ No personal liability of the owner grows out of an assessment for local improvement.⁶¹⁰ (l) *Reducing assessment*: An order reducing an assessment in the absence of proof of the total cost is erroneous where the reduction provided for by the charter is based on the proportion the unlawful increase bears to the total cost. The cost of the improvement in such case is the standard.⁶¹¹

⁶⁰³ *Weston v. City of Syracuse*, 31 N. Y. S. 186; s. c. 82 Hun (N. Y.) 67.

⁶⁰⁴ *Barber Asphalt Pav. Co. v. City of Harrisburg*, 62 Fed. 565; distinguishing *Hitchcock v. Galveston*, 96 U. S. 341. And see *Barber Asphalt Pav. Co. v. City of Harrisburg*, 64 Fed. 283.

⁶⁰⁵ *Little v. City of Portland*, 26 Or. 235; s. c. 37 Pac. 911.

⁶⁰⁶ *City of Dallas v. Emerson* (Tex. Civ. App.), 36 S. W. 304.

⁶⁰⁷ *Leake v. City of Philadelphia*, 171 Pa. St. 125; s. c. 32 Atl. 1110; *Philadelphia v. Eddleman*, 169 Pa. St. 452; s. c. 32 Atl. 639.

⁶⁰⁸ *Illinois & C. R. Co. v. People*, 161 Ill. 244; s. c. 43 N. E. 1107; *Ivanhoe v. City of Enterprise*, 29 Or. 45; s. c. 45 Pac. 771.

⁶⁰⁹ *Pittsburg & C. R. Co. v. Hays*, 17 Ind. App. 261; s. c. 44 N. E. 375.

⁶¹⁰ *Moody & Co. v. Chadwick*, 52 La. An. 1888; s. c. 28 So. 361. Oth-

erwise under *Burns' Rev. Stat. Indiana 1901*, § 4294: *Edward C. Jones Co. v. Perry*, 26 Ind. App. 554; s. c. 57 N. E. 583.

⁶¹¹ *In re Phoenix*, 65 N. Y. S. 719; s. c. 53 App. Div. (N. Y.) 636.

STATUTES AND CHARTERS IN RELATION TO SPECIAL ASSESSMENTS CONSTRUED.

Arkansas:—The constitution of Arkansas, art. 19, § 27, authorizing assessments for local improvements, does not forbid by implication assessments for improvements for whole city: *Crane v. City of Siloam Springs*, 67 Ark. 30; s. c. 55 S. W. 955. *California*:—Cal. act of 1885, in regard to street improvement, construed in *Frenner v. Sunnyside Land Co.*, 124 Cal. 437; s. c. 57 Pac. 302. As to what is insufficient to create a lien for special assessment under *California St. 1889*, see *Fren-*

ner v. Sunnyside Land Co., 124 Cal. 437; s. c. 57 Pac. 302. Construction of California Stat. 1891 and 1899, in relation to reassessment: *Hornung v. McCarthy*, 126 Cal. 17; s. c. 58 Pac. 303; *Westall v. Altschul*, 126 Cal. 164; s. c. 58 Pac. 458; *Ede v. Cuneo*, 126 Cal. 167; s. c. 58 Pac. 538. Acts of February 27, 1893, and Stat. of 1895, § 327, construed as affecting remedy: *Ramish v. Hartwell*, 126 Cal. 443; s. c. 58 Pac. 920. *Connecticut*:—Construction of Special Laws of Connecticut in relation to special assessments: *Appeal of Hunter*, 71 Conn. 189; s. c. 41 Atl. 557. *Illinois*:—Act of Illinois 1895, p. 100, construed not to be amendment of sidewalk act of April 15, 1875: *People v. Yancey*, 167 Ill. 255; s. c. 47 N. E. 521. Statutory provisions regarding assessments construed in *Illinois &c. R. Co. v. City of Wrenona*, 163 Ill. 288; s. c. 45 N. E. 265; *City of Charleston v. Cadle*, 166 Ill. 487; s. c. 46 N. E. 1120; *Palmer v. City of Danville*, 166 Ill. 42; s. c. 46 N. E. 629. The West Chicago park commissioners are corporate authorities and have power to make special assessments: *Farr v. West Chicago Park Com'rs*, 167 Ill. 355; s. c. 46 N. E. 893. City of Chicago has power, under act of 1872, to establish districts for a system of sewers irrespective of act of 1885: *Mason v. City of Chicago*, 178 Ill. 499; s. c. 53 N. E. 354. Construction of Illinois City and Village Act in relation to reassessments: *Ewart v. Village of Western Springs*, 180 Ill. 318; s. c. 54 N. E. 478. The Illinois act of July 1, 1897, did not deprive county courts of jurisdiction to enter judgments for special assessments: *Murphy v. People*, 183 Ill. 185; s. c. 55 N. E. 678. Cf. *Leitch v. People*, 183 Ill. 569; s. c. 56 N. E. 127. Construction of special assessment statute of 1897, Illi-

nois, with reference to jurisdiction of county court: *Noonan v. People*, 183 Ill. 52; s. c. 55 N. E. 679. *Indiana*:—Construction of Burns' Rev. Stat. Ind. 1901, § 4297: *Jessen v. Pierce*, 25 Ind. App. 222; s. c. 57 N. E. 941. *Kentucky*:—Ky. St., § 2834, construed as to review of courts: *City of Louisville v. Selvage*, 21 Ky. L. 349; s. c. 51 S. W. 447. *Louisiana*:—Construction of Louisiana act No. 113, of 1886, relative to special assessments: *Barber Asphalt Pav. Co. v. Watt*, 51 La. An. 1345; s. c. 26 So. 70. *Massachusetts*:—The construction of a tunnel in the city of Boston under Stat. 1897, ch. 500, § 17, being a public work for a public use, for which an assessment is made, is valid and legal: *Browne v. Turner*, 176 Mass. 9; s. c. 56 N. E. 969. Under Massachusetts Const., ch. 1, art. 4, § 1, a statute is valid which authorizes the watering of certain streets at the expense of the city and others at the expense of the abutting owners: *Sears v. Board &c.*, 173 Mass. 71; s. c. 53 N. E. 138. *Michigan*:—Compiled Laws of 1897, § 3406, held valid in *Voght v. City of Detroit*, 123 Mich. 547; s. c. 82 N. W. 253. *Minnesota*:—Construction of special laws Minn. 1891, ch. 35, § 26, in relation to confirmation of assessments by board of public works: *State v. District Court &c.*, 75 Minn. 292; s. c. 77 N. W. 968. Minnesota Laws of 1891, ch. 54, construed and held to provide for unequal taxation and unconstitutional: *State v. District Court &c.*, 66 Minn. 161; s. c. 68 N. W. 860. Construction of St. Paul charter in relation to redemption from sale for special assessments: *Merchants' Realty Co. v. City of St. Paul*, 77 Minn. 343; s. c. 79 N. W. 1040. *Missouri*:—Construction of Missouri St. 1887, § 1077, and held invalid: *Inhabitants &c. v. Grubbs*, 80 Mo. App. 433. *New Jersey*:—As to the effect of

New Jersey Stat., March 15, 1898, on irregular proceedings, see *Lord v. Mayor &c.*, 65 N. J. L. 27; s. c. 46 Atl. 701. *New York*:—Under Buffalo charter it is the duty of the assessor and not the common council to define the assessment districts: *Smith v. City of Buffalo*, 159 N. Y. 427; s. c. 54 N. E. 62. Construction of New York consolidation act 1882, ch. 410, in reference to amount of assessment: In re City of New York, 61 N. Y. S. 431; s. c. 26 App. Div. (N. Y.) 52. Interest not allowed on assessment under charter of Greater New York: In re Opening of Whitlock Ave., 64 N. Y. S. 717; s. c. 51 App. Div. (N. Y.) 436. *Ohio*:—Construction of Ohio act of May 11, 1886, as to amount of the assessment: *Walsh v. Barron*, 61 Ohio St. 15; s. c. 55 N. E. 164; *Hays v. City of Cincinnati*, 62 Ohio St. 116; s. c. 56 N. E. 658. *Oregon*:—Construction of Oregon St. of 1893, in relation to instalments of special assessments: *Mall v. City of Portland*, 35 Or. 89; s. c. 56 Pac. 654. Portland city charter construed in *Nottage v. City of Portland*, 35 Or. 539; s. c. 58 Pac. 883.

Pennsylvania:—The Pennsylvania act of May 16, 1891, does not repeal in the matter of the construction of sewers the act of June 15, 1871: In re Mill Creek Sewer, 196 Pa. St. 183; s. c. 46 Atl. 312. Construction of Pennsylvania act of 1871, in reference to liens of assessments: *City of Pittsburg v. Murphy*, 95 Fed. 57. *South Carolina*:—The Spartanburg city charter in regard to opening streets on the payment of damage is repealed by the act of 1884: *State v. Tenny*, 58 S. C. 215; s. c. 36 S. E. 555. *Washington*:—Under Hill's Code, § 520, Washington, payment of assessments may be made in instalments: *Heath v. McCrea*, 20 Wash. 342; s. c. 55 Pac. 432. Construction of Washington Laws 1893 in reference to apportionment of assessment: *City of New Whatcom v. Bellington Bay Imp. Co.*, 16 Wash. 131; s. c. 47 Pac. 236. Ballinger's Ann. Code & Stat., § 1185, construed in *State v. Rathbun*, 22 Wash. 651; s. c. 62 Pac. 85. *Wisconsin*:—Construction of Superior City charter in *State v. Hobe*, 106 Wis. 411; s. c. 82 N. W. 336.

CHAPTER XXIX.

STREETS, ALLEYS, WHARVES, ETC.

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§ 1277. **Street defined.**—A street is a road or public way in a city, town or village, and the purpose for which it is laid out and the use made of it determine its character. All public streets are highways, though all highways are not streets. It not only includes the surface but such depth below the surface as may be necessary for municipal purposes.¹ As a rule the fee is not in the city, but its proprietary interest is that of an easement for such time as the municipality sees proper to use it as a highway for the benefit of the public. A street includes the roadway, the gutters and sidewalk. But all parts of the street from side to side and end to end are for the public use in appropriate and proper methods.² A street is in the strictest sense a highway free to all and maintained for the public benefit.³ It is under the control of the municipality, and no private individual or corporation has a legal right to appropriate it to private purposes, nor has the municipality a right to grant the use thereof to private enterprise.

§ 1278. **Alley defined.**—An alley in the ordinary acceptance is a public highway in the same sense as a street and is generally governed by the same rules. As a general thing it is much less in width and

¹ Elliott Roads & Streets (2d ed.), § 17, and cases cited.

² State v. Berdetta, 73 Ind. 185.

³ Reed v. Erie, 79 Pa. St. 346.

its public nature is determined by the rights the public have to use it and not by the number who use it or the purposes for which it is used. While an alley is devoted more particularly to the private use and convenience of those who occupy the abutting property, yet it is none the less a public highway, and the rights and liabilities incident thereto attach.

§ 1279. **Sidewalk defined.**^{3a}—A sidewalk is that part of a public street designed to be used by footmen and can not lawfully be used by vehicles. Its public use for the purposes designed and the rights and liabilities pertaining thereto are the same substantially as apply to streets generally,⁴ and the control of the municipality over it, as to construction, maintenance, repairs and use, is the subject of a wide field of judicial investigation and has resulted in the establishment of many rules of law not in themselves difficult but difficult in application.

§ 1280. **Methods of acquiring land for streets and alleys.**—There are two modes by which property to be devoted to streets and alleys may be acquired. The first is by condemnation under the power of eminent domain, which is an exercise of sovereign power in the interest of the public, and the second is either by what is known as the common law dedication or a statutory dedication provided for by statutory enactment in most states. With the details in the exercise of these modes we are not concerned in this connection.⁵ There is also a public right recognized in the law which can not be traced directly to either of these modes, which is in the nature of an easement acquired by user. The user, for a considerable period, of property as a public highway, creates a presumption of its being a public street.⁶ While there is a distinction between a public road and a public street yet when property over which a road is located is annexed to a municipality the road becomes a street, and while the purposes and uses are the same the regulation and control will be different.⁷ Even where

^{3a} See § 1304(a), post.

⁴ *Mercer v. Corbin*, 117 Ind. 450; s. c. 20 N. E. 132.

⁵ See *Elliott Roads & Streets* (2d ed.).

⁶ User for five years creates a presumption of its being a public street: *Zwack v. New York & C. R. Co.*, 40 N. Y. S. 821; s. c. 8 App. Div. (N. Y.) 483. User of land for an alley from 1861 to 1890 is sufficient to create an easement: *City of Chicago v. Sawyer*, 166 Ill. 290; s. c. 46 N.

E. 759. An easement in a street belongs to the public and not the municipality: *Busse v. Town of Central Covington*, 19 Ky. L. 157; s. c. 38 S. W. 865; 39 S. W. 848.

⁷ *Wabash R. Co. v. City of Defiance*, 10 Ohio C. C. 27. Where a public highway by annexation is within a city it becomes a public street: *Brown v. Hines*, 16 Ind. App. 1; s. c. 44 N. E. 655. A city by extending its limits so as to include

the city acquires the fee in land on which a street is located it is regarded as holding the title in trust and for the use of the public. As a rule, however, the municipality has but an easement in the land and is not to be regarded as the owner in the ordinary sense.⁸ Nor has an abutting owner a vested right in a street in the sense that he as owner can compel the city to provide other drainage for that cut off by a sewer.⁹

§ 1281. Dedication must be accepted.—In so far as the liability of the city is concerned it should be borne in mind that it is not every act of dedication by an owner that will render the municipality liable for the management or condition of the proposed street. The dedication of lands for a street does not make it a street until accepted as such by the municipality, but acceptance may be by formal act or unequivocal public user.¹⁰ A street laid out by an individual may be accepted as a street by the city by ordinance, by repairs made, or the ratification of repairs.¹¹ The bringing of an action by a city to recover possession of land dedicated to public use is a sufficient acceptance,¹² and so is the construction of a sewer in a street dedicated, and otherwise treating it as any other street.¹³

§ 1282. Care of streets, alleys, etc.—When a street has become public by dedication and acceptance, or otherwise, certain duties are as-

a bridge belonging to the county makes the bridge a part of the street: *Cascade Co. v. City of Great Falls*, 18 Mont. 537; s. c. 46 Pac. 437. The taking of a county road into the city by annexation makes it subject to city control: *Wabash R. Co. v. City of Defiance*, 52 Ohio St. 262; s. c. 40 N. E. 89.

⁸ A bridge wholly within corporate limits and forming part of a street renders the city liable for an injury growing out of disrepair, although it is built and maintained by the county: *City of Rosedale v. Golding*, 55 Kan. 167; s. c. 40 Pac. 284. The public highways of a city are not to be regarded as its private property and the supervision thereof may be transferred by the legislature to another governmental agency where the use is to remain the same: *Simon v. Northup*, 27 Or. 487; s. c. 40 Pac. 560; *Hanson v. Hirsch*, 27 Or. 487; s. c. 40 Pac. 560.

⁹ *Eddy v. Granger*, 19 R. I. 105; s. c. 31 Atl. 831.

¹⁰ *State v. Mayor &c.*, 57 N. J. L. 252; s. c. 30 Atl. 628. Where a street is laid out by an individual and the city accepts the street it becomes liable for defects: *Steel v. Borough of Huntingdon*, 191 Pa. St. 627; s. c. 43 Atl. 398.

¹¹ *Steel v. Borough of Huntingdon*, supra. Facts held not to constitute an acceptance by the city in *Ogle v. Mayor &c.*, 90 Md. 59; s. c. 44 Atl. 1015; *Richardson v. Davis*, 91 Md. 390; s. c. 46 Atl. 964.

¹² *City of Atlantic City v. Groff*, 64 N. J. L. 527; s. c. 45 Atl. 916.

¹³ *In re Hunter*, 163 N. Y. 542; s. c. 57 N. E. 735. Evidence that a city had cleaned the walks and notified owners to clean them is proper as showing adoption of a street: *Stapleton v. City of Newburgh*, 41 N. Y. S. 96; s. c. 9 App. Div. (N. Y.) 39.

sumed and become binding on the municipality in reference to care thereof, and certain liabilities attach by reason of mismanagement and injuries resulting therefrom. Stated in general terms, when a street or alley has become public the municipality assumes the duty of maintaining it in a reasonably safe condition for the benefit of the public for the uses and purposes to which a street or alley may be ordinarily devoted. It must use ordinary care in this regard but is not required to provide for unusual or extraordinary uses and emergencies.¹⁴ It must keep them in reasonably safe condition for ordinary travel,¹⁵ but is not liable for injury occasioned by the breaking of a sidewalk in removing a 1,400-pound safe.¹⁶ The city council has no power to alien or otherwise encumber its streets so long as they are public streets but must hold them in trust for public purposes only, and therefore can grant no easement or right therein not of a public character.¹⁷ The care which devolves upon the city can not be delegated.¹⁸ In the interest of the public the city may prohibit fast driving,¹⁹ and limiting the use of a street to a pleasure driveway under authority of a general act of the legislature is not a violation of a trust by a municipality.²⁰ Corresponding duties are required of those who are

¹⁴ *Sutton v. City of Snohomish*, 11 Wash. 24; s. c. 39 Pac. 273; *Goins v. City of Moberly*, 127 Mo. 116; s. c. 29 S. W. 985; *Shietart v. City of Detroit*, 108 Mich. 309; s. c. 66 N. W. 221; *City of Chicago v. McDonald*, 57 Ill. App. 250; *Twist v. City of Rochester*, 55 N. Y. S. 850; s. c. 37 App. Div. (N. Y.) 307.

¹⁵ *Lorence v. City of Ellensburg*, 13 Wash. 341; s. c. 43 Pac. 20.

¹⁶ *City of Chicago v. Kohlhof*, 64 Ill. App. 349. Where a sidewalk is reasonably safe for the use of pedestrians the city is not liable for an injury to a bicycle rider, though rightfully riding on the sidewalk: *Morrison v. City of Syracuse*, 61 N. Y. S. 313; s. c. 45 App. Div. (N. Y.) 421. If the street is reasonably safe and in fit condition for ordinary vehicles a town is not liable for an injury from being thrown from a bicycle: *Leslie v. City of Grand Rapids*, 120 Mich. 28; s. c. 78 N. W. 885. The city is only required to keep its sidewalks in a suitable condition for

people to walk over, and that they were not must be established by one injured by riding a tricycle on the sidewalk, and that he was using due care: *Wheeler v. City of Boone*, 108 Iowa 235; s. c. 78 N. W. 909. The care must be ordinary: *Young v. City of Webb City*, 150 Mo. 333; s. c. 51 S. W. 709; *City of Rock Falls v. Wells*, 59 Ill. App. 155; *Town of Worthington v. Morgan*, 17 Ind. App. 603; s. c. 47 N. E. 235.

¹⁷ *Snyder v. City of Mount Pulaski*, 176 Ill. 397; s. c. 52 N. E. 62; *Field v. Barling*, 149 Ill. 556; s. c. 37 N. E. 850; *Hibbard v. City of Chicago*, 173 Ill. 91; s. c. 50 N. E. 256.

¹⁸ *Patterson v. City of Austin* (Tex. Civ. App.), 29 S. W. 1139.

¹⁹ An ordinance may be unreasonable as to fast driving when applied to a salvage corps organized under a general law for fire protection: *State v. Sheppard*, 64 Minn. 287; s. c. 67 N. W. 62.

²⁰ *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9; s. c. 51 N. E. 758.

legitimately using the streets in the matter of care to be exercised,²¹ and the question of care is in all cases a question of fact for the jury.²²

§ 1283. Power to vacate streets.—The legislature has paramount authority over all public streets, and the law is well settled that when no private right is invaded it may vacate a street or highway, abridge or limit its use in its discretion. This power may be delegated to municipalities, and this is the course usually pursued.²³ The power to vacate is sometimes in the legislature, but usually is delegated to the city council or other municipal authority and may be vested in courts, but when delegated the power must be clear and unambiguous, or by necessary implication.²⁴ Where the power to vacate a street is vested in the municipality the exercise of that power is discretionary. It is a part of the legislative functions of the state and being so is not to be enjoined.²⁵ A city has no proprietary interest in a street,

²¹ A person in passing on a street or sidewalk must use ordinary care: *Russell v. Town of Monroe*, 116 N. C. 720; s. c. 21 S. E. 550; *District of Columbia v. Haller*, 4 App. D. C. 405; *Lord v. City of Mobile*, 113 Ala. 360; s. c. 21 So. 366. A momentary diversion does not as a matter of law constitute contributory negligence where the injury results from defects in the sidewalk: *West v. City of Eau Claire*, 89 Wis. 31; s. c. 61 N. W. 313. Where plaintiff was walking slowly and was looking for holes in the sidewalk, but the walk was smooth and appeared sound at the place of the accident, he was exercising due care: *City of Huntington v. First*, 22 Ind. App. 66; s. c. 53 N. E. 246.

²² *Willis v. City of New Berne*, 118 N. C. 132; s. c. 24 S. E. 706; *Dempsey v. City of Rome*, 94 Ga. 420; s. c. 20 S. E. 335; *Coffin v. Inhabitants &c.*, 162 Mass. 192; s. c. 38 N. E. 509.

²³ *West Chicago Park Com'rs v. McMullen*, 134 Ill. 170; s. c. 25 N. E. 676; *Meyer v. Village of Teutopolis*, 131 Ill. 552; s. c. 23 N. E. 651. Cf. *Barnes v. District of Columbia*, 91 U. S. 540; *Transportation Co. v. Chicago*, 99 U. S. 635; *Sinton v. Asbury*, 41 Cal. 525; *Brook v. Horton*, 68 Cal. 554; s. c. 10 Pac. 204; *Brown*

v. Board &c., 124 Cal. 274; s. c. 57 Pac. 82; *McGee's Appeal*, 114 Pa. St. 470; *State v. Huggins*, 47 Ind. 586; *Kellinger v. Forty-second St. R. Co.*, 50 N. Y. 206; *Riggs v. Board &c.*, 27 Mich. 262; *Whitsett v. Union Depot &c. R. Co.*, 10 Colo. 243; s. c. 13 Pac. 339; *Gerhard v. Seekonk &c. Com'rs*, 15 R. I. 334; s. c. 5 Atl. 199; *Heller v. Atchison &c. R. Co.*, 28 Kan. 625. And see note to *Moffitt v. Brainard*, 92 Iowa 122; s. c. 60 N. W. 226, in 26 L. R. A. 821, where the subject of the vacation of streets by whom and the manner of doing it is fully considered.

²⁴ *Mayor &c. v. Central &c. R. Co.*, 40 N. J. Eq. 417; *City of Louisville v. Bannon*, 99 Ky. 74; s. c. 18 Ky. L. 10; 35 S. W. 120. A city has no implied power to close a public alley for a money consideration against the will of property owners affected who have an easement therein: *City of Louisville v. Bannon*, 99 Ky. 74; s. c. 18 Ky. L. 10; 35 S. W. 120. A city is without power to vacate a street without authority from the legislature: *City of Texarkana v. Leach*, 66 Ark. 40; s. c. 48 S. W. 807.

²⁵ *Atkinson v. Wykoff*, 58 Mo. App. 86. See *Glasgow v. City of St. Louis*, 107 Mo. 198; s. c. 17 S. W. 743, cited in n. 38, *infra*.

and the same may be vacated without compensation to it as a municipality.²⁶ But a person whose property is located on a street and who is injured by the vacation thereof and suffers special damages may recover therefor.²⁷ As a citizen in general he may have no proprietary interest in the street and may not recover for a vacation, but he may be so situated that his injury is special, and his damages different from the general public. The city may be liable to abutting owners for vacating streets.²⁸ A part vacation of a street leaving access to the property one way the same as before does not entitle an owner to damages.²⁹ An act providing for compensation for vacating a street does not apply to streets never condemned nor accepted as dedications, nor to private ways.³⁰ The right to vacate a public street is based upon the necessity therefor, and while the council, or other municipal authority, is vested with discretion which is not ordinarily subject to review yet it is not authorized to act arbitrarily or vacate a street for private purposes.³¹ In the absence of fraud courts will not review the action of a city council in vacating a street, and the general rule is that the determination of a proper board as to the opening or closing of a street is not the subject of review by the courts.³² The right to vacate includes the right to vacate a part of a street as well

²⁶ *In re Albers' Petition*, 113 Mich. 640; s. c. 71 N. W. 1110.

²⁷ If by the vacation of a public street and the erection of a viaduct plaintiff is injured in a manner different from the general public he is entitled to recover: *City of Chicago v. Burcky*, 158 Ill. 103; s. c. 42 N. E. 178.

²⁸ *Heinrich v. City of St. Louis*, 125 Mo. 424; s. c. 28 S. W. 626. The measure of damage in such case is the difference in value of the property before and afterwards, with the land taken by the street added: *Heinrich v. City of St. Louis*, 125 Mo. 424; s. c. 28 S. W. 626.

²⁹ *In re Melon St.*, 1 Pa. Super. Ct. 63.

³⁰ *Matter of the Mayor*, 58 N. Y. S. 736; s. c. 41 App. Div. (N. Y.) 586.

³¹ The right to vacate a street is subject to the condition that such vacation is not for the benefit of private parties or for private uses: *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9; s. c. 51 N. E. 758.

³² *Knapp, Stout & Co. v. City of*

St. Louis, 156 Mo. 343; s. c. 56 S. W. 1102; *Symons v. City of San Francisco*, 115 Cal. 555; s. c. 42 Pac. 913. Where in obedience to an ordinance of the department of public works a street is struck off the city plan and a new plan is confirmed omitting the street the legal vacation of the street is complete without confirmation or other action in the courts: *Wetherill v. Pennsylvania R. Co.*, 195 Pa. St. 156; s. c. 45 Atl. 653. Cf. *Carpenter v. Pennsylvania R. Co.*, 195 Pa. St. 160; s. c. 45 Atl. 685. The vacation of a portion of a street at the instigation of a corporation and for its corporate use is not such fraud as will invalidate the ordinance: *Knapp, Stout & Co. v. City of St. Louis*, 156 Mo. 343; s. c. 56 S. W. 1102. Proceedings by certiorari to review the action of the city in vacating a street must be taken in apt time or laches will be imputed: *Beutel v. Bay Circuit Judge*, 124 Mich. 521; s. c. sub nom. *People v. West Bay City Sugar Co.*, 83 N. W. 278.

as the whole.³³ A city, under the Iowa code, has authority to vacate a part of a street for the benefit of the general public, although the lots fronting on it may be somewhat depreciated in value thereby.³⁴ The legislature, either by its own act, or by authority delegated to municipal corporations, has power to order the vacation of any public street or highway. The absence of a formal ordinance declaring the streets vacated will not defeat a railroad company's right of occupation of such streets, if such right is otherwise unequivocal.³⁵ A charter which gave the common council of a city in Wisconsin among others the power to vacate streets and alleys, to be exercised "anything in any general law of the state to the contrary notwithstanding," was held to vest in the council exclusive power in vacating streets and alleys, although the circuit courts of the state by a statute possess authority to vacate any recorded plat of a city or village, or part thereof, and to vest the title of the streets vacated in the owners of the abutting lots.³⁶ And it is not within the province of the courts to determine that there must be public streets or highways kept open when the town plat shows that no streets are located, the city council having full control over the opening and vacation of streets and highways within a city.³⁷ One who merely suffers an inconvenience in

³³ Under the power to vacate streets a part of a street may be vacated and made narrower where it is for the benefit of the abutting owners: *City of Mt. Carmel v. Shaw*, 155 Ill. 37; s. c. 39 N. E. 584. A street may be vacated by the adoption of an ordinance ratified by the legislature declaring a map to be the plan of a city in regard to the location and establishment of streets: *City of San Francisco v. Burr*, 108 Cal. 460; s. c. 41 Pac. 482. The granting of a revocable license to display merchandise on the street is not a vacation: *City of Denver v. Girard*, 21 Colo. 447; s. c. 42 Pac. 662. Vacation of a street does not infringe private rights: *United N. J. R. & C. Co. v. National Docks & C. R. Co.*, 57 N. J. L. 523; s. c. 31 Atl. 981. The closing of a street may be for a public purpose: *In re East 168th St.*, 157 N. Y. 409; s. c. 52 N. E. 1126. Park commissioners are a municipal corporation and are agencies of the state for governmental purposes

within their districts, and as such may have power over streets as other municipalities: *West Chicago Park Com'rs v. McMullen*, 134 Ill. 170; s. c. 25 N. E. 676, and cases cited.

³⁴ *Williams v. Carey*, 73 Iowa 194; s. c. 34 N. W. 813.

³⁵ *McGee's Appeal*, 114 Pa. St. 470; s. c. 8 Atl. 237.

³⁶ *Brandt v. City of Milwaukee*, 69 Wis. 386; s. c. 34 N. W. 246. The jurisdiction of the courts in the matter is purely statutory: *Warren v. City of Wausau*, 66 Wis. 206; s. c. 28 N. W. 187.

³⁷ *Platt v. Chicago & C. R. Co.* (Iowa), 31 N. W. 883. In Pennsylvania the town council of a borough has the right to open a street laid down in the general plan of a town, even if, in doing so, it will necessarily and unavoidably close up and obstruct another highway not laid down in the town plan, but which has become a highway by having been the bed of an artificial road

common with all other persons from the vacation of a street on which none of his property abuts can not have an injunction to restrain the enforcement of a city ordinance vacating such street.³⁸ The question whether a street should be kept open or closed is for the municipal assembly and not for the courts.³⁹ And where a city has the power to vacate streets, it makes no difference in the exercise of that power whether the public acquired the street to be vacated by condemnation or by dedication.⁴⁰ It is within the legislative discretion to direct in a statute relating to the vacation of streets that the jury ascertain both damages and benefits, and apply the latter directly to the payment of the former.⁴¹ And a non-adjacent property owner is not entitled to damages caused by vacating a street under the Illinois statute where ingress and egress to his property are not affected by the vacation, and where the damages suffered consist of mere inconvenience common to the general public.⁴²

§ 1284. The vacation is discretionary.—As we have seen, the right to vacate, as a rule, is in the discretion of the body possessing the power. In proceedings by petition to the common council of a city to discontinue a portion of a street it is in the discretion of the council to determine as to the public convenience and necessity of such discontinuance, and where there has been no glaring informality or illegality in the proceedings their judgment should not be disturbed.⁴³ The legality of such proceedings would not be affected by the fact that the expense attendant upon the discontinuance was borne by some one, and the city saved thereby from the burden.⁴⁴ Nor are pro-

belonging to a turnpike company, which, on being abandoned by the company, became a public road under the general laws of Pennsylvania: *Appeal of Commonwealth (Pa.)*, 9 Atl. 524.

³⁸ *Glasgow v. City of St. Louis*, 107 Mo. 198; s. c. 17 S. W. 743. See *Atkinson v. Wykoff*, 58 Mo. App. 86, cited in n. 25, *supra*.

³⁹ *Glasgow v. City of St. Louis*, *supra*.

⁴⁰ *Glasgow v. City of St. Louis*, *supra*.

⁴¹ *In re Vacation of Howard St.*, 142 Pa. St. 601; s. c. 21 Atl. 974, where a statute directing that damages awarded to property owners for the vacation of a street shall be assessed on the owners of properties benefited was held not to be uncon-

stitutional, so long as the basis of the assessment should be the special benefit, although the city was under no constitutional obligation to pay for such damages.

⁴² *City of East St. Louis v. O'Flynn*, 119 Ill. 200; s. c. 10 N. E. 395. See also, *Whitsett v. Union Depot & R. Co.*, 10 Colo. 243; s. c. 15 Pac. 339.

⁴³ *Pillsbury v. Mayor &c.*, 79 Maine 71; s. c. 8 Atl. 150.

⁴⁴ *Pillsbury v. Mayor &c.*, 79 Maine 71; s. c. 8 Atl. 150. See also, *Parks v. Mayor &c.*, 8 Pick. (Mass.) 218 (in which the court met a similar objection in these words: "If the public necessity and convenience required the alteration it is immaterial at whose expense it was made. A donation or contribution from individuals to relieve the burden upon

ceedings in relation to the discontinuance of ways affected on account of there being no determination in relation to damages and nothing done upon that subject.⁴⁵

§ 1285. Abandonment of streets.—There is such a thing as abandonment of public highways, including streets, but so far as streets are concerned abandonment is rare, and the non-user must be for a long period of time, the length of which probably varying in each case under the circumstances developed. It has been held, in order to constitute abandonment by non-user, the non-user must exist for twenty-one years.⁴⁶ The mere non-user of a street is not such abandonment as will destroy the right to open the street.⁴⁷ An abutting owner is not entitled to question the validity of the abandonment of a street when the ground of action is an alleged prescriptive easement to light and air, such easements being acquired only by covenant or special grant.⁴⁸ Acquiescence by the city in the use of land claimed as a street for any length of time will not be construed as an abandonment.⁴⁹ A street is not abandoned by the city leasing it or by delay in opening it after acceptance or dedication.⁵⁰ Nor is it abandoned by its being taxed and the taxes paid by another. The abutting property owners alone are entitled to the land where a street is abandoned.⁵¹

§ 1286. Discretion in improving unused streets.—A city, as against a lot owner, as trustee of the public use, has an undoubted right, whenever its authorities see fit, to open and fit for use and travel a street over which a public easement extends, to its entire width; and whether it will so open and improve it, or whether it should be so opened or improved, is a matter of discretion, to be determined by the public authorities to whom the charge and control of the public interests in and over such easements is committed. With this discretion of the authorities courts can not ordinarily interfere upon the complaint of a lot owner, so long as the easement continues to exist; and no mere non-user, however long continued, will operate as an

the city has no tendency to prove that the enlargement of the street was not a public benefit. It is not material at whose expense such are laid out or altered"); *Gay v. Bradstreet*, 49 Maine 580; *Coombs v. County Com'rs*, 68 Maine 484.

⁴⁵ *Inhabitants &c. v. County Com'rs*, 49 Maine 143; *Hicks v. Ward*, 69 Maine 436, 441.

⁴⁶ *Lake Shore &c. R. Co. v. City of Cleveland*, 1 Ohio N. P. 1; s. c. 32 Week. L. Bul. (Ohio) 206.

⁴⁷ *Chafee v. City of Aiken*, 57 S. C. 507; s. c. 35 S. E. 800. Cf. *Hewes v. Village of Crete*, 175 Ill. 348; s. c. 51 N. E. 696.

⁴⁸ *Trustees v. Shepard*, 22 R. I. 112; s. c. 46 Atl. 402.

⁴⁹ *City of Cleveland v. Cleveland &c. R. Co.*, 93 Fed. 113.

⁵⁰ *Beebe v. City of Little Rock*, 68 Ark. 39; s. c. 56 S. W. 791.

⁵¹ *Beebe v. City of Little Rock*, supra.

abandonment of the public right, even though until needed for a public use the authorities should treat the street as the property of the owner of the lot abutting. The public authorities will not be thereby estopped from removing obstructions therefrom, and opening and fitting it for public use to its entire width.⁵² The public use is the dominant interest, and the public authorities are the exclusive judges of when and to what extent the streets of a city shall be improved. Courts can interfere only in case of fraud or oppression constituting manifest abuse of discretion.⁵³

§ 1287. Use of streets for private purposes.—The exclusive power granted a common council by statute over the streets and alleys of a city does not extend to authorizing the construction for private purposes of a log way or elevated platform upon lands used in connection with a wharf so as to obstruct the use of a wharf. Such power of the council is to be exercised only for the benefit of the general public.⁵⁴ Streets, alleys and highways are held in trust for the public for public purposes and no other. A common council has no power or authority to authorize the permanent possession of a public highway, street or alley for private purposes.⁵⁵

⁵² *Chase v. City of Oshkosh*, 81 Wis. 313; s. c. 51 N. W. 560; *State v. Leaver*, 62 Wis. 387; s. c. 22 N. W. 576; *Reilly v. City of Racine*, 51 Wis. 526; s. c. 8 N. W. 417; *Childs v. Nelson*, 69 Wis. 125; s. c. 33 N. W. 587.

⁵³ *Benson v. Village of Waukesha*, 74 Wis. 31, 39; s. c. 41 N. W. 1017; *Wright v. Forrestal*, 65 Wis. 341; s. c. 27 N. W. 52; *City of Pontiac v. Carter*, 32 Mich. 164; *Brush v. City of Carbondale*, 78 Ill. 74.

⁵⁴ *Adams v. Ohio Falls Car Co.*, 131 Ind. 375; s. c. 31 N. E. 57.

⁵⁵ *State v. Berdetta*, 73 Ind. 185; *Sims v. City of Frankfort*, 79 Ind. 446; *Elliott Roads & Streets* (2d ed.), § 659. In *Pettis v. Johnson*, 56 Ind. 139, it was held that the city had no power to authorize a property owner to put up an iron stairway in an alley, although the grant was founded upon a valuable consideration, and in pursuance of a contract by which the city acquired the use of the rooms to which the stairway led,

for its council chamber and various city offices. In *Adams v. Ohio Falls Car Co.*, 131 Ind. 375; s. c. 31 N. E. 57, the court said:—"Where a street or other public way is used for public purposes, such as for street railways or other improved methods of travel, the common council have authority to permit permanent obstructions to be placed on the streets; but they have no such power when the purpose is strictly private, and the public in no manner served." This distinction is illustrated in *Mikesell v. Durkee*, 34 Kan. 509; s. c. 9 Pac. 278, where the court sustained the right of an abutting landowner to perpetually enjoin the construction of a railroad upon the street of a city by permission of the city authorities, not for the use of the public, but to transport grain between the elevator of the defendants and the railroad, the court holding the city had no right to grant such a permission.

§ 1288. **Powers not to be surrendered.**—The powers of a municipal corporation in respect to opening, improving and controlling its streets are held in trust for the public benefit, and can not be surrendered by contract to private persons, or to a corporation, by resolution of the common council, or in any other manner.⁵⁶ A city may by condemnation proceedings take the property of a railway corporation for street purposes, as well as that of any other person; for its property not actually in use, or absolutely necessary for the enjoyment of the franchise, is subject to condemnation for other purposes, the same as the property of an individual.⁵⁷

§ 1289. **Liability of municipality for defective streets.**—In most of the states municipalities are given extensive power over streets, either by charter or by general statute, and are held to corresponding duties and liabilities. In some jurisdictions, where municipalities have exclusive control over streets and have power to raise money to maintain and repair them, it is held to be an implied duty to keep them in a reasonably safe condition for public use. In other jurisdictions it is held that there is no liability on the part of the municipality for a failure to keep its streets in repair in the absence of an express statute on the subject.⁵⁸ The great weight of authority in this country and the general rule outside of New England, is that

⁵⁶ *City of Grand Rapids v. Grand Rapids &c. R. Co.*, 66 Mich. 42; s. c. 33 N. W. 15, in which case a contract which the railroad company claimed existed between the city and itself, that the city would not open a street across its track, was held to be void on the ground that the laying out and opening of streets by the common council of a city is the exercise of its legislative functions, and any contract made by the city with an individual or corporation, by which it agrees that it will not in the future open or extend a street in any particular place or part of the city, is an abnegation of its legislative power, unauthorized by its charter, and may be alike destructive of the convenience and prosperity of the municipality. See also, *Dillon Munic. Corp.* (4th ed.), § 716; *Davis v. Mayor &c.*, 14 N. Y. 506, 532; *People's Railroad v. Memphis Railroad*, 10 Wall. 38.

⁵⁷ *Matter of Opening of First St.*, 66 Mich. 42; s. c. sub nom. *City of Grand Rapids v. Grand Rapids &c. R. Co.*, 33 N. W. 15; *Enfield Toll Bridge Co. v. Hartford &c. R. Co.*, 17 Conn. 40; *Backus v. Lebanon*, 11 N. H. 19; *Peoria &c. R. Co. v. Peoria &c. R. Co.*, 66 Ill. 174; *Iron R. Co. v. City of Ironton*, 19 Ohio St. 299; *West River Bridge Co. v. Dix*, 6 How. 507; *Crosby v. Hanover*, 36 N. H. 404; *Richmond &c. R. Co. v. Louisa R. Co.*, 13 How. 71; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. The mortgagees of the franchises and easements of a railway company need not be made parties to a proceeding to condemn a right of way across its track for a street, if the track is not disturbed and the company is left in control of the road: *City of Grand Rapids v. Grand Rapids &c. R. Co.*, 58 Mich. 641; s. c. 26 N. W. 159.

⁵⁸ *Elliott Roads & Streets* (2d ed.), ch. 26.

a municipality which has exclusive control over its streets, and has the means of repairing and maintaining them, must keep its streets and alleys in reasonably safe and convenient condition, and for a failure to do so is rendered liable for an injury which results from such failure.⁵⁹ With some few exceptions it is also the general doctrine that lack of funds in the municipality is not a justification for a failure to repair, and is therefore not a defense to an action for personal injury.⁶⁰ Even if the indebtedness of the city at the time of the injury is up to the constitutional limit and no available funds are on hand, if the city has power to make repairs at the expense of abutting owners, the city is liable.⁶¹ It is a prerequisite to the right of recovery against a municipality that the plaintiff shall exercise ordinary care and prudence, and the degree of care and prudence has been defined to be such as the surrounding circumstances would demand and not such as men ordinarily exercise in their daily affairs.⁶²

§ 1290. Negligence of municipality in regard to.—As elsewhere seen, to entitle plaintiff to recover for a personal injury growing out of the negligence of the municipality, it is necessary that he shall be free from contributory negligence. We come now to a consideration of the negligence of the municipality, which, in law, is regarded as sufficient to entitle plaintiff to recover for personal injury sustained through the neglect of the former. Negligence never has been, and never can be, defined with any degree of certainty. The facts and circumstances are never the same in any two cases. A variance in the facts will call for a corresponding variance in the law, or its application, so that all that can be expected is a statement of illustrative cases which may, to some extent, illustrate the principles applicable and aid, as far as possible, in a proper understanding of the corresponding duties and liabilities in actions wherein it is sought to hold the municipality liable for personal injuries based on its alleged negligence. (a) *Ditches in the street*: Where the city permits ditches to be dug in the streets, and a person falls into them and is injured, the city is not released from liability because it did not construct the ditches.⁶³ (b) *Holes in street*: The city is liable to one

⁵⁹ Elliott Roads & Streets (2d ed.), § 611 et seq., and cases cited in notes.

⁶⁰ Lord v. City of Mobile, 113 Ala. 360; s. c. 21 So. 366; Mayor &c. v. Lewis, 92 Ala. 352; s. c. 9 So. 243; Albrittin v. Mayor &c., 60 Ala. 486; Evanston v. Gunn, 99 U. S. 660; Carney v. Village of Marseilles, 136 Ill. 401; s. c. 26 N. E. 491; 29 Am. St.

328; Village of Shelby v. Claggett, 46 Ohio St. 549; s. c. 22 N. E. 407; Monk v. Town of New Utrecht, 104 N. Y. 552; s. c. 11 N. E. 268.

⁶¹ City of New Albany v. McCulloch, 127 Ind. 500; s. c. 26 N. E. 1074.

⁶² Rhyner v. City of Menasha, 107 Wis. 201; s. c. 83 N. W. 303.

⁶³ Foy v. City of Winston, 126 N. C. 381; s. c. 35 S. E. 609.

injured by falling into an opening for a sewer connection which is negligently left uncovered by a licensed plumber,⁶⁴ and a hole in a sidewalk existing a year is negligence.⁶⁵ (c) *Injury at other than street crossing*: The city may be liable for an injury to a person at a place other than a crossing if the city is guilty of maintaining a place dangerous to pedestrians only.⁶⁶ When a street has been opened for public use the city is liable for its defective condition outside of so much of it as is ordinarily used by the public, although such part may have been left in its natural condition.⁶⁷ (d) *Liability for negligence of others and officers*: A city may be liable in the first instance for a defect in the street caused by the negligence of a street railway which occupies an undue and unnecessary portion of the street,⁶⁸ and for the negligence of its officers in building and repairing sidewalks.⁶⁹ (e) *Not relieved by delegation of work*: The liability of the city can not be absolved by delegating the work to a contractor under a contract which provides for the protection of the public.⁷⁰ (f) *Negligence generally*: The city may be liable for negligence in not keeping its streets in repair, and this notwithstanding illegality in the proceedings to open the street.⁷¹ Mowing weeds and filling holes in a street are a recognition of the street so as to render the city liable for personal injuries thereon, growing out of failure to repair.⁷² There is a joint liability where a street railway company has agreed to keep crossings in repair and has not done so with the city's knowledge.⁷³ A fireman in the employ of the city and using the streets in the discharge of his duties is entitled to the same degree of care in the main-

⁶⁴ *Monje v. City of Grand Rapids*, 122 Mich. 645; s. c. 81 N. W. 574. Cf. *Hayes v. City of West Bay City*, 91 Mich. 418; s. c. 51 N. W. 1067; *Joslyn v. City of Detroit*, 74 Mich. 459; s. c. 42 N. W. 50; *Gavett v. City of Jackson*, 109 Mich. 415; s. c. 67 N. W. 517.

⁶⁵ *Diamond v. City of Brooklyn*, 36 N. Y. S. 97; s. c. 91 Hun (N. Y.) 640.

⁶⁶ *City of Dallas v. Webb*, 22 Tex. Civ. App. 48; s. c. 54 S. W. 398.

⁶⁷ *Lamb v. City of Cedar Rapids*, 108 Iowa 629; s. c. 79 N. W. 366.

⁶⁸ *District of Columbia v. Sullivan*, 11 App. D. C. 533. Where an excavation is made under a sidewalk by a lot owner, with the knowledge of the city, but the city not participating in the excavation, and not for its benefit, the city is not liable as a joint tortfeasor, but is liable for

negligently permitting such dangerous place to remain unguarded: *Brown v. Town of Louisville*, 126 N. C. 701; s. c. 36 S. E. 166; *Town of Franklin v. House*, 104 Tenn. 1; s. c. 55 S. W. 153; *City of Atchison v. Acheson*, 9 Kan. App. 33; s. c. 57 Pac. 248.

⁶⁹ *Town of Boswell v. Wakley*, 149 Ind. 64; s. c. 48 N. E. 637; *Town of Williamsport v. Lisk*, 21 Ind. App. 414; s. c. 52 N. E. 628.

⁷⁰ *Scanlan v. City of Watertown*, 43 N. Y. S. 618; s. c. 14 App. Div. (N. Y.) 1.

⁷¹ *Faake v. City of Seattle*, 16 Wash. 90; s. c. 47 Pac. 220.

⁷² *City of Henderson v. White*, 20 Ky. L. 1525; s. c. 49 S. W. 764.

⁷³ *Union Street R. Co. v. Stone*, 54 Kan. 83; s. c. 37 Pac. 1012.

tenance of the streets as any other person.⁷⁴ (g) *Negligence is a question of fact for the jury*: What is negligence on the part of the municipality in matters of personal injury growing out of defects in the street, is a question of fact to be left to the jury.⁷⁵

§ 1291. **Contributory negligence.**—In determining the liability of the municipality for a personal injury resulting from the defective condition of its streets the law exacts from the person alleging the injury freedom on his part from what is termed contributory negligence. In short, notwithstanding the condition of the street or sidewalk, he must exercise reasonable care and precaution to avoid injury. Even though a street or sidewalk may be out of repair, or even may be dangerous, a person is not permitted to recklessly subject himself to the danger and expect to recover for an injury received.⁷⁶ It is negligence for a blind man to use the streets without an attendant or unless he constantly feels his way with his staff.⁷⁷ A blind person, who was on the street unattended, and fell in a ditch which he knew of, must affirmatively show that he used due care.⁷⁸ A person in a diseased condition is not required to exercise a greater degree of care than a well person unless the disease and the danger have some rela-

⁷⁴ *City of Kansas City v. McDonald*, 60 Kan. 481; s. c. 57 Pac. 123. A sidewalk thirty inches above ground is not negligence as a matter of law: *City of Sumner v. Scaggs*, 52 Ill. App. 551. A slope of 1¾ inches to a foot in an apron reaching from the curb to the street and without cleats or railings is not defective as a matter of law: *Morrison v. City of Madison*, 96 Wis. 452; s. c. 71 N. W. 882.

⁷⁵ *Johnson v. City of Worcester*, 172 Mass. 122; s. c. 51 N. E. 519; *Wells v. City of Brooklyn*, 38 N. Y. S. 309; s. c. 16 Misc. (N. Y.) 314; *Akers v. Mayor &c.*, 35 N. Y. S. 1099; s. c. 14 Misc. (N. Y.) 524; *Cummings v. Village of New Rochelle*, 56 N. Y. S. 701; s. c. 38 App. Div. (N. Y.) 583. For cases in which city held negligent, see *Lane v. City of Syracuse*, 42 N. Y. S. 219; s. c. 76 N. Y. St. 219; *City of Natchez v. Shields*, 74 Miss. 871; s. c. 21 So. 797; *Patterson v. City of Austin*, 15 Tex. Civ. App. 201; s. c. 39 S. W.

976. In *Morrison v. City of Syracuse*, 65 N. Y. S. 939; s. c. 53 App. Div. (N. Y.) 490, the evidence was held not sufficient to establish the negligence of defendant. And see *Kaseman v. Borough of Sunbury*, 197 Pa. St. 162; s. c. 46 Atl. 1032; *City of Columbus v. Ogletree*, 96 Ga. 177; s. c. 22 S. E. 709. An ordinance requiring teams to be driven on the right hand side of the street is not of itself evidence of negligence, but may be considered with all the other evidence in determining negligence: *Foote v. American Product Co.*, 195 Pa. St. 190; s. c. 45 Atl. 934.

⁷⁶ A person guilty of contributory negligence can not recover: *Church v. President &c.*, 111 Mich. 298; s. c. 69 N. W. 651; *Hudson v. City of Little Falls*, 68 Minn. 463; s. c. 71 N. W. 678; *Pittman v. City of El Reno*, 4 Okl. 638; s. c. 46 Pac. 495.

⁷⁷ *Foy v. City of Winston*, 126 N. C. 381; s. c. 35 S. E. 609.

⁷⁸ *Stewart v. City of Nashville*, 96 Tenn. 50; s. c. 33 S. W. 613.

tion to each other.⁷⁹ A person passing along a street at night has a right to assume that it is safe and is not guilty of contributory negligence if he does not search for holes.⁸⁰

§ 1292. **Knowledge of defects—Effect of.**—The streets and sidewalks are maintained for use, and mere knowledge of defects therein, or even dangerous condition, will not of itself constitute contributory negligence in the use by those entitled to use them for ordinary purposes. The fact that plaintiff had knowledge of the dangerous condition of a street will not prevent his recovery if he used reasonable diligence to prevent injury;⁸¹ hence traveling on a sidewalk known to be out of repair is not negligence of itself.⁸² It may be evidence of negligence to use a street in a dangerous condition, but it is not negligence as a matter of law.⁸³ Use of a street with knowledge of its unsafe condition is not contributory negligence where care is used proportionate to the known danger,⁸⁴ but one knowing the dangerous condition of an apron connecting a sidewalk and street, who could easily have gone around it, is guilty of contributory negligence.⁸⁵ The care which a person is required to exercise is not capable of measurement by any known rules, and the only requirement is that it shall be reasonable under all the surrounding circumstances.⁸⁶ Knowledge

⁷⁹ *Edwards v. Common Council &c.*, 102 Mich. 153; s. c. 60 N. W. 454.

⁸⁰ *Robinson v. Mayor &c.*, 8 Houst. (Del.) 409; s. c. 32 Atl. 347.

⁸¹ Where plaintiff knew of no defect in the street and there was nothing to indicate it in the appearance or indicating danger, and the public frequently used the street where the injury occurred, the verdict of the jury will not be set aside where a finding is had in behalf of plaintiff.

⁸² *City of Kokomo v. Boring*, 24 Ind. App. 552; s. c. 57 N. E. 202.

⁸³ *Giffen v. City of Lewiston* (Idaho), 55 Pac. 545.

⁸⁴ *Village of Cullom v. Justice*, 161 Ill. 372; s. c. 43 N. E. 1098.

⁸⁵ *City of Chicago v. Fitzgerald*, 75 Ill. App. 174; *City of East St. Louis v. Donahue*, 77 Ill. App. 574; *Citizens' Street R. Co. v. Ballard*, 22 Ind. App. 151; s. c. 52 N. E. 729; *Marshall v. City of Belle Plaine*, 106 Iowa 508; s. c. 76 N. W. 797. One

knowing of the defective condition of the sidewalk must use more care than if he did not know of its condition: *City of Bedford v. Neal*, 143 Ind. 425; s. c. 41 N. E. 1029. Contributory negligence as a matter of law is not only that plaintiff knew of its condition and the impropriety of passing over it, but there was another walk that might have been taken: *Barnes v. Town of Marcus*, 96 Iowa 675; s. c. 65 N. W. 984. A person falling into an excavation in a sidewalk of which he has no knowledge, though on a dark night, may recover: *Keyes v. City of Cedar Falls*, 107 Iowa 509; s. c. 78 N. W. 227.

⁸⁶ Knowledge of defect does not require the exercise of extraordinary care, but only such care as would have been exercised by a man of ordinary prudence under the same circumstances: *Koch v. City of Ashland*, 88 Wis. 603; s. c. 60 N. W. 990. Knowledge of defect does not defeat

can not be inferred, as a matter of law, of a particular defect in a sidewalk not discoverable by casual observation.⁸⁷

§ 1293. **Illustrations of contributory negligence.**—Where an injury resulted from driving against a heap of snow and ice that had been in the street for ten days and was visible for a long distance and located at a railway crossing where more than usual care is to be observed, a verdict for the city will not be disturbed.⁸⁸ Where the plaintiff was injured by an obstruction in a street which he, in the prosecution of his business as street-car conductor, was passing many times a day each way, no recovery could be had, on the ground of contributory negligence.⁸⁹ Where the plaintiff knows of obstructions in the street and drives in a trot on a dark night on such street, at a place where guards to the excavations are usually absent, he is guilty of contributory negligence and can not recover.⁹⁰ Where plaintiff was injured by driving into a hole in the street, which he could have seen and avoided by the exercise of reasonable diligence, he is not entitled to recover.⁹¹ One knowing of the bad condition of a walk and who, by stepping a few feet to one side, can avoid danger, must do so or be guilty of contributory negligence.⁹² It has been held that the fact that a person attempted to cross a sidewalk which he knew was unsafe, even though he did so in a prudent and careful manner, will preclude his recovery.⁹³ This is, however, an unwarranted extension

the right of recovery if plaintiff used reasonable care: *Samples v. City of Atlanta*, 95 Ga. 110; s. c. 22 S. E. 135. It is not conclusive evidence of contributory negligence: *Sias v. Village of Reed City*, 103 Mich. 312; s. c. 61 N. W. 502; *City of Springfield v. Rosenmeyer*, 52 Ill. App. 301; *City of Mt. Carmel v. Blackburn*, 53 Ill. App. 658. Unless the place is so dangerous that a man of prudence would not venture on it: *Germaine v. City of Muskegon*, 105 Mich. 213; s. c. 63 N. W. 78. But knowledge of the dangerous condition does not necessarily bar recovery: *Manross v. City of Oil City*, 178 Pa. St. 276; s. c. 35 Atl. 959; *Culverson v. City of Marysville*, 67 Mo. App. 343; *Schwingschlegl v. City of Monroe*, 113 Mich. 683; s. c. 72 N. W. 7; *Bothell v. City of Seattle*, 17 Wash. 263; s. c. 49 Pac. 491; *Smith v. City of Spokane*, 16 Wash. 403;

s. c. 47 Pac. 888; *Carstesen v. Town of Stratford*, 67 Conn. 428; s. c. 35 Atl. 276.

⁸⁷ *Cox v. City of Des Moines*, 111 Iowa 646; s. c. 82 N. W. 993. And so when a person is injured by a person slipping on a sidewalk which he knew was in a dangerous condition he is not guilty of contributory negligence: *Beck v. City of Buffalo*, 63 N. Y. S. 499; s. c. 50 App. Div. (N. Y.) 621.

⁸⁸ *Hursen v. City of Chicago*, 85 Ill. App. 298.

⁸⁹ *District of Columbia v. Ashton*, 14 App. D. C. 571.

⁹⁰ *Morgan v. Village of Penn Yan*, 59 N. Y. S. 504; s. c. 42 App. Div. (N. Y.) 582.

⁹¹ *Pierce v. Mayor &c.*, 2 Marv. (Del.) 306; s. c. 43 Atl. 162.

⁹² *Irion v. City of Saginaw*, 120 Mich. 295; s. c. 79 N. W. 572.

⁹³ *Town of Boswell v. Wakley*, 148

of the doctrine of contributory negligence. It is undoubtedly true that where a woman was injured at a place where she had previously received a fall, and there was nothing to divert the attention and the defect could be readily seen, no recovery can be had.⁹⁴ An unmanageable team that had run a mile, falling off a bridge without a railing, does not make city liable.⁹⁵ A person crossing a street elsewhere than at a crossing on a dark night is negligent per se.⁹⁶

§ 1294. What is not contributory negligence—Illustrations.—

Where a person was injured by the overturning of a wagon by driving on a pile of sand in the middle of the street where there was no warning displayed, there was no contributory negligence.⁹⁷ Although a person is thoroughly familiar with the dangerous condition of a sidewalk by reason of its frequent use, yet if, through forgetfulness, he walks into a hole in such walk and is thereby injured, it is not contributory negligence.⁹⁸ But he will be chargeable with knowledge of the defects in the gratings which he might have known by due diligence.⁹⁹ It is not negligence as a matter of law for a person to use a public street or highway that is out of repair.¹⁰⁰ It has been held, however, that one familiar with the dangerous condition of a sidewalk will not be permitted to act on the ordinary presumption that is in a safe condition. Where an injury results from a horse becoming frightened and running into an obstruction, and it appears that the horse was gentle and the cause of its fright unknown, plaintiff will not be presumed to have been negligent.¹⁰¹ And so the city is liable to a person injured by a defective sidewalk, although by charter the owner is re-

Ind. 64; s. c. 48 N. E. 637; *Rogers v. City of Bloomington*, 22 Ind. App. 601; s. c. 52 N. E. 242. But see *Town of Williamsport v. Lisk*, 21 Ind. App. 414; s. c. 52 N. E. 628.

⁹⁴ *Barce v. City of Shenandoah*, 106 Iowa 426; s. c. 76 N. W. 747.

⁹⁵ *Teater v. City of Seattle*, 10 Wash. 327; s. c. 38 Pac. 1006.

⁹⁶ *Baker v. City of Grand Rapids*, 111 Mich. 447; s. c. 69 N. W. 740. The city is not liable for an injury to a person caused by coasting on the public streets: *Mayor &c. v. Vandegrift*, 1 Marv. (Del.) 5; s. c. 29 Atl. 1047. Cf. *Smith v. City of Jackson*, 106 Mich. 136; s. c. 63 N. W. 982. Contributory negligence on the part of plaintiff will not be inferred from knowledge of the bad

condition of the sidewalk at which the injury occurred: *City of Ottawa v. Black*, 10 Kan. App. 439; s. c. 61 Pac. 985.

⁹⁷ *Rommeny v. City of New York*, 63 N. Y. S. 186; s. c. 49 App. Div. 64.

⁹⁸ *Neal v. Town of Marion*, 126 N. C. 412; s. c. 35 S. E. 812. Cf. *Russell v. Town of Monroe*, 116 N. C. 720; s. c. 21 S. E. 550; *Brucker v. Town of Covington*, 69 Ind. 33; *Walker v. Town of Reidsville*, 96 N. C. 382; s. c. 2 S. E. 74; *Bunch v. Town of Edenton*, 90 N. C. 431.

⁹⁹ *Harvey v. City of Clarinda*, 111 Iowa 528; s. c. 82 N. W. 994.

¹⁰⁰ *Cowie v. City of Seattle*, 22 Wash. 659; s. c. 62 Pac. 121.

¹⁰¹ *Dillon v. City of Raleigh*, 124 N. C. 184; s. c. 32 S. E. 675.

quired to construct and repair such walk, and the city may itself make repairs only after notice to and failure by the owner.¹⁰² Where a person, while in the exercise of due care, is injured by falling over an embankment in the street in front of his house, his knowledge that the street was torn up and in a dangerous condition does not, as a matter of law, make him guilty of contributory negligence.¹⁰³ His knowledge of the dangerous condition does not prevent recovery, if he uses ordinary and reasonable care to avoid injury.¹⁰⁴ Knowledge does not require him to abandon the street. Where there was a hole in the sidewalk which was obscured by persons walking in front of plaintiff, but which was known to her, and an injury results from falling into it, it can not be said as a matter of law that plaintiff was guilty of contributory negligence.¹⁰⁵ A stranger slowly going over a cross walk which he has only crossed once before, is not guilty of negligence in stepping into a channel worn in the pavement which he did not know of, although in the daytime and the channel was somewhat obvious.¹⁰⁶ A person who passes across the street to avoid a known danger and there steps into a hole not known and is injured, is not, as a matter of law, guilty of contributory negligence.¹⁰⁷ A man in walking over a dangerous sidewalk is not necessarily guilty of contributory negligence.¹⁰⁸ That plaintiff was not looking at the sidewalk when the injury occurred is not negligence such as will bar recovery,¹⁰⁹ nor does the fact that the defect was visible constitute such negligence.¹¹⁰ The burden of proof to establish contributory negligence is on the defendant.¹¹¹

¹⁰² *City of Dallas v. Jones* (Tex. Civ. App.), 54 S. W. 606.

¹⁰³ *Dwyer v. Salt Lake City*, 19 Utah 521; s. c. 57 Pac. 535.

¹⁰⁴ *City of Streator v. Chrisman*, 82 Ill. App. 24; *City of Huntington v. First*, 22 Ind. App. 66; s. c. 53 N. E. 246.

¹⁰⁵ *Lyons v. City of Red Wing*, 76 Minn. 20; s. c. 78 N. W. 868.

¹⁰⁶ *Richardson v. City of Syracuse*, 58 N. Y. S. 487; s. c. 41 App. Div. (N. Y.) 118; *Cummings v. Village of New Rochelle*, 56 N. Y. S. 701. What is not contributory negligence, —see *Ouverson v. City of Grafton*, 5 N. D. 281; s. c. 65 N. W. 676; *City of Guthrie v. Swan*, 3 Okl. 116; s. c. 41 Pac. 84; *City of Oklahoma City v. Welsh*, 3 Okl. 288; s. c. 41 Pac. 598; *Lorence v. City of Ellensburg*, 13

Wash. 341; s. c. 43 Pac. 20; *City of Decatur v. Stoops*, 21 Ind. App. 397; s. c. 52 N. E. 623.

¹⁰⁷ *Smith v. City of Newcastle*, 178 Pa. St. 298; s. c. 37 Atl. 195.

¹⁰⁸ *Wiggin v. City of St. Louis*, 135 Mo. 558; s. c. 37 S. W. 528. Facts not constituting contributory negligence,—see *City of Huntington v. McClurg*, 22 Ind. App. 261; s. c. 53 N. E. 658.

¹⁰⁹ *City of Nokomis v. Salter*, 61 Ill. App. 150.

¹¹⁰ *City of Streator v. Hamilton*, 61 Ill. App. 509.

¹¹¹ *Russell v. Town of Monroe*, 116 N. C. 720; s. c. 21 S. E. 550. In some jurisdictions it is incumbent on the plaintiff to show that he was himself free from contributory negligence. See *City of Lincoln v.*

§ 1295. **Contributory negligence a question for the jury.**—Where the danger of a route taken is not so obvious as to deter the general public and ordinarily careful people from using it, and the plaintiff had knowledge of a safer route, it is for the jury to say whether contributory negligence existed or not.¹¹² Contributory negligence, under circumstances existing at the time of an injury, is a question for the jury.¹¹³

§ 1296. **Negligence must be proximate cause of injury.**—The mere fact of negligence on the part of plaintiff as a contributing cause, or negligence on the part of the municipality, does not necessarily prevent a recovery on the part of plaintiff or establish a liability on the part of the municipality. The negligence must be the proximate cause of the injury following. It is not enough to show fault on the part of plaintiff. It must be shown that his negligence was the proximate cause of the injury;¹¹⁴ nor is it enough to show negligence on the part of the municipality unless such negligence was the proximate cause of the injury. A person is not debarred from recovering for an injury from an obstruction in the street although at the time he was violating an ordinance, unless the injury was a proximate result of the violation of such ordinance.¹¹⁵ Where an obstruction exists in a

Walker, 18 Neb. 244; s. c. 20 N. W. 113, in 5 Eng. & Am. Corp. Cas. 610, 615, where the subject is fully considered and the decisions analyzed. On the general subject of contributory negligence see 1 Thompson Neg. (2d ed.), chs. 7-14; Beach Contributory Negligence, ch. 2.

¹¹² Mellor v. Burgess &c., 191 Pa. St. 562; s. c. 43 Atl. 365.

¹¹³ Flynn v. Inhabitants &c., 173 Mass. 108; s. c. 53 N. E. 147; Pitman v. City of El Reno, 2 Okl. 414; s. c. 37 Pac. 851; Briggs v. Borough of West Newton, 164 Pa. St. 341; s. c. 30 Atl. 204; Mackie v. City of West Bay City, 106 Mich. 242; s. c. 64 N. W. 25; Sutton v. City of Snohomish, 11 Wash. 24; s. c. 39 Pac. 273; Allen v. Borough of Du Bois, 181 Pa. St. 184; s. c. 37 Atl. 195; City of Omaha v. Richards, 49 Neb. 244; s. c. 68 N. W. 528; Scott v. City of New Orleans, 75 Fed. 373; Robinson v. City of Cedar Rapids, 100 Iowa 662; s. c. 69 N. W. 1064; Calkins v. City of Springfield, 167 Mass.

68; s. c. 44 N. E. 1055. An instruction which takes from the jury the question of contributory negligence is error: Giffen v. City of Lewiston (Idaho), 55 Pac. 545. Recovery may be had for an injury caused partly from a defect in the street and partly from an accident not connected with the defect and for which neither the plaintiff nor city is responsible, but where plaintiff is not guilty of contributory negligence: Vogel v. City of West Plains, 73 Mo. App. 588. It is negligence per se to violate a city ordinance: Skinner v. Stifel, 55 Mo. App. 9. A rule of a fire department requiring its members to drive in the middle of a street does not charge a driver of the department with greater care than in the absence of the rule: City of Kansas City v. McDonald, 60 Kan. 481; s. c. 57 Pac. 123.

¹¹⁴ Nave v. Flack, 90 Ind. 205.

¹¹⁵ City of Atchison v. Acheson, 9 Kan. App. 33; s. c. 57 Pac. 248.

street and plaintiff's horse, from fright, runs into the obstruction and plaintiff is injured, without negligence on his part, the obstruction and not the running is the proximate cause.¹¹⁶ When a horse by reason of fright, disease or viciousness, becomes uncontrollable by the driver, and in this condition comes upon a defect in the highway, or a place dangerous for want of a railing, from which an injury occurs, the municipality is not liable unless it appears that it would have occurred if the horse had not been so uncontrollable.¹¹⁷ But this is not the rule where the horse merely shies, or starts, or is momentarily not controlled by the driver.¹¹⁸ Where there are two distinct causes operating at the same time to produce a given result, which might be produced by either, they are concurrent causes; but if two distinct causes are successive and unrelated in their operation, one is proximate and the other remote.¹¹⁹ Where a horse, which was high-blooded, had previously made several attempts to run away, and on the day of the injury had been driven twenty-six miles in six hours, got scared in the street at the scraping noise of the cart on street-car tracks, which were from two to four inches above the street level, in violation of an ordinance, it was held that the horse was the proximate cause of an injury caused by his running away.¹²⁰ Where a patrol wire belonging to the city broke and fell across a trolley wire but did not reach the street and was pulled down by the street car employes, and it came in contact with a person and killed him, the breaking of the wire in the first instance is the proximate cause of the injury.¹²¹ If the injury would not have occurred but for the defect, it is proximate cause.¹²² Where the approach to a railroad crossing is narrow, the

¹¹⁶ *Dillon v. City of Raleigh*, 124 N. C. 184; s. c. 32 S. E. 548.

¹¹⁷ *Titus v. Inhabitants &c.*, 97 Mass. 258; *Davis v. Inhabitants &c.*, 4 Allen (Mass.) 557. And so when a horse threw his tail over the rein and became unmanageable: *Fogg v. Inhabitants of Nahant*, 98 Mass. 578. To the same effect are *Schaeffer v. Jackson Tp.*, 150 Pa. St. 145; s. c. 24 Atl. 629; *Chartiers Tp. v. Phillips*, 122 Pa. St. 601; s. c. 16 Atl. 26; *Herr v. City of Lebanon*, 149 Pa. St. 222; s. c. 24 Atl. 207; *Jackson v. Town of Bellevieu*, 30 Wis. 250; *Moore v. Inhabitants &c.*, 32 Maine 46; *Coombs v. Inhabitants &c.*, 38 Maine 204; *Anderson v. City of Bath*, 42 Maine 346; *Moulton v. Inhabitants*

&c., 51 Maine 127. The rule can not be said to be uniform however: *Foley v. East Flamborough Tp.*, 29 Ont. 139; *Village of Bureau Junction v. Long*, 56 Ill. App. 458; *Schaeffer v. Jackson Tp.*, supra.

¹¹⁸ *Stone v. Inhabitants &c.*, 100 Mass. 49. See *City of Peoria v. Gerber*, 68 Ill. App. 255.

¹¹⁹ *Herr v. City of Lebanon*, 149 Pa. St. 222; s. c. 24 Atl. 207.

¹²⁰ *Mayor &c. v. Dykes*, 103 Ga. 847; s. c. 31 S. E. 443.

¹²¹ *Twist v. City of Rochester*, 55 N. Y. S. 850; s. c. 37 App. Div. (N. Y.) 307.

¹²² *Union St. R. Co. v. Stone*, 54 Kan. 83; s. c. 37 Pac. 1012.

banks precipitate, and no railings are provided, the negligence of the city may be the proximate cause of an injury although the fright of the plaintiff's horse may have operated to produce the injury.¹²³

§ 1297. Notice of defective condition of street or sidewalk.—The settled law of this country is that to render a municipality liable for the defective condition of its streets and sidewalks whereby an injury ensues, it must have notice of the defective or dangerous condition. This is the general rule on the subject.¹²⁴ The city is liable for the defective condition of its sidewalks, if it knows through its proper officers, or might have known by ordinary diligence that the walk was out of repair or in a dangerous condition, and a reasonably sufficient time has elapsed to make necessary repairs.¹²⁵ A town is not liable for an injury occasioned by a person falling into a hole left uncovered by a telephone company in placing its poles in the street by authority of the town, where it has no notice of the negligence of the company.¹²⁶

§ 1298. The notice may be constructive.—There must be either actual notice, or such time elapse that with reasonable care the defect might have been discovered.¹²⁷ In the absence of actual notice, the defect must have existed for such a length of time that the city is presumed to have notice.¹²⁸ Constructive notice is where defects have existed for such length of time that the city, by exercise of ordinary

¹²³ *Harvey v. City of Clarinda*, 111 Iowa 528; s. c. 82 N. W. 994. Cf. *Hungerman v. City of Wheeling*, 46 W. Va. 761; s. c. 34 S. E. 778; *City of Atchison v. Acheson*, 9 Kan. App. 33; s. c. 57 Pac. 248. Proximate cause is a question for the jury: *Cleveland v. City of Bangor*, 87 Maine 259; s. c. 32 Atl. 892. Cf. *Western Sav. &c. Soc. v. City of Philadelphia*, 31 Pa. St. 175; *City Council &c. v. Hudson*, 88 Ga. 599; s. c. 15 S. E. 678; *The F. C. Latrobe*, 28 Fed. 377; *The Giovanni v. City of Philadelphia*, 59 Fed. 303; *City of Philadelphia v. Gavagnin*, 62 Fed. 617; *Sherlock v. Alling*, 93 U. S. 99; *City of Denver v. Johnson*, 8 Colo. App. 384; s. c. 46 Pac. 621; *Vogelgesang v. City of St. Louis*, 139 Mo. 127; s. c. 40 S. W. 653.

¹²⁴ *Davis v. City of Omaha*, 47 Neb. 836; s. c. 66 N. W. 859; *Mayor &c. v.*

Boone, 93 Ga. 662; s. c. 20 S. E. 46; *City of Denver v. Saulcey*, 5 Colo. App. 420; s. c. 38 Pac. 1098; *Cunningham v. City of Denver*, 23 Colo. 18; s. c. 45 Pac. 356.

¹²⁵ *Reid v. City of Chicago*, 83 Ill. App. 554; *Ryan v. City of Chicago*, 79 Ill. App. 28; *Burleson v. Village of Reading*, 110 Mich. 512; s. c. 68 N. W. 294.

¹²⁶ *Franklin v. House*, 104 Tenn. 1; s. c. 55 S. W. 153.

¹²⁷ *Aslen v. Village of Charlotte*, 54 N. Y. S. 754; *Williams v. City of Brooklyn*, 53 N. Y. S. 1007; *City of Joliet v. Johnson*, 177 Ill. 178; s. c. 52 N. E. 498; *City of Pleasanton v. Rhine*, 8 Kan. App. 452; s. c. 54 Pac. 572.

¹²⁸ *Village of Lockport v. Richards*, 81 Ill. App. 533; *City of Fairfield v. Hornick*, 53 Ill. App. 558.

care, could have discovered it. It is constructive notice of the defective condition of a sidewalk to show that the defect was of such character that the municipal authorities, in the exercise of reasonable diligence, could have ascertained its existence and repaired it.¹²⁹ And so the city is chargeable with notice of a defect in a sidewalk which has existed several months, and could have been seen for a distance of two rods.¹³⁰ And notice will be presumed if the sidewalk has remained in a dangerous condition for such a period that by ordinary diligence the municipal authorities could have discovered its condition.¹³¹ But a defect which is not known, and is not so apparent as to attract attention, will not impute notice.¹³²

§ 1299. To whom notice should be given.—It is an important element in the matter of notice to determine to whom the notice shall be given, or notice to what officers and agents shall be deemed sufficient, in order to charge the municipality. It would seem to be sufficient if the notice of the defect or dangerous condition is given to, or is within the knowledge of, a municipal officer or agent who is charged with the duty of looking after the condition and repairs of the streets and sidewalks. But there may be no one charged specifically with this duty. It has been held that notice to the city marshal, charged with the duty of looking after the condition of the streets, is sufficient.¹³³ Where policemen are charged with the duty of examining and reporting the condition of sidewalks for the benefit of the superintendent of the streets, then notice to a policeman is notice to the city.¹³⁴ But notice to a policeman is not notice to the city unless it is the duty of the policeman to look after the condition of the

¹²⁹ *City of Streator v. Chrisman*, 182 Ill. 215; s. c. 54 N. E. 997; *District of Columbia v. Payne*, 13 App. D. C. 500.

¹³⁰ *Urtel v. City of Flint*, 122 Mich. 65; s. c. 80 N. W. 991.

¹³¹ *City of Lincoln v. Pirner*, 59 Neb. 634; s. c. 81 N. W. 846. If the dangerous condition of a street crossing has existed long enough to raise a presumption of notice the city will be liable: *Piper v. City of Spokane*, 22 Wash. 147; s. c. 60 Pac. 138; *City of Joliet v. Johnson*, 177 Ill. 178; s. c. 52 N. E. 498; *Village of Mansfield v. Moore*, 124 Ill. 133; s. c. 16 N. E. 246; *City of Sterling v. Merrill*, 124 Ill. 522; s. c. 17 N. E. 6; *Mayor &c. v. Starr*, 112 Ala. 98;

s. c. 20 So. 424; *Hunt v. City of Dubuque*, 96 Iowa 314; s. c. 65 N. W. 319.

¹³² *Beekman v. Mayor &c.*, 41 N. Y. S. 990; s. c. 18 Misc. (N. Y.) 509. City not liable for limb falling from tree where condition not noticeable to city officials: *Jones v. City of Greensboro*, 124 N. C. 310; s. c. 32 S. E. 675.

¹³³ *City of Erie v. Phelps*, 56 Kan. 135; s. c. 42 Pac. 336.

¹³⁴ *City of Joliet v. Looney*, 159 Ill. 471; s. c. 42 N. E. 854. Notice to officer charged with keeping street in order is sufficient: *Saylor v. City of Montesano*, 11 Wash. 328; s. c. 39 Pac. 653.

streets.¹³⁵ But notice to an alderman is,¹³⁶ or to the city engineer and street commissioner.¹³⁷ Notice to the chief inspector of sidewalks and repairs, who is a subordinate of the superintendent of streets, is not sufficient,¹³⁸ nor is notice to a foreman under road commissioners sufficient, though the defect was through his negligence.¹³⁹

§ 1300. **When notice is not required.**—Notice of a defect in, or a dangerous condition of the sidewalk is not required where the condition is the result of an excavation or other work of the city,¹⁴⁰ and is not necessary where by contract the city had allowed dangerous ditches to be dug and left unguarded,¹⁴¹ or where officers of the city create the obstruction.¹⁴² Notice of a defect in the street caused by excavations made by a water company, under an ordinance of the city granting permission, which requires the company to restore the street in as good condition as before, and in case of a default after notice the city should put the street in order at the company's expense, need not be given.¹⁴³ Notice is not required where the city is charged with notice that the material is insufficient to make a safe walk.¹⁴⁴

¹³⁵ *City of Columbus v. Ogletree*, 96 Ga. 177; s. c. 22 S. E. 709. Notice to a policeman is not notice to the city of the dangerous condition of a sidewalk in the absence of evidence that the policeman was charged, by the proper department, with the duty of reporting defects: *Reid v. City of Chicago*, 83 Ill. App. 554.

¹³⁶ *Owen v. City of Ft. Dodge*, 98 Iowa 281; s. c. 67 N. W. 281; *Cropper v. City of Mexico*, 62 Mo. App. 385. But see *Frazier v. Butler Borough*, 172 Pa. St. 407; s. c. 33 Atl. 691. Notice to alderman who makes an excavation for his own purposes is notice to the city: *Keyes v. City of Cedar Falls*, 107 Iowa 509; s. c. 78 N. W. 227. The existence for months of a defect and common knowledge of the marshal and council is sufficient: *City of Huntingburgh v. First*, 22 Ind. App. 66; s. c. 53 N. E. 246.

¹³⁷ *Patterson v. City of Austin* (Tex. Civ. App.), 29 S. W. 1139. An examination of a defective walk by street commissioner is notice of a defect then existing: *Fee v. Columbus*

Borough, 168 Pa. St. 382; s. c. 31 Atl. 1076.

¹³⁸ *Sprague v. City of Rochester*, 34 N. Y. S. 1126; s. c. 88 Hun (N. Y.) 613.

¹³⁹ *Rich v. City of Rockland*, 87 Maine 188; s. c. 32 Atl. 872. An excavation open for two months which the mayor and one councilman were near frequently is sufficient notice where the council originally gave permission to make it: *Sutton v. City of Snohomish*, 11 Wash. 24; s. c. 39 Pac. 273.

¹⁴⁰ *Akers v. Mayor &c.*, 35 N. Y. S. 1099; s. c. 14 Misc. (N. Y.) 524.

¹⁴¹ *City of Oklahoma City v. Welsh*, 3 Okl. 288; s. c. 41 Pac. 598.

¹⁴² *Stedman v. City of Rome*, 34 N. Y. S. 737; s. c. 88 Hun (N. Y.) 279.

¹⁴³ *City of Denver v. Aaron*, 6 Colo. App. 232; s. c. 40 Pac. 587.

¹⁴⁴ *City of Paxton v. Frew*, 52 Ill. App. 393. Where a defect arises from construction or impairment, which is brought to the notice of the city, a neglect to remedy the defect renders the city liable for an injury: *City of Dayton v. Taylor*, 62 Ohio St. 11; s. c. 56 N. E. 480. No-

§ 1301. **Notice required by statute or charter.**—In some states notice is made imperative by statute or charter. Where the law requires twenty-four hours actual notice of a defect in a street to render it liable for an injury, a heavy fall of snow which drifts generally, but blows off in spots, is not such notice. Personal notice to the proper officers is required.¹⁴⁵

§ 1302. **Notice inferred from lapse of time.**—An instruction that the city was liable for an accident if the defect had existed long enough for the city to have known of it by the exercise of the utmost diligence, exacts too high a degree of care.¹⁴⁶ Omission of duty is not to be inferred from a failure of the agents and servants to search for defects in the sidewalk when no reason exists for supposing such defects to exist.¹⁴⁷ A patent defect which has existed so long that notice may be inferred renders the city liable.¹⁴⁸ In the absence of evidence of how long a defect had existed in a street, or evidence that the city in the exercise of reasonable care and diligence might have known of the defect and remedied it, recovery can not be had for a personal injury.¹⁴⁹ There is, and can be, no fixed time from which notice may be inferred. A reasonable time in one instance may not be in another.¹⁵⁰

tice that trap-doors in a sidewalk used in the manner they are built to be used and ordinarily are used, is sufficient without actual notice that the doors were being used when the injury occurred: *Sweeney v. City of Butte*, 15 Mont. 274; s. c. 39 Pac. 286.

¹⁴⁵ *Gurney v. Inhabitants &c.*, 93 Maine 360; s. c. 45 Atl. 310. Cf. *Smyth v. City of Bangor*, 72 Maine 249; *Pendleton v. Inhabitants &c.*, 80 Maine 598; s. c. 16 Atl. 253; *Hutchinson v. City of Ypsilanti*, 103 Mich. 12; s. c. 61 N. W. 279; *Baker v. City of Grand Rapids*, 111 Mich. 447; s. c. 69 N. W. 740; *Southwell v. City of Detroit*, 74 Mich. 438; s. c. 42 N. W. 118; *Hamilton v. City of Detroit*, 105 Mich. 514; s. c. 63 N. W. 511; *Hurley v. Inhabitants &c.*, 88 Maine 293; s. c. 34 Atl. 72; *Carleton v. Inhabitants &c.*, 88 Maine 461; s. c. 34 Atl. 269.

¹⁴⁶ *Abbott v. City of Mobile*, 119 Ala. 595; s. c. 24 So. 565.

¹⁴⁷ *City of Lincoln v. Pirner*, 59 Neb. 634; s. c. 81 N. W. 846.

¹⁴⁸ *Union St. R. Co. v. Stone*, 54 Kan. 83; s. c. 37 Pac. 1012.

¹⁴⁹ *Parker v. City of Boston*, 175 Mass. 501; s. c. 56 N. E. 569.

¹⁵⁰ One day has been held not sufficient: *Breil v. City of Buffalo*, 144 N. Y. 163; s. c. 38 N. E. 977; but three or four days may be sufficient in a much-used portion of the city: *Briel v. City of Buffalo*, 35 N. Y. S. 359; s. c. 90 Hun (N. Y.) 93. Three months has been held sufficient in *Strobel v. City of New York*, 36 N. Y. S. 814; three or four months in *Lorence v. City of Ellensburg*, 13 Wash. 341; s. c. 43 Pac. 20; five months in *Strudgeon v. Village of Sand Beach*, 107 Mich. 496; s. c. 65 N. W. 616. An obstruction on a sidewalk for two weeks in violation of an ordinance, at a place where the police and street superintendent passed daily, is sufficient to charge the city: *City of Palestine v. Has-*

§ 1303. **Time sufficient to impute notice for the jury.**—The lapse of a sufficient period of time from which notice may be inferred, is in all cases a question of fact to be submitted to and found by the jury,¹⁵¹ and there are no established principles that will aid in determining the matter. There can be no notice when the defects are not observable to a person passing over the sidewalk.¹⁵² The question is was it noticeable; not that all persons saw it.¹⁵³ A city is not liable for an injury occurring through a defective sidewalk unless it was it noticeable; not whether all persons saw it.¹⁵³ A city is not city has notice of the disrepair of a sewer, or by the use of reasonable diligence could have known it, it is liable to a property owner injured by the condition of the sewer.¹⁵⁵

§ 1304. **Sidewalks.**—In so far as municipalities are concerned, the law is not materially different in regard to sidewalks from that pertaining to streets generally, for in reality the sidewalk, except in a few unimportant particulars, is part and parcel of the street. But for facility in the application of the law a few of the most general principles have been segregated in this section which are peculiarly applicable to sidewalks and the rights, duties and liabilities of the municipality in relation thereto. (a) *Sidewalk defined:*^{155a} A sidewalk means that portion of a street set apart for pedestrians.¹⁵⁶ The sidewalk is not distinguished from the street in the grant of rights to a railroad company,¹⁵⁷ and is within the meaning of "streets and public

sell, 15 Tex. Civ. App. 519; s. c. 40 S. W. 147. In the following cases lapses of time from two weeks to six months were held sufficient: *L'Herauld v. City of Minneapolis*, 69 Minn. 261; s. c. 72 N. W. 73; *Dempsey v. City of Rome*, 94 Ga. 420; s. c. 20 S. E. 335; *Warner v. Village of Randolph*, 45 N. Y. S. 1112; s. c. 18 App. Div. (N. Y.) 458; *Devenish v. City of Spokane*, 21 Wash. 77; s. c. 57 Pac. 340; *City of Belvidere v. Crichton*, 81 Ill. App. 595; *West v. City of Eau Claire*, 89 Wis. 31; s. c. 61 N. W. 313; but one month not sufficient when a bridge was closed on account of other defects: *City of Austin v. Colgate* (Tex. Civ. App.), 27 S. W. 896. A telephone wire broken loose by a storm and permitted to remain suspended for four months, of which the city has both actual and constructive notice, renders both the telephone company and the city

liable for an injury: *District of Columbia v. Dempsey*, 13 App. D. C. 533.

¹⁵¹ *Scoville v. Salt Lake City*, 11 Utah 60; s. c. 39 Pac. 481; *Barr v. Village of Bainbridge*, 59 N. Y. S. 132; s. c. 42 App. Div. (N. Y.) 628.

¹⁵² *Lohr v. Phillipsburg Borough*, 165 Pa. St. 109; s. c. 30 Atl. 822.

¹⁵³ *Rosevere v. Borough of Osceola Mills*, 169 Pa. St. 555; s. c. 32 Atl. 548.

¹⁵⁴ *Richardson v. City of Marceline*, 73 Mo. App. 360.

¹⁵⁵ *Lindsay v. City of Sherman* (Tex. Civ. App.), 36 S. W. 1019.

^{155a} See § 1279, ante.

¹⁵⁶ *City of Ord v. Nash*, 50 Neb. 335; s. c. 69 N. W. 964.

¹⁵⁷ *Knapp Stout & Co. v. St. Louis & C. R. Co.*, 126 Mo. 26; s. c. 28 S. W. 627. What is a flagged sidewalk,—see *City of New York v. Brown*, 57

grounds.”¹⁵⁸ The adoption of a plan for a sidewalk is a governmental function, and where the plan adopted is permissible, and is not so defective as to require repairs to make it safe, the city is not liable.¹⁵⁹

(b) *Control over and liability in regard to:* The control over a sidewalk and liability for its condition in the matter of safety and convenience of the public, are the same as in regard to the street generally. If the municipality permits its sidewalks to get out of repair, or defective, or obstructed in such manner as to become dangerous to the public who are in the legitimate use thereof, and through negligence a person is injured, it becomes liable in damages.^{159a}

(c) *Presumption as to condition of sidewalk:* A person having occasion to use a sidewalk for the ordinary purposes of travel, has a right to assume that it is in a safe condition, unless he has actual knowledge to the contrary.¹⁶⁰ (d) *Duty to erect barriers and signals:* Where a sidewalk becomes obstructed, or in a dangerous condition, it is the city's duty to erect barriers, or at least signals, that persons may be warned of its condition.¹⁶¹ Where the city negligently permits water to accumulate in a pond, partly on a street and partly on an adjoining lot, around which no barrier was erected, the pond being formed by filling in the street, and a child is drowned in the pond, it is liable.¹⁶²

It is a question of fact whether a sign of warning was reasonable under the circumstances.¹⁶³ But the city is not required to place warning signals where they are properly placed by the owner or contractor.¹⁶⁴ (e) *Liability for defective sidewalks:* The city is liable for an injury from a dangerous defect in a street or sidewalk of which it had notice, although it arose from the construction or alteration of the street in conformity with a plan adopted by the municipal officers.¹⁶⁵ The city is liable for an injury growing out of a defective

N. Y. S. 742; s. c. 27 Misc. (N. Y.) 218.

¹⁵⁸ *Giffen v. City of Lewiston* (Idaho), 55 Pac. 545.

¹⁵⁹ *Hoyt v. City of Danbury*, 69 Conn. 341; s. c. 37 Atl. 1051.

^{159a} *Simonds v. City of Baraboo*, 93 Wis. 403; s. c. 67 N. W. 40; *Oliver v. City of Denver*, 13 Colo. App. 345; s. c. 57 Pac. 729.

¹⁶⁰ *Mayor & c. v. Starr*, 112 Ala. 98; s. c. 20 So. 424.

¹⁶¹ Where a street is graded down so as to leave embankments at the side of sufficient width to erect barriers the city must erect such barriers so as to protect persons approaching the street: *O'Malley v.*

Borough of Parsons, 191 Pa. St. 612; s. c. 43 Atl. 384; *Kinney v. City of Tekamah*, 30 Neb. 605; s. c. 46 N. W. 835.

¹⁶² *Bowman v. City of Omaha*, 59 Neb. 84; s. c. 80 N. W. 259; *City of Omaha v. Richards*, 49 Neb. 244; s. c. 68 N. W. 528. But see *City of Omaha v. Bowman*, 52 Neb. 293; s. c. 72 N. W. 316.

¹⁶³ *Mulligan v. City of New Britain*, 69 Conn. 96; s. c. 36 Atl. 1005.

¹⁶⁴ *Walker v. City of Ann Arbor*, 111 Mich. 1; s. c. 69 N. W. 87.

¹⁶⁵ *City of Circleville v. Sohn*, 59 Ohio St. 285; s. c. 52 N. E. 788; *City of Lincoln v. O'Brien*, 56 Neb. 761;

sidewalk notwithstanding a provision of the charter requiring real estate owners and occupants to maintain sidewalks and making them liable for injuries growing out of defects;¹⁶⁶ nor can it relieve itself from liability for a defective sidewalk by ordinance.¹⁶⁷ The city is responsible for the condition of a sidewalk which is in constant use by the public generally as a public thoroughfare, though laid by the county on the court-house square.¹⁶⁸ The city is not required to remedy every slight inequality in the walks which is not likely to cause injury,¹⁶⁹ but where there is a decided depression in the sidewalk, of which the city has notice and from which an injury results to a pedestrian, the depression being concealed by snow and slush, the city is liable.¹⁷⁰ If a person uses the care and precaution common to persons of ordinary prudence, he is not bound to discover every defect that may exist in the walk.¹⁷¹ It is the duty of the police officer, or other employe, to notify the proper officer whose duty it is to repair sidewalks and keep them in order, and in the meantime properly warn persons of the danger.¹⁷² (f) *Miscellaneous illustrations of liability*: Where there are excavations on private lots adjacent to a sidewalk the city must use reasonable care to protect pedestrians from falling therein.¹⁷³ The city is liable for an injury occasioned by the fall of a show-case continuously maintained on a sidewalk for several years without permission of the city authorities.¹⁷⁴

s. c. 77 N. W. 76; *City of Depere v. Lawrence v. Davis*, 8 Kan. App. 225; Hibbard, 104 Wis. 666; s. c. 80 N. s. c. 55 Pac. 492.

W. 933. What is not an actionable ¹⁷¹ *Barnes v. Town of Marcus*, 96 defect in a sidewalk,—see *Klemer v. Iowa* 675; s. c. 65 N. W. 984.

City of Madison, 104 Wis. 330; s. c. ¹⁷² *Lundon v. City of Chicago*, 83 Ill. App. 208. See contra: *Reid v. City of Chicago*, 83 Ill. App. 554.

80 N. W. 453. ¹⁷³ *City of Oklahoma City v. Meyers*, 4 Okl. 686; s. c. 46 Pac. 552; *Wiggin v. St. Louis*, 135 Mo. 558; s. c. 37 S. W. 528; *Hall v. Incorporated Town of Manson*, 99 Iowa 698; s. c. 68 N. W. 922; 34 L. R. A. 207. And this is a question for the jury: *Kiernan v. Mayor &c.*, 43 N. Y. S. 538; *Tisdale v. Inhabitants &c.*, 167 Mass. 248; s. c. 45 N. E. 730; *Baker v. City of Grand Rapids*, 111 Mich. 447; s. c. 69 N. W. 740; *Welsh v. City of Lansing*, 111 Mich. 589; s. c. 70 N. W. 129.

¹⁶⁶ *City of Lincoln v. Pirner*, 59 Neb. 634; s. c. 81 N. W. 846.

¹⁶⁷ *City of Belton v. Turner* (Tex. Civ. App.), 27 S. W. 831.

¹⁶⁸ *City of Huntington v. McClurg*, 22 Ind. App. 261; s. c. 53 N. E. 658.

¹⁶⁹ *Tubesing v. City of Buffalo*, 64 N. Y. S. 399; s. c. 51 App. Div. (N. Y.) 14.

¹⁷⁰ *Kellow v. City of Scranton*, 195 Pa. St. 134; s. c. 45 Atl. 676. An injury by stepping in a hole in the end of an alley crossing not known to plaintiff and hidden from view on approaching it will render the city liable: *City of Bluffton v. McAfee*, 23 Ind. App. 112; s. c. 53 N. E. 1058. City liable for injury from decayed sidewalk: *City of*

¹⁷⁴ *Wells v. City of Brooklyn*, 60 N. Y. S. 802; s. c. 45 App. Div. (N. Y.) 623.

The city is liable for an injury occasioned by a person falling into a hole in the sidewalk, such hole being spanned by two twelve-inch boards, laid lengthwise and unguarded, and in such case it is immaterial that the fall was caused by the loosening of the plank, of which the city had no notice.¹⁷⁵ Where an injury occurs by a person falling over a fire plug of ordinary construction, the city is not liable if it had authority to place the fire plug, and is not obliged to light the streets, and this though the lighting is defective.¹⁷⁶ (g) *Liability of owner for failure to repair*: An abutting property owner owes no duty to the public to keep the sidewalk in front of his premises in repair,¹⁷⁷ nor is he liable for an injury caused by want of repair unless its condition is a result of his fault,¹⁷⁸ but he may be compelled to keep the sidewalk free from snow.¹⁷⁹ Where an owner of a building leaves an opening in the sidewalk, made and left open by him, from which an injury ensues and a judgment is recovered against the city, which such owner is notified to defend, which he does not do, he is bound by the judgment.¹⁸⁰ And this though the property is in the possession of a tenant at the time of the injury.¹⁸¹ One who negligently permits a coal hole in a sidewalk in front of his premises to fall into a state of disrepair, is liable to the city for damages it is compelled to pay.¹⁸² (h) *Liability of city for failure to*

¹⁷⁵ *City of Dallas v. Jones*, 93 Tex. 38; s. c. 49 S. W. 577; 53 S. W. 377. A hole from two to three inches deep in the sidewalk held not sufficient negligence to give plaintiff a right of recovery for injury growing out of a fall caused by stepping in the hole; *Getzoff v. City of New York*, 64 N. Y. S. 636; s. c. 51 App. Div. (N. Y.) 450. Hole in pavement for two months is negligence: *Robinson v. Mayor &c.*, 8 Houst. (Del.) 409; s. c. 32 Atl. 347. A loose plank in a cross-walk two inches above the level has been held not to be negligence: *Weisse v. City of Detroit*, 105 Mich. 482; s. c. 63 N. W. 423; and a brick loosened from its place which caused plaintiff to fall and be injured is not ground for recovery: *Morris v. Philadelphia*, 195 Pa. St. 372; s. c. 45 Atl. 1068; but a cellar door left open on the sidewalk is negligence: *Sweeney v. City of Butte*, 15 Mont. 274; s. c. 39 Pac. 286.

¹⁷⁶ *Horner v. City of Philadelphia*, 194 Pa. St. 542; s. c. 45 Atl. 330.

¹⁷⁷ *Baustian v. Young*, 152 Mo. 317; s. c. 53 S. W. 921.

¹⁷⁸ *Sneeson v. Kupfer*, 21 R. I. 560; s. c. 45 Atl. 579.

¹⁷⁹ *Inhabitants &c. v. Welsh*, 166 Mass. 133; s. c. 43 N. E. 1116. Where an ordinance requires the owner to repair his sidewalk within five days after notice it is a reasonable compliance with such notice if the repairs are completed the day after the expiration of the five days where diligence is shown in the commencement and prosecution of the work: *Heman v. St. Louis Merchants &c. Co.*, 75 Mo. App. 372.

¹⁸⁰ *City of Pawtucket v. Bray*, 20 R. I. 17; s. c. 37 Atl. 1.

¹⁸¹ *McNerney v. Reading City*, 150 Pa. St. 611; s. c. 25 Atl. 57.

¹⁸² *Trustees &c. v. Foster*, 30 N. Y. S. 686; s. c. 81 Hun (N. Y.) 147. A lot owner is liable to a city for the amount of a judgment paid by the

repair.^{182a} Failure to repair the sidewalk on a strip of land forming part of a street renders the city liable.¹⁸³ The city must keep in repair the entire sidewalk and not such parts as may be most generally used.¹⁸⁴ The reasonable care required in keeping sidewalks in repair means as to persons traveling in the usual mode.¹⁸⁵ If the city once constructed a street in a safe condition it is only required to exercise reasonable care in the discovery of defects and repair thereof.¹⁸⁶ It is not necessary that a sidewalk should have been built by the city to render it liable,¹⁸⁷ and the liability extends beyond the line fixed by ordinance. If it is controlled by the city it must be kept in repair by it,¹⁸⁸ and it is liable if the sidewalk is constructed and maintained by it on the ground of another.¹⁸⁹ (i) *Michigan rule of liability for failure to repair*: In Michigan a city is not liable for a failure to keep its streets and sidewalks in repair. The duty it owes, in that regard, is to the public and not to private individuals, and the neglect of such duty is a nonfeasance only. In that state cities are placed on the same plane as counties and townships.¹⁹⁰ In 1879 the legislature passed an act for the collection of damages sustained by reason of defective public highways, streets, bridges, cross walks and culverts. But this law was held inapplicable to sidewalks. In other words a statute in derogation of the common law would not be extended by construction.¹⁹¹ A city is now liable, however, for damages resulting

city to a person who is injured from an unguarded area in a sidewalk: *Reading City v. Reiners*, 167 Pa. St. 41; s. c. 31 Atl. 357.

^{182a} See § 1316, post.

¹⁸³ *Downend v. Kansas City*, 156 Mo. 60; s. c. 56 S. W. 902.

¹⁸⁴ *City of Atlanta v. Milam*, 95 Ga. 135; s. c. 22 S. E. 43; *City of Springfield v. Burns*, 51 Ill. App. 595.

¹⁸⁵ *Waggener v. Town of Point Pleasant*, 42 W. Va. 798; s. c. 26 S. E. 352.

¹⁸⁶ *Peake v. City of Superior*, 106 Wis. 403; s. c. 82 N. W. 306.

¹⁸⁷ *Fuller v. Mayor &c.*, 82 Mich. 480; s. c. 46 N. W. 721; *McArthur v. City of Saginaw*, 58 Mich. 357; s. c. 25 N. W. 313; *City of Mt. Carmel v. Blackburn*, 53 Ill. App. 658.

¹⁸⁸ *City of Chadron v. Glover*, 43 Neb. 732; s. c. 62 N. W. 62.

¹⁸⁹ *City of Roodhouse v. Christian*, 53 Ill. App. 107. But the mere use

by the public is not sufficient: *Garnett v. City of Slater*, 56 Mo. App. 207. Where the declaration based the injury upon the bad repair of the sidewalk and the evidence substantiates the declaration an instruction based upon defective construction is not proper: *City of Joliet v. Johnson*, 177 Ill. 178; s. c. 52 N. E. 498. Where by charter the city is exempted from gross carelessness unless notice in writing shall have been given to the mayor or engineer and ten days has expired, it is not exempted from ordinary negligence: *Peacock v. City of Dallas*, 89 Tex. 438; s. c. 35 S. W. 8.

¹⁹⁰ *City of Detroit v. Beckman*, 34 Mich. 125; *City of Lansing v. Toolan*, 37 Mich. 152; *City of Detroit v. Blackeby*, 21 Mich. 84; *Detroit v. Osborne*, 135 U. S. 492; s. c. 10 S. Ct. 1012; *City of Detroit v. Putnam*, 45 Mich. 263; s. c. 7 N. W. 815.

¹⁹¹ *In Church v. City of Detroit*, 64

from an injury from a defective sidewalk.¹⁹² (j) *Liability for accumulations of snow and ice*: It is impossible to harmonize the decisions in regard to municipal liability for injuries resulting from accumulations of snow and ice upon the sidewalk. It has been held that the city is liable for an injury which results from ice on the sidewalk, caused by permitting snow to remain on the sidewalk for several weeks,¹⁹³ and so where a sidewalk was constructed with such a slope as to make it dangerous to pedestrians when coated with ice or snow,¹⁹⁴ but injury resulting from stepping on a ridge of snow at the edge of a foot-path at a place other than the street crossing does not render the municipality liable.¹⁹⁵ It is negligence to permit snow and ice to accumulate on a sidewalk on a street open for several years.¹⁹⁶ Permitting the sidewalk to become covered with ice four or five inches deep, higher in the middle, the whole sidewalk slippery and difficult to pass from it without falling, and this condition having lasted two weeks, is sufficient evidence of negligence.¹⁹⁷ Ridges formed by tree roots of long standing, on which ice accumulated and was concealed by snow and caused injury, render the city liable.¹⁹⁸ Where the injury was caused by snow which had been removed from a railway track in the center of the street and left on both sides of the street, leaving a rut where the wheels ran, by which plaintiff was thrown out of a sleigh, the city is liable.¹⁹⁹ Snow accumulating from natural causes, which becomes uneven by travel at a point where the walk dams up melted snow flowing from adjoining land and freezing into ridges will, after the city has notice a reasonable time, or might have had notice, render the city liable.²⁰⁰ The length of time in which the sidewalk is

Mich. 571; s. c. 31 N. W. 447, an act purporting to extend the liability of cities to damages arising from defective sidewalks was held unconstitutional. And see *Detroit v. Osborne*, 135 U. S. 492, 496; s. c. 10 S. Ct. 1012.

¹⁹² *Kopelka v. City of Bay City*, 125 Mich. 625; s. c. 84 N. W. 1106. The rule as originally enforced in Michigan, independent of statute, was not the general rule: *Town of Waltham v. Kemper*, 55 Ill. 346; *Nagle v. Wakey*, 161 Ill. 387; s. c. 43 N. E. 1079. The reason for the general rule is that cities are regarded as corporations created for their own benefit while the inhabitants of a county are invested in invitum with particular powers and made corporations without their consent.

¹⁹³ *Beck v. City of Buffalo*, 63 N. Y. S. 499; s. c. 50 App. Div. (N. Y.) 621.

¹⁹⁴ *Hodges v. City of Waterloo*, 109 Iowa 444; s. c. 80 N. W. 523.

¹⁹⁵ *Olive v. Westmount*, 16 Rap. Jud. Que. C. S. 426.

¹⁹⁶ *Deufel v. Long Island City*, 46 N. Y. S. 355; s. c. 19 App. Div. (N. Y.) 620; *Haight v. City of Elmira*, 59 N. Y. S. 193; s. c. 42 App. Div. (N. Y.) 391.

¹⁹⁷ *Walsh v. City of Buffalo*, 44 N. Y. S. 940; s. c. 17 App. Div. (N. Y.) 112.

¹⁹⁸ *Conklin v. City of Elmira*, 42 N. Y. S. 518; s. c. 11 App. Div. (N. Y.) 402.

¹⁹⁹ *Ellis v. City of Lewiston*, 89 Maine 60; s. c. 35 Atl. 1016.

²⁰⁰ *Huston v. City of Council Bluffs*,

permitted to remain in an uneven and dangerous condition is an important element to be considered.²⁰¹ A person in passing on a sidewalk obstructed by snow which she had not previously known of and receiving an injury, can not be said to be guilty of negligence.²⁰² On the contrary another line of decisions closely analogous to those above cited, have held that the city is not liable on account of unevenness in the sidewalk caused by the accumulation of snow and the freezing and melting thereof, and the passing over such snow by persons and teams,²⁰³ or for slight inequalities in a sidewalk, by means of which water accumulated in the depressions and froze, but the walk being sufficient for ordinary purposes.²⁰⁴ The city is not liable for throwing snow from a cross walk on each side of the walk whereby a pedestrian was injured by stepping on one of the banks of snow to avoid a pool of water on the walk. The city in clearing the walk, as it was required to do, could not fairly and reasonably have anticipated an accident of this character, and besides, was not required to clear the street outside the cross walk.²⁰⁵ Where by reason of severity of the weather and sudden and frequent changes the sidewalks become icy, which it is practically impossible to remedy, the city is not liable for an injury growing out of such condition.²⁰⁶ A person receiving an injury from a fall on an icy sidewalk, knowing its condition, and

101 Iowa 33; s. c. 69 N. W. 1130; 36 L. R. A. 211.

²⁰¹ *Stapleton v. City of Newburgh*, 41 N. Y. S. 96; s. c. 9 App. Div. (N. Y.) 39. Failure to remove ice on sidewalk within a reasonable time after notice renders city liable: *Koch v. City of Ashland*, 88 Wis. 603; s. c. 60 N. W. 990. City not liable for ordinary slippery condition of sidewalk, but if snow and ice are permitted to exist in ridges and little hills and remain a sufficient length of time to charge the city with knowledge, it may be: *Wyman v. City of Philadelphia*, 175 Pa. St. 117; s. c. 34 Atl. 621. A city is liable for a personal injury growing out of the rough surface of snow and ice upon a sidewalk which it has had an opportunity to remove and failed to do, if the injury is the result of the uneven condition: *Hodges v. City of Waterloo*, 109 Iowa 444; s. c. 80 N. W. 523.

²⁰² *City of Rockford v. Rannie*, 77 Ill. App. 665; *Hawley v. City of Gloversville*, 38 N. Y. S. 647; s. c. 4 App. Div. (N. Y.) 343. City is liable for rounded and uneven condition from accumulations of water from tops of buildings: *Scoville v. Salt Lake City*, 11 Utah 60; s. c. 39 Pac. 481.

²⁰³ *Dapper v. City of Milwaukee*, 107 Wis. 88; s. c. 82 N. W. 725.

²⁰⁴ *Hogan v. City of Watervliet*, 59 N. Y. S. 103; s. c. 42 App. Div. (N. Y.) 325.

²⁰⁵ *Lichtenstein v. Mayor &c.*, 159 N. Y. 500; s. c. 54 N. E. 67.

²⁰⁶ *Hyer v. City of Janesville*, 101 Wis. 371; s. c. 77 N. W. 729; *Staley v. Mayor &c.*, 56 N. Y. S. 237; s. c. 37 App. Div. (N. Y.) 598; *Peard v. City of Mt. Vernon*, 158 N. Y. 681; s. c. 52 N. E. 1125; *Kleng v. City of Buffalo*, 156 N. Y. 700; s. c. 51 N. E. 1091.

when there was space free from ice sufficient for passage, can not recover.²⁰⁷

§ 1305. **Right of municipality to indemnity.**—If a municipality has been compelled to pay a judgment recovered against it for personal injuries from a defect or obstruction in one of its highways, which defect or obstruction was created by the wilful act or negligence of a third person, it may maintain an action for its reimbursement against that person; and the rule is the same when it has paid an undoubted liability without suit.²⁰⁸ So, if it has provided for the repair of its streets by contract with other parties and has had to pay for in-

²⁰⁷ *Kleng v. City of Buffalo*, 156 N. Y. 700; s. c. 51 N. E. 1091. The city is not liable for obstruction caused by snow thrown from sidewalk and street-car track: *Hutchinson v. City of Ypsilanti*, 103 Mich. 12; s. c. 61 N. W. 279. And see *Peard v. City of Mt. Vernon*, 31 N. Y. S. 395; s. c. 83 Hun (N. Y.) 250. And is not liable for snow in an unusual amount, four feet deep, and permitted to remain a period of seven days: *McDonald v. City of Toledo*, 63 Fed. 60; *Chase v. City of Cleveland*, 44 Ohio St. 505; s. c. 9 N. E. 225. Nor for injury caused by a ridge of ice on sidewalk formed by tramping, freezing and melting: *Rolf v. City of Greenville*, 102 Mich. 544; s. c. 61 N. W. 3. Nor for injuries caused by smooth coating of ice on the sidewalk caused by a low temperature, causing all walks to become slippery, there being no ridge, unevenness or unusual condition, and no other evidence of negligence: *Anthony v. Village of Glens Falls*, 38 N. Y. S. 536; s. c. 4 App. Div. (N. Y.) 218; *Govett v. City of Jackson*, 109 Mich. 408; s. c. 67 N. W. 517. Under Massachusetts St. 1896, ch. 540, the city is not liable for injury from snow and ice unless the place of the accident was otherwise unsafe, and it must be shown that this fact contributed to the injury: *Newton v. City of Worcester*, 174 Mass. 181; s. c. 54 N. E. 521; *Bailey v. City of*

Cambridge, 174 Mass. 188; s. c. 54 N. E. 523. The statute sometimes exempts the city from liability for injuries from snow and ice in the absence of notice: *Allen v. Cook*, 21 R. I. 525; s. c. 45 Atl. 148. It has been held that where an ordinance required the bureau of streets to employ men to clean the sidewalks where owners failed to do so, and they had not been cleaned for two weeks, negligence is a question for jury: *McPherson v. City of Buffalo*, 43 N. Y. S. 658; s. c. 13 App. Div. (N. Y.) 502; *Stone v. City of Poughkeepsie*, 44 N. Y. S. 609; s. c. 15 App. Div. (N. Y.) 582. That a real estate agent whose agency is for the collection of rents or procuring offers to purchase is not the owner, agent or tenant of property and required to remove snow and ice from sidewalk within the meaning of the act of congress of March 2, 1897: *Holtzman v. United States*, 14 App. D. C. 454. That where notice is necessary notice to an alderman is sufficient: *Fife v. City of Oshkosh*, 89 Wis. 540; s. c. 62 N. W. 541. That after notice sufficient time must elapse to remove the obstruction: *City of Virginia v. Plummer*, 65 Ill. App. 419.

²⁰⁸ 2 *Thompson Negligence* (1st ed.) 789; *City of Rochester v. Montgomery*, 72 N. Y. 65; *Village of Fulton v. Tucker*, 3 Hun (N. Y.) 529.

juries to persons growing out of the neglect of the contractors, it may recover the same from the contractors. The principle governing in such cases is that these parties are primarily liable to the person injured, and the municipality by paying the damages is subrogated to the remedies of the person whose damages have been satisfied.²⁰⁹ But where a charter imposes upon lot-owners the duty of keeping the sidewalk adjoining the lots in repair and free from snow or ice or other obstruction, and also provides that the superintendent of streets should repair any sidewalk when the owner of the property neglected to repair the same for a fixed number of days after the service upon him of a written notice to do so, and that the superintendent should collect the expense of such repair from the owner of the property, it only imposes upon the lot-owner a statutory liability for the expense of such repairs. It does not directly and specifically make him liable for any damages in case of personal injury to persons from a failure to keep such sidewalks in repair, and the municipality, though it may in an action be held liable to the person injured and pay the same, can not maintain the action against the lot-owner for indemnity.²¹⁰

§ 1306. Power of park board over streets.—The statute providing for a system of public parks and parkways of one of the principal cities of Minnesota has been held not to authorize the board created by it to vacate or close or exclude any class of vehicles from any street except such as might run through any tract of land taken for a park; and the board could not acquire that power over a street by merely widening it by acquiring title to a strip on each side.²¹¹ An owner of

²⁰⁹ *Village of Port Jervis v. First Nat'l Bank &c.*, 96 N. Y. 550; *Chicago City v. Robbins*, 2 Black 418; *City of Brooklyn v. Brooklyn &c. R. Co.*, 47 N. Y. 475, 486. In *Inhabitants &c. v. Boston &c. R. Co.*, 23 Pick. (Mass.) 24, 34, it was said that "if the defendants had been prosecuted instead of the town, they must have been held liable for damages, and from this liability they have been relieved by the plaintiffs. It can not, therefore, be controverted that the plaintiffs' claim is founded in manifest equity. The defendants are bound in justice to indemnify them, so far as they have been relieved from a legal liability, and the policy of the law does not, in this

instance, interfere with the claim of justice."

²¹⁰ *City of Rochester v. Campbell*, 123 N. Y. 405; s. c. 25 N. E. 937; *Moore v. Gadsden*, 93 N. Y. 12; *Wenzlich v. McCotter*, 87 N. Y. 122, 127.

²¹¹ *State v. Waddell*, 49 Minn. 500; s. c. 52 N. W. 213, reversing the conviction of one charged with violation of an ordinance of the park commissioners closing an avenue boulevard for traffic purposes. The court said:—"The legislature had in mind that in case of a tract of land appropriated for a park in order to make it most available for that purpose, it might be necessary to close or vacate roads or highways running through

a lot can not complain of the regulation of park commissioners requiring entrance to boulevard at alternate streets.²¹²

§ 1307. **Extent of municipal control.**—The legislature has plenary power over streets and highways and it may in the absence of constitutional restrictions vacate or discontinue them, or invest municipalities with authority to do so.²¹³ The legislature may transfer the control of a street in a city or village to park commissioners to be by them controlled for boulevard and park purposes when such use is not inconsistent with their use for ordinary travel.²¹⁴ A county board by providing for commissioners to open streets and for grading commissioners does not delegate its authority.²¹⁵ The control of the streets in the matter of grade, improvement, nature and character is in the discretion of the city and the courts will exercise no control over the matter.²¹⁶ Where the city has control of the streets it is liable for injuries from defects.²¹⁷ A city is liable for the defective sidewalk in front of a postoffice although the government constructed the sidewalk.²¹⁸ And so where the sidewalk is constructed by private parties where it has the appearance of a public walk and has been used by the public for a number of years.²¹⁹ The laying out, repair and control

it. The power given by the [statute] takes such roads or highways out from the control of the common council—the body that has the general supervision and control over roads, highways and streets in the city. We are not to suppose the legislature intended to do that any further than is expressed in the act or implied, because necessary to accomplish its purposes. The power to exclude from any street taken possession of by the board any kind of travel, or travel with any vehicle ordinarily used for travel, can only be found in the power given to close or vacate. And while the board may probably make a parkway of any established street, and may regulate the use of and the travel upon such parkway, it can not vacate or close it, nor exclude from it vehicles which otherwise have a right to travel upon it. If it could, it might take possession of any street in the city, and exclude from it all vehicles except those used for purposes of

pleasure—a power that can not well be implied from the provisions of the [statute].”

²¹² *Quick v. Board &c.*, 20 Ky. L. 1457; s. c. 49 S. W. 483. *Laws of New York 1892 and charter of Greater New York construed with reference to erection of poles and stringing of wires along avenues in parks and consent necessary: Sheehy v. Clausen*, 55 N. Y. S. 1000; s. c. 26 Misc. (N. Y.) 269.

²¹³ *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9; s. c. 51 N. E. 758.

²¹⁴ *Cicero Lumber Co. v. Town of Cicero*, *supra*.

²¹⁵ *Robert v. Board &c.*, 158 N. Y. 673; s. c. 52 N. E. 1126.

²¹⁶ *McHale v. Easton &c. Transit Co.*, 169 Pa. St. 416; s. c. 32 Atl. 461.

²¹⁷ *Saylor v. City of Montesano*, 11 Wash. 328; s. c. 39 Pac. 653.

²¹⁸ *City of Denver v. Hickey*, 9 Colo. App. 137; s. c. 47 Pac. 908.

²¹⁹ *Hutchings v. Inhabitants &c.*, 90 Maine 131; s. c. 37 Atl. 883.

of streets are ministerial acts.²²⁰ A grant of the right to lay pipes in a street subject to conditions and the acceptance of such grant binds the company to the conditions though they are afterwards held illegal.²²¹ Where a natural gas company is granted the right to lay its pipes in the street it can not by injunction test the right of a rival company to use the street for a similar purpose.²²²

§ 1308. **Franchise in the use of streets.**—Where the state grants a franchise to a corporation subject to reasonable regulations by the state, as to its use, and subsequently grants to a city the right to regulate its streets and also general police power, the franchise is subject to the ordinances of the city.²²³ Where a city has granted to a water company a franchise to use the streets and such grant has been accepted and acted upon it constitutes a contract and an ordinance or resolution attempting to annul the contract and repeal the grant is unconstitutional and void.²²⁴ A franchise granted in a street can not be revoked without consent.²²⁵

§ 1309. **The use of streets and alleys.**—(a) *Power of legislature over:* There is in the absence of special constitutional restrictions no limit upon the power of the legislature as to the uses to which a street may be devoted.²²⁶ (b) *Nature of public interest in:* The public has an interest in the public streets and alleys to use them for the ordinary purposes of travel but the right of each citizen to travel on and use a public street with an ordinary vehicle is not a property right.²²⁷ A city holds its streets in trust for the public for the purposes of travel and it can not exact a license fee therefor. And so it has no right to

²²⁰ *Sutton v. Snohomish*, 11 Wash. 24; s. c. 39 Pac. 273.

²²¹ *Allegheny City v. People's Nat. Gas &c. Co.*, 172 Pa. St. 632; s. c. 33 Atl. 704.

²²² *Coffeyville &c. Co. v. Citizens' Gas &c. Co.*, 55 Kan. 173; s. c. 40 Pac. 326.

²²³ *State v. Murphy*, 130 Mo. 10; s. c. 31 S. W. 594.

²²⁴ *Little Falls Electric &c. Co. v. City of Little Falls*, 102 Fed. 663. Cf. *New Orleans Gas-Light Co. v. Louisiana Light &c. Co.*, 115 U. S. 650; s. c. 6 S. Ct. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674; s. c. 6 S. Ct. 273; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; s. c. 6 S. Ct. 265; *Walla Walla*

City v. Walla Walla W. Co., 172 U. S. 1; s. c. 19 S. Ct. 77.

²²⁵ *Borough of Avoca v. Pittston &c. R. Co.*, 7 Kulp (Pa.) 470.

²²⁶ *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9; s. c. 51 N. E. 758; *Meyer v. Village of Teutopolis*, 131 Ill. 552; s. c. 23 N. E. 651; *True v. Davis*, 133 Ill. 522; s. c. 22 N. E. 410; *Barrows v. City of Sycamore*, 150 Ill. 588; s. c. 37 N. E. 1096; *Simon v. Northup*, 27 Or. 487; s. c. 40 Pac. 560.

²²⁷ *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9; s. c. 51 N. E. 758. The use of a street for which the city is liable in the matter of repairs is the ordinary use of travel: *Jackson v. City of Greenville*, 72 Miss. 220; s. c. 16 So. 382.

exact a wheel tax for use of wheels for private purposes exclusively.²²⁸ The city can not charge rent for the use of its streets where the law grants the use without compensation,²²⁹ and holding the streets for the public benefit a municipality has no right to grant the use of the streets for private purposes.²³⁰ An ordinance granting a private corporation the right to use the streets by subways, etc., without imposing any obligation to maintain the streets, or requiring it to allow the public to use them, and reserving no control over the works or business, is a grant for private purposes and void.²³¹ An abutting owner has a right to the use of the space beneath a sidewalk, and in order to enjoy such use may put gratings therein to admit light if they are properly constructed and maintained.²³² A person owning property abutting on a street has a right to obstruct the sidewalk for a reasonable time to move heavy merchandise to and from his premises if done in such a way as not to interfere with the public to a greater extent than necessary.²³³ The unlawful use of an alley for a long period of time is notice to the city.²³⁴ There is nothing unreasonable in excluding traffic teams from a street designated and intended to be used as a pleasure driveway. It can not be said that pleasure and recreation are not as much for the good of the people as business and traffic.²³⁵ The city may prohibit the carrying on the streets of loads in excess of three tons,²³⁶ or in excess of 3,500 pounds on wagons with tires of less than three inches in width.²³⁷ The use of a public street does not include the right to move a house along such street.²³⁸ The city is not liable for injury to a child where the street is closed to travel and guarded.²³⁹ (c) *Use by gas company*: Where consent of a board is required in order that a gas company may extend its mains it has no power to contract in advance with one company that no other company

²²⁸ *City of Chicago v. Collins*, 175 Ill. 445; s. c. 51 N. E. 907.

²²⁹ *Hodges v. Western Union &c. Co.*, 72 Miss. 910; s. c. 18 So. 84.

²³⁰ *State v. Murphy*, 134 Mo. 548; s. c. 31 S. W. 784; 34 S. W. 51; 35 S. W. 1132; *Berry-Horn &c. Co. v. Scruggs &c. Co.*, 62 Mo. App. 93. A street can not be lawfully contracted or given away for private use: *Chicago &c. R. Co. v. Chicago City R. Co.*, 62 Ill. App. 502.

²³¹ *State v. Murphy*, 134 Mo. 548; s. c. 31 S. W. 784; 34 S. W. 51; 35 S. W. 1132.

²³² *Jegglin v. Roeder*, 79 Mo. App. 428.

²³³ *Tompkins v. North Hudson R. Co.*, 63 N. J. L. 322; s. c. 43 Atl. 885.

²³⁴ *City of Atchison v. Acheson*, 9 Kan. App. 33; s. c. 57 Pac. 248.

²³⁵ *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9; s. c. 51 N. E. 758; *Barrows v. City of Sycamore*, 150 Ill. 588; s. c. 37 N. E. 1096.

²³⁶ *Commonwealth v. Mulhall*, 162 Mass. 496; s. c. 39 N. E. 183.

²³⁷ *Harrison v. City of Elgin*, 53 Ill. App. 452.

²³⁸ *Dickson v. Kewanee &c. Co.*, 53 Ill. App. 379.

²³⁹ *Hamilton v. City of Detroit*, 105 Mich. 514; s. c. 63 N. W. 511.

shall have its consent to extend its mains or lay its pipes.²⁴⁰ (d) *Use by telephone company*: Inasmuch as the state has the exclusive dominion over the streets of a city, and the general law gives to telephone and telegraph companies the use of public streets and highways, a city has no franchise in its streets which it can sell to a telephone company for the maintenance of its lines.²⁴¹ A contract by the city granting the use of its streets for telephone conduits can only be rescinded by the city on the ground of danger to the public health, safety or convenience.²⁴² A city after granting a license to occupy a street for value can not revoke that license without a hearing.²⁴³ (e) *Use by railroad company*: A contract between a city and a railroad company, giving the latter a right to construct its road upon a street, if valid can not be abrogated by the legislature.²⁴⁴ Where a city has acquiesced for twenty years in the use of its streets by a railroad company and has required the expenditure of money in the improvement of crossings, and authorized the construction of depots, it is estopped to deny the authority of the company to lay its tracks in the streets.²⁴⁵ It is too late in such case for the city to raise the question of the lack of original consent to the laying of its tracks.²⁴⁶ The right of a railroad to use a right of way is subordinate to the right of the public to extend its highways and streets across it, and it makes no difference which was constructed first.²⁴⁷ The power to grant right of way upon any public levees of the city is not authority to grant the use of such levees for a freight-

²⁴⁰ *Parfitt v. Furguson*, 159 N. Y. 111; s. c. 53 N. E. 707.

²⁴¹ *Barhite v. Home Tel. Co.*, 63 N. Y. S. 659; s. c. 50 App. Div. (N. Y.) 25. Cf. *Skaneateles Water Works Co. v. Village of Skaneateles*, 161 N. Y. 154, 165; s. c. 55 N. E. 562; *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510; s. c. 53 N. E. 692; *Adamson v. Nassau & C. R. Co.*, 89 Hun (N. Y.) 261; s. c. 34 N. Y. S. 1073.

²⁴² *Chesapeake & C. Co. v. Mayor & C.*, 89 Md. 689; s. c. 43 Atl. 784; 44 Atl. 1033.

²⁴³ *Vicksburg & C. R. Co. v. Mayor & C.*, 48 La. An. 1102; s. c. 20 So. 664.

²⁴⁴ *City of Chicago v. Union Stock Yards & C. Co.*, 164 Ill. 224; s. c. 45 N. E. 430; 35 L. R. A. 281.

²⁴⁵ *Chicago & C. R. Co. v. People*, 91

Ill. 251; *Martel v. City of East St. Louis*, 94 Ill. 67; *People v. Maxon*, 139 Ill. 306; s. c. 28 N. E. 1074; *Chicago & C. R. Co. v. West Chicago Park Com'rs*, 151 Ill. 204; s. c. 37 N. E. 1079; 25 L. R. A. 300.

²⁴⁶ *Gregston v. City of Chicago*, 145 Ill. 451; s. c. 34 N. E. 426; *Babbage v. Powers*, 130 N. Y. 281; s. c. 29 N. E. 132; *Jennings v. Van Schaick*, 108 N. Y. 530; s. c. 15 N. E. 424; *Corporation of Pembroke Tp. v. Canada & C. R. Co.*, 3 Ont. R. 503; *Connett v. City of Chicago*, 114 Ill. 233; s. c. 29 N. E. 280; *Town of Bruce v. Dickey*, 116 Ill. 527, 534; s. c. 6 N. E. 435; *Gridley v. City of Bloomington*, 68 Ill. 47; *Chicago & C. R. Co. v. City of Joliet*, 79 Ill. 25.

²⁴⁷ *Pittsburgh & C. R. Co. v. City of Chicago*, 159 Ill. 369; s. c. 42 N. E. 781.

house.²⁴⁸ In the absence of a clearly expressed intention to the contrary the grant of right of way on a public street is subject to existing public uses and must not interfere therewith unnecessarily.²⁴⁹ Municipal consent is requisite to enable a railroad company to occupy streets unless the charter contains such power express or implied.²⁵⁰ In the absence of a general law or charter power a city can not close the intersection of streets and give to a railroad company the exclusive right thereto.²⁵¹ A railway can not be ordered to remove its tracks without a hearing.²⁵² An ordinance granting a railroad company the right to use a street for switching and sidetrack purposes is void.²⁵³ (f) *Use by street railway company*: The grant to a municipality to impose terms and conditions upon a corporation seeking to occupy a street or highway and to exclude it altogether unless resort be had to condemnation proceedings gives by implication the right to limit the time of occupancy.²⁵⁴ The easement of a street railway company in the streets is referred by the legislature to the municipality and its duration does not depend upon the duration of the corporate franchises.²⁵⁵ The city has power to limit the time in which an easement shall be exercised in a street.²⁵⁶ The failure of a corporation to operate a railway on a street in which it has been granted the right raises a presumption of abandonment if for a sufficient length of time.²⁵⁷ The right of street railways to occupy streets, no matter by what authority granted, is an easement and as such is a property right subject to sale or assignment and is entitled to constitutional protection as other contracts and property rights.²⁵⁸ Where an incorporation law requires the charter to set out the termini and general route of a proposed road and the occupancy depends upon the consent of the city authorities first being obtained, the power of the city to consent is limited to the streets included between the termini and general route described in the charter, and in such case a grant of a right of way over

²⁴⁸ *City of St. Paul v. Chicago &c. R. Co.*, 63 Minn. 330; s. c. 63 N. W. 267; 65 N. W. 649; 68 N. W. 458.

²⁴⁹ *Jones v. Erie &c. R. Co.*, 169 Pa. St. 333; s. c. 32 Atl. 535.

²⁵⁰ *City of Philadelphia v. River Front R. Co.*, 173 Pa. St. 334; s. c. 34 Atl. 60.

²⁵¹ *San Antonio &c. R. Co. v. Bergsland*, 12 Tex. Civ. App. 97; s. c. 34 S. W. 155.

²⁵² *State v. City of Cape May*, 58 N. J. L. 565; s. c. 34 Atl. 397.

²⁵³ *Stevenson v. Missouri &c. R. Co. (Mo.)*, 31 S. W. 793.

²⁵⁴ *Louisville Tr. Co. v. City of Cincinnati*, 76 Fed. 296.

²⁵⁵ *Louisville Tr. Co. v. City of Cincinnati*, 76 Fed. 296.

²⁵⁶ *Detroit Citizens' St. R. Co. v. City of Detroit*, 64 Fed. 628.

²⁵⁷ *Louisville Tr. Co. v. City of Cincinnati*, 76 Fed. 276.

²⁵⁸ *Mayor &c. v. Africa*, 77 Fed. 501; *City of Detroit v. Detroit Citizens' St. R. Co.*, 64 Fed. 628.

all the streets, present or prospective, is invalid.²⁵⁹ Exclusive occupancy of a street can not be granted by a municipality unless power is expressly granted by the legislature or by implication equally as clear as if in express terms. It will not be implied from general terms.²⁶⁰ Where the power is given to a municipality to grant the use of its streets it does not mean that this power may be delegated to the corporation so that it may elect from time to time what streets it will occupy and what new lines or extension of old ones it may see proper to make. It would violate public policy.²⁶¹ The consent of a dock company to the occupancy of a street is a mere license since franchises can not be granted by such company.²⁶² The authority to use streets for railroad purposes resides in the legislature and is sovereign power and municipalities only have such power as is granted to them and this power can only be exercised in the manner and on the conditions prescribed by the legislature for that purpose.²⁶³ A city has no power in Illinois to grant the right to a street railway company to occupy the streets, without the consent of a majority of the abutting owners (act of 1887).²⁶⁴ An exclusive right to the use of a street for a fixed period constitutes a contract.²⁶⁵ A street railway company organized under a general law can not operate its road over the streets of a municipality without the consent of the latter.²⁶⁶ Permitting streets to be occupied by a street railroad is not in itself subjecting the streets to an unlawful use.²⁶⁷ Under the laws of Michigan the general powers vested in a city give it power to consent to the use of its streets for street railway purposes.²⁶⁸ Notice to abutting owners is not required in giving a right to maintain and operate a street railway in a street.²⁶⁹

²⁵⁹ *Mayor &c. v. Africa*, 77 Fed. 501.

²⁶⁰ *Detroit Citizens' St. R. Co. v. City of Detroit*, 110 Mich. 384; s. c. 68 N. W. 304; 35 L. R. A. 859; *Grand Rapids Electric &c. Co. v. Grand Rapids &c.*, 33 Fed. 639; *Saginaw G. Co. v. Saginaw*, 28 Fed. 529; *Parkhurst v. Capital City R. Co.*, 23 Or. 471; s. c. 32 Pac. 304; *Long v. City of Duluth*, 49 Minn. 280; s. c. 51 N. W. 913.

²⁶¹ *Mayor &c. v. Africa*, 77 Fed. 501; *State of New Jersey v. Mayor &c.*, 57 N. J. L. 293; s. c. 30 Atl. 531; *Citizens' St. R. Co. v. Jones*, 34 Fed. 579.

²⁶² *Central Crosstown R. Co. v. Metropolitan St. R. Co.*, 44 N. Y. S. 752; s. c. 16 App. Div. (N. Y.) 229.

²⁶³ *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144; s. c. 47 N. E. 277.

²⁶⁴ *Beeson v. City of Chicago*, 75 Fed. 880.

²⁶⁵ *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557; s. c. 17 S. Ct. 653.

²⁶⁶ *People v. Suburban R. Co.*, 178 Ill. 594; s. c. 53 N. E. 349.

²⁶⁷ *Chicago &c. R. Co. v. General Electric R. Co.*, 74 Ill. App. 465.

²⁶⁸ *Detroit Citizens' R. Co. v. City of Detroit*, 64 Fed. 628.

²⁶⁹ *State v. Mayor &c.*, 57 N. J. L. 293; s. c. 30 Atl. 531. Construction of Kentucky St., § 2825, in reference to repeal of private charter: *City of Louisville v. Louisville Water Co.*, 20 Ky. L. 1529; s. c. 49 S. W. 766. Grants to the use of a street in

Where a county road has been included within the limits of an incorporated town and the municipal authorities have assumed control of it, it has been held that they may, under the general powers conferred by West Virginia statutes with references to streets, alleys, etc., authorize a railroad company to use a portion of such road for the purpose of constructing its railway along the same in accordance with the statute which provides for such construction.^{269a} It has been held in Kentucky that the power to grant to a railroad company the right of way over and along its public streets is not conferred upon a council by a charter provision that they shall have "exclusive control of the streets, sidewalks, lanes, alleys, market places and other public grounds within the corporate limits, and shall cause the same to be kept clean and in repair," as such a grant would be an appropriation or use of the streets for a purpose not contemplated when the charter was granted.^{269b} And it has been held in New Jersey that a city council of one of its cities had no power by ordinance to confer upon a railroad company a right to occupy exclusively twelve feet of a street by the erection thereon of a freight platform and roof under the power to pass ordinances to regulate or prevent the use of streets for any other purposes than public travel.^{269c} An ordinance of a city in Colorado granting the right of way to a railroad company through certain of its streets therein designated has been held not invalid for want of legislative authority, as under the constitution of the state any railroad company may construct a railroad between any designated points in the state, and under the charter of the city its city council may regulate the location of public crossings and the speed of trains. Such use of the streets was clearly contemplated by these provisions and the ordinance passed was a valid license to use the streets designated.^{269d} And the fact that a street has been paved with asphalt, the cost of which was assessed against the abutting owners, has been held not to affect the right of the municipal authorities to consent to the laying of street car tracks in such street.^{269e} Under the general con-

derogation of the public right to the free and unobstructed use are construed freely in favor of the public and strictly against the grantee: *Railroad Co. v. Defiance*, 52 Ohio St. 262; s. c. 40 N. E. 89. Under act of March 19, 1874, New Jersey (P. L. 1874, p. 45), a city may by resolution contract to change the grade of existing streets and accept the dedication of a new street to enable a railroad company to lay its tracks beneath the new grade: *Morris &c.*

Dredging Co. v. Mayor &c., 64 N. J. L. 587; s. c. 46 Atl. 609.

^{269a} *Yates v. Town of West Grafton*, 34 W. Va. 783; s. c. 12 S. E. 1075.

^{269b} *Ruttle v. City of Covington*, 10 Ky. L. 766; s. c. 10 S. W. 644.

^{269c} *State v. Mayor &c.*, 52 N. J. L. 65; s. c. 18 Atl. 586.

^{269d} *Denver &c. R. Co. v. Domke*, 11 Colo. 247; s. c. 17 Pac. 777.

^{269e} *Lockhart v. Craig St. R. Co.*, 139 Pa. St. 419; s. c. 21 Atl. 26.

trol of the streets and alleys given to cities of the second class by the Kansas statutes, it has been held that the city council had the power to grant to a street horse railway company permission to construct and operate a street railway in the streets of the city.²⁷⁰ Brewer, J., in a later case in the federal court, commented at large upon the ruling, in which he, as one of the judges of the supreme court of Kansas, had written the opinion, and held that where the legislature of Kansas had not given to its cities the power of granting an exclusive privilege of occupying the streets with railroads, nor the right to contract away its continuous control of the streets and its future judgment of the needs of the public in those streets, a city could not surrender the occupation of its streets for railroad purposes to individuals for a series of years. The judge made this distinction:—The ruling by the Kansas supreme court was, simply, that having a general control and supervision of its streets, a city might permit a street railroad, as a street railroad comes within the ordinary scope of the use of a street as a street. This is a mere street regulation or license. But to allow such a use exclusively for a series of years would give it the dignity of a contract, and there must be special legislation for that.²⁷¹ Where a railroad company has been granted the right to occupy a street of a city with its tracks and has built the same and then abandoned the road, as this was but a license from the city, it may confer the right on another company without first procuring a decree of forfeiture.²⁷² (g) *The right of railways to use of streets limited:* The first use of a street is for the ordinary travel over it; the right of a railroad com-

²⁷⁰ Atchison St. R. Co. v. Missouri &c. R. Co., 31 Kan. 660; s. c. 3 Pac. 284.

²⁷¹ Jackson Co. &c. R. Co. v. Interstate &c. R. Co., 24 Fed. 306, refusing an injunction against an elevated railroad in the same street where the horse-car railroad was already constructed and in operation. See also, Davis v. Mayor &c., 14 N. Y. 506; People v. Kerr, 27 N. Y. 188; Mayor v. Ohio &c. R. Co., 26 Pa. St. 355; Commonwealth v. Erie &c. R. Co., 27 Pa. St. 339.

²⁷² The G. C. R. Co. v. G. C. S. R. Co., 63 Tex. 529. In Texas the right of a railroad company to occupy any particular street with its road-bed is entirely dependent upon the consent of the city authorities. To this end the local authorities have free con-

trol and management of the streets and may or may not consent to their use for such purpose: Const. Tex., art. 10, § 7; Tex. Rev. Stats., art. 4173; City of Indianola v. Gulf &c. R. Co., 56 Tex. 594. As to the power of a council to withdraw its consent to such a license and by conferring the license upon another company to occupy its streets with its road-bed, and the presumption that it had withdrawn its consent by thus conferring the privilege upon another company, see also, City of Detroit v. Detroit City R. Co., 37 Mich. 558; Street R. Co. v. West Side R. Co., 48 Mich. 433; s. c. 12 N. W. 643; 7 Am. & Eng. R. Cas. 95; New York &c. R. Co. v. Forty-second St. &c. R. Co., 50 Barb. (N. Y.) 285; Market St. R. Co. v. Central R. Co., 51 Cal. 583.

pany to operate its trains across it is subordinate to the use of the general public.²⁷³ The legislature may authorize the laying of a railroad track in the street of a city, but the track must be laid in the manner authorized. So if there be a requirement in the statute authorizing such laying of the track that it must "be so constructed as not to hinder or prevent the public from using the street," if the character of the street be such that it could not be constructed without hindering the public from using the street, then it can not be laid therein, no matter how important it should be to the company to use the street. A city has no power to authorize such a use of a street dedicated for that purpose as will destroy its use as a public thoroughfare. And one owning property sustaining special damages by reason of an appropriation of a street to a railroad company for track purposes can maintain injunction to restrain such use.²⁷⁴ And where tracks have been laid in the streets of a city by authority of the legislature, such authority does not go to the extent of allowing these railroad companies to so use the streets as to allow, for instance, their loaded and unloaded cars to stand upon the tracks so as to become offensive to the citizens occupying property contiguous to the street. They can only use them for moving their cars to and fro; the street can not be used for yard purposes or for the purpose of shifting cars and making up and breaking up trains in the conduct of general business. And one having the right of possession, but not absolute ownership, of real estate abutting upon such streets may maintain an action for personal annoyances resulting from a nuisance committed in such an unlawful and unreasonable use of a street by a railroad company.²⁷⁵ A city by permitting a railroad company to use one of its streets by building its track thereon and running its cars through it does not part with its right to control such street, for, without some special legislative authority, it can not make any such grant to a railroad company, if the effect of such grant would be to relinquish its own control over such street, or to abandon its duty to keep the same in repair. The privilege of a railroad company to lay down and use a track in a street of a city is not exclusive but must be exercised in common with the general public. The streets are held in trust for the public use, and are public for all

²⁷³ *Houston &c. R. Co. v. Carson*, 66 Tex. 345; s. c. 1 S. W. 107.

²⁷⁴ *Dubach v. Hannibal &c. R. Co.*, 89 Mo. 483; s. c. 1 S. W. 86. As to the power of the legislature of Missouri to authorize the use of the streets of a city for railroad tracks, see also, *Porter v. North Missouri R. Co.*, 33 Mo. 128; *Tate v. Missouri &c. R. Co.*, 64 Mo. 149. As to a city's

lack of authority to authorize such use of a street, and the right of property owners to have injunction, see *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 121, 124.

²⁷⁵ *Hopkins v. Baltimore &c. R. Co.*, 6 Mack. (D. C.) 311; approving *Neitzey v. Baltimore &c. R. Co.*, 5 Mack. (D. C.) 34.

purposes of free and unobstructed passage. For those purposes a city may improve and control them, and adopt all needful rules and regulations for their management and use, but can not alien or otherwise dispose of them.²⁷⁶ The permission given a street railway company to occupy streets is subordinate to a municipality's statutory and corporate powers respecting the use, control and regulation of streets. "The right of public supervision and control of highways results from the power and duty of providing and preserving them. The charter of a city generally commits the regulation, supervision and control of its streets to the common council. It empowers the council to improve the same and determine the nature and details of such improvement. The council is given the power to control, prescribe and regulate the manner in which the streets shall be used and enjoyed. These powers are held in trust for the public benefit, and can not be surrendered or delegated to private parties. All franchises granted or contracts made with reference to the use of streets must be made, not only with due regard to their lawful and proper use by others, but subject to the exercise by the municipality of the foregoing powers. A city is not under obligation to conform its treatment of its streets to the construction of a railroad company's road-bed, but, on the contrary, the company must conform the construction of its road-bed to such reasonable regulations as are made by the municipality in the reasonable exercise of its powers respecting the use, control, regulation and improvement of its streets. Street railways occupy public streets subject to the use of such streets by the public, subject to such burdens as may be made necessary by reason of the improvements of such streets, and subject to such changes in the construction of road-beds as improved and changed conditions may demand."^{276a} (h) *Regulating speed of*

²⁷⁶ *Chicago &c. R. Co. v. City of Quincy*, 136 Ill. 563; s. c. 27 N. E. 192, in which the right of the city to order such a street to be paved was sustained, notwithstanding it might put the railroad company to some inconvenience. The court said:—"It frequently happens that the business of the individual citizen is injured and interfered with by the construction of a street improvement, but no greater obligation rests upon him than upon the railroad company to submit gracefully to such annoyance. On such occasions the owners of railways, like other parties desirous of using the street, must endure

a temporary inconvenience for the sake of a permanent advantage;" citing *Middlesex R. Co. v. Wakefield*, 103 Mass. 261; *City of Quincy v. Jones*, 76 Ill. 231; *Kreigh v. City of Chicago*, 86 Ill. 407; *City of Bloomington v. Bay*, 42 Ill. 503; *Watson v. Tripp*, 11 R. I. 98.

^{276a} These principles are declared in the opinion of McGrath, J., for the supreme court of Michigan, as governing that court, in *City of Detroit v. Ft. Wayne &c. R. Co.*, 90 Mich. 646; s. c. 51 N. W. 688, in which case they ordered a writ of mandamus to issue to compel the authorities of the railway company to remove the

cars: A municipal corporation may regulate within its limits the running and stopping of cars propelled by steam, by virtue of its power over the streets and to protect the safety of citizens and their property. In the absence of any express authority in its charter, a right to pass ordinances as to the speed with which such cars should be run through the streets would ensue by virtue of its general supervision over the police of the city. And such an ordinance would be applicable where the track is located on the uninclosed private property of the company.²⁷⁷ A learned author says on this subject:—"It has been held that a statute giving power to the common council of a city to regulate the running of cars within the corporate limits authorizes the adoption of an ordinance entirely prohibiting the propelling of cars by steam through any part of the city. We would entertain no doubt of the right of the municipal authorities of a city, or large town, to adopt such an ordinance without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdictions."²⁷⁸ With a limitation, the whole matter of regulating the speed of trains of cars running through the various cities organized under the general incorporation act of Illinois is left by that act to the sound discretion of the municipal authorities. Such discretion, however, is not absolute, but is subject to the limitation that the ordinance adopted in such matters must be reasonable. Upon this question of reasonableness, it has been held that, where one railroad runs through a densely populated part of a city, where a high rate of speed would be extremely dangerous to persons and property, and another railway runs through a portion of the same city where there are but few inhabitants, and where it is improbable that injury will happen to any person who is in the exercise of ordinary care, an ordinance making a discrimination as to the speed at which the trains of the two roads may be run can hardly be said to be

projecting ends of the ties upon which its tracks were laid, as that was necessary to protect the concrete which was to be used in the plan of repaving the streets.

²⁷⁷ *Merz v. Missouri &c. R. Co.*, 88 Mo. 672; s. c. 1 S. W. 382. This doctrine is sustained by *Buffalo &c. R. Co. v. City of Buffalo*, 5 Hill (N. Y.) 209; *Whitson v. City of Franklin*, 34 Ind. 392; *Chicago &c. R. Co. v. Haggarty*, 67 Ill. 113; *Cooley Const. Lim.* (5th ed.), 712; 2 *Dillon Munic.*

Corp., § 713; *Neier v. Missouri Pac. R. Co.* (Mo.), 1 S. W. 386, 387.

²⁷⁸ 2 *Redfield Railways* 577-8. There has been no general grant of police powers by the legislature of Louisiana to police juries, and it has been held in that state, that, in the absence of a grant to that end, such corporate authorities are not authorized to pass an ordinance regulating the speed of cars running through the villages of their parish: *State v. Miller*, 41 La. An. 53; s. c. 7 So. 672.

unreasonable. But where no such disparity of circumstances is shown, making it necessary to apply different regulations to the different roads, an ordinance which limits the speed of the trains of one road and leaves the other to run through the city without such limitation, would be unreasonable, and therefore void.²⁷⁹ (i) *Regulating trains at crossings*: Ordinances of a city in Louisiana, requiring railroad companies to place watchmen with prescribed signals at all points where their tracks intersect streets on which street cars are running, and which impose imprisonment on the person in charge of a train who crosses such street without being signaled as therein provided, have been held to be a valid exercise of the power conferred on it by its charter to "authorize the use of the streets for horse or steam railroads and to regulate the same."²⁸⁰ And the Louisiana courts refused to interfere with the discretion vested in the municipal authorities as to the mode and means of regulating the use of its streets by railway companies unless they are manifestly unreasonable and oppressive.²⁸¹ The charter of a city authorizing the adoption of ordinances to prevent the incumbering of streets with carriages authorizes an ordinance to prevent the obstruction of streets by railroad cars; and an ordinance prohibiting the stopping of railroad cars or locomotives on a street crossing for the switching of cars has been held not to be prima facie unreasonable and void.²⁸² Courts are not justified in declaring such enactments unreasonable and therefore invalid unless their unreasonableness is clearly shown.²⁸³

²⁷⁹ *City of Lake View v. Tate*, 130 Ill. 247; s. c. 22 N. E. 791. As to ordinances making unjust discriminations, see also, *Tugman v. City of Chicago*, 78 Ill. 405; *City of Chicago v. Rumpff*, 45 Ill. 90; *Dillon Munic. Corp.*, §§ 319, 328. A municipal corporation, under authority given it to regulate the use of its streets by street-cars "so as to prevent injury and inconvenience to the public," has no power to suspend, alter or change the general statutes of the state regulating the running of railroads. Therefore, an ordinance prohibiting the blowing of steam-whistles within a city would be void so far as it conflicts with a law of the state imposing upon railroad companies in general the duty of blowing whistles at crossings:" *Katzenberger v. Lawo*, 90 Tenn. 235;

s. c. 16 S. W. 611 (a street "dummy" road held to be a "railroad" and subject to the state law).

²⁸⁰ *State v. Cozzens*, 42 La. An. 1069; s. c. 8 So. 268.

²⁸¹ *State v. Cozzens*, supra.

²⁸² *City of Duluth v. Mallett*, 43 Minn. 204; s. c. 45 N. W. 154.

²⁸³ *Knobloch v. Chicago & C. R. Co.*, 31 Minn. 402; s. c. 18 N. W. 106. A charter of a city authorizing the passage of such ordinances as shall appear to its council requisite and necessary for the security, welfare and convenience of its inhabitants, and for preserving health, peace and good government within its limits, authorizes the council to pass an ordinance requiring street-railroad companies to keep their tracks watered so as to lay the dust, and impose a fine for failing so to do.

§ 1310. **Obstructions in streets.**—The law as to obstructions in the streets, and municipal liability growing out of injuries caused thereby, is not materially different from that applicable in case of defective condition or bad repair already considered, but for convenience will be separately considered. Where the legislature authorizes the placing of an obstruction in a street it is a governmental matter and for which the municipality is relieved from all liability.²⁸⁴ (a) *Care of streets in regard to obstructions:* We have already seen that where the care of the streets is assumed by a municipality its responsibility in regard to their safety for public use becomes a legal obligation. Where a public work, unless carefully done, is likely to be dangerous to the public, a duty rests upon the municipality to see that no dangerous obstructions are placed in the road by which passengers may be injured. Nor is the municipality relieved by employing a contractor to do the work.²⁸⁵ Where a path in a parkway is used by a large number of people, and is poorly lighted, and the city knowing its condition takes no steps to warn people of the danger, it is liable for an injury.²⁸⁶ Where there is an obstruction in the street by municipal permission, that is liable to produce injury, it is its duty to place signals or danger warnings to protect the public.²⁸⁷ The duty resting on a city as to obstructions is reasonable as to the extent thereof, and it is not a guarantor as to safety under all conditions that may arise. A city is not required to keep its streets free from lamp-posts, telephone posts, water hydrants, hitching-posts, and like obstructions so that a runaway team may have a clear way from sidewalk to sidewalk.²⁸⁸ Where a city is required to keep its streets in a safe condition the presence of a light at the place of an accident is not of itself a defense, but is a circumstance to be taken into consideration in determining whether plaintiff is guilty of contributory negligence.²⁸⁹ The statutory duty of keep-

Even if a railroad company has not, as in a case in Georgia, submitted itself to the police regulations and ordinances of the city on entering it over tracks laid in its streets, it would be subject to it. Nor is an ordinance of this kind so partial and wanting in generality as to vitiate it: *City & C. R. Co. v. Mayor & C.*, 77 Ga. 731. See also, *Goddard, Petitioner*, 16 Pick. (Mass.) 504, 506, 510; *Railroad Co. v. Richmond*, 96 U. S. 521.

²⁸⁴ *Redford v. Coggeshall*, 19 R. I. 313; s. c. 36 Atl. 89.

²⁸⁵ *Hill v. Tottenham Urban District Council*, 79 Law T. (N. S.) 495.

In the construction of a street improvement the city need not anticipate unusual storms provided it uses ordinary care or skill in its construction: *Taubert v. City of St. Paul*, 68 Minn. 519; s. c. 71 N. W. 664.

²⁸⁶ *Collett v. Mayor & C.*, 64 N. Y. S. 693; s. c. 51 App. Div. (N. Y.) 394.

²⁸⁷ *Mayor & C. v. Chapman*, 94 Ga. 711; s. c. 20 S. E. 3.

²⁸⁸ *Village of Bureau Junction v. Long*, 56 Ill. App. 458.

²⁸⁹ *Giffen v. City of Lewiston (Idaho)*, 55 Pac. 545.

ing streets open, in repair and free of nuisances is ministerial and mandatory from whatever cause arising when brought to notice of the municipality.²⁹⁰ (b) *Presumption as to streets*: Where no knowledge of defects in a street is shown a person using such street has a right to presume that it is in a reasonably safe condition.²⁹¹ The presumption that a street is passable and that excavations are properly guarded may be indulged in by persons using the street.²⁹² (c) *Notice of obstruction*: It is a prerequisite to liability on the part of the city for an injury caused by an obstruction that it shall have notice of the obstruction, and this notice may be actual or constructive. Where the charter provides that the city shall not be liable for an injury caused by a sidewalk or roadway being obstructed or out of repair or dangerous from snow or ice unless actual notice has been given to officers having charge of highways a reasonable time before the injury, actual notice is a prerequisite to liability.²⁹³ An obstruction for one year and until the street had become overgrown with grass and weeds is ample time for the law to presume notice.²⁹⁴ Where a defect in a sidewalk is not calculated to attract attention and there is no evidence as to the natural life of such sidewalk, notice will not be imputed.²⁹⁵ Where a defect has existed for a sufficient length of time that the city by the exercise of ordinary diligence could have discovered it and thus have prevented an injury the city is liable. Failure to discover a defect in a public street in a reasonable time is not diligence.²⁹⁶ Where a charter provides that a city shall not be liable for injuries caused by defects in the streets in the absence of actual notice to an alderman or unless the defect shall have existed three weeks prior to the injury, and provides that knowledge shall not be presumed from the expiration of such period, an instruction that if the defect had existed three weeks prior to the injury the jury could presume the defendant had

²⁹⁰ *City of Circleville v. Sohn*, 59 Ohio St. 285; s. c. 52 N. E. 788. An obstruction in a street at the outskirts of a village, at a place where the unobstructed portion of the street was of sufficient width to meet the public necessity or convenience, does not render the village liable: *Village of Rankin v. Smith*, 63 Ill. App. 522.

²⁹¹ *Citizens' St. R. Co. v. Ballard*, 22 Ind. App. 151; s. c. 52 N. E. 729; *Pierce v. Mayor &c.*, 2 Marv. (Del.) 306; s. c. 43 Atl. 162.

²⁹² *Carswell v. Mayor &c.*, 2 Marv. (Del.) 360; s. c. 43 Atl. 169.

²⁹³ *Tarba v. City of Rochester*, 58 N. Y. S. 755; s. c. 41 App. Div. (N. Y.) 188.

²⁹⁴ *Young v. City of Webb City*, 150 Mo. 333; s. c. 51 S. W. 709; *City of Dallas v. Jones*, 93 Tex. 38; s. c. 49 S. W. 577; 53 S. W. 377; *Downs v. Commissioners &c.*, 2 Penn. (Del.) 132; s. c. 45 Atl. 717.

²⁹⁵ *Buckley v. City of Kansas City*, 156 Mo. 16; s. c. 56 S. W. 319.

²⁹⁶ *Cowie v. City of Seattle*, 22 Wash. 659; s. c. 62 Pac. 121.

knowledge is erroneous.²⁹⁷ The city is not liable for an injury resulting from an obstruction of which it has no notice actual or constructive presumed from its existence for a considerable length of time before the injury.²⁹⁸ The burden is on plaintiff to show that the city had actual or implied notice.²⁹⁹ Where a steam heating company in excavating the streets, by permission of the city, regularly put out lights to guard the excavation until the night of an accident, no notice of negligence to the town can be imputed.³⁰⁰ What is sufficient time to imply notice depends on the circumstances of each particular case.³⁰¹ The city is chargeable with notice where the nature of the defect is such that the authorities by the exercise of reasonable diligence could have known of its existence and repaired it,³⁰² but no actual time can be fixed arbitrarily.³⁰³ Where actual notice is relied on it must be given to an officer or agent charged with the duty of looking after the condition of the streets.³⁰⁴ Knowledge of the members of a committee of the city council on streets and alleys of the dangerous condition of a sidewalk is sufficient to charge the city with negligence.³⁰⁵ Where the law makes the liability of a city depend on the

²⁹⁷ *Rhyner v. City of Menasha*, 107 Wis. 201; s. c. 83 N. W. 303.

²⁹⁸ *Downs v. Commissioners &c.*, 2 Penn. (Del.) 132; s. c. 45 Atl. 717; *Buckley v. City of Kansas City*, 156 Mo. 16; s. c. 56 S. W. 319.

²⁹⁹ *Jones v. City of Greensboro*, 124 N. C. 310; s. c. 32 S. E. 675.

³⁰⁰ *Morgan v. Village of Penn Yan*, 59 N. Y. S. 504; s. c. 42 App. Div. (N. Y.) 582.

³⁰¹ *Young v. City of Webb City*, 150 Mo. 333; s. c. 51 S. W. 709.

³⁰² *Streator v. Chrisman*, 82 Ill. App. 24.

³⁰³ Two weeks not sufficient: *Tarba v. City of Rochester*, 58 N. Y. S. 755; s. c. 41 App. Div. (N. Y.) 188; but six weeks has been held sufficient: *Young v. City of Webb City*, 150 Mo. 333; s. c. 51 S. W. 709. A telegraph pole overhanging street for a year is notice: *Fisher v. City of Mt. Vernon*, 58 N. Y. S. 499; s. c. 41 App. Div. (N. Y.) 293. Defects for two months is notice: *Schively v. Borough of Jenkintown*, 180 Pa. St. 196; s. c. 36 Atl. 754. Notice is chargeable from an obstruction remaining three

or four days in the street: *Briel v. City of Buffalo*, 156 N. Y. 699; s. c. 51 N. E. 1089. A city is required to exercise active vigilance to ascertain the condition of its sidewalks and streets, and if there has been opportunity to observe the defect in the performance of duty notice will be imputed, and an allegation of knowledge or notice need not be expressly alleged: *City of Evansville v. Frazer*, 24 Ind. App. 628; s. c. 56 N. E. 729. The city is not chargeable with notice of snow and ice on the sidewalk until the expiration of the time specified in an ordinance making it the duty of a street commissioner to remove ice and snow after a specified time: *McAllister v. City of Bridgeport*, 72 Conn. 733; s. c. 46 Atl. 552.

³⁰⁴ Notice to city officers other than those charged with the duty of repair is not sufficient: *City of Austin v. Colgate* (Tex. Civ. App.), 27 S. W. 896.

³⁰⁵ *City of Pittsburg v. Broderson*, 10 Kan. App. 430; s. c. 62 Pac. 5.

fact of notice of a defect in the sidewalk, notice given to a clerk two months before an accident, where he made a note of it in the office of the executive board, which was open to the public, will be sufficient.³⁰⁶ Where the city has an agent to supervise and inspect the work of a contractor for the construction of a sewer inlet it is chargeable with notice of negligence in the work.³⁰⁷ Notice of the defective condition of a sidewalk can only be given to an officer having authority to act, or to one whose duty it is to report to some one having authority to act.³⁰⁸ Notice to a foreman of sidewalks clothed with general power to repair sidewalks is notice to a city officer having charge of highways.³⁰⁹ If a city with the knowledge of the aldermen permits its streets to be obstructed by ditches, it is error to instruct that no recovery can be had without knowledge of the condition of the street.³¹⁰ A city which has or should have knowledge of a defect in the street, is liable to a person injured thereby,³¹¹ but where the defect is a hidden one and not shown to have existed a sufficient length of time to justify knowledge, the city is not liable.³¹² (d) *Negligence in regard to obstructions*: Negligence of the municipality in the matter of obstructions in the streets is a question of fact as a rule and the facts and circumstances of each case must determine the question of negligence.³¹³ Where electric light poles are erected by a company the duty of the city extends only to a general supervision of the company, and it is liable only for injuries caused by defects only when it has been guilty of negligence after actual or constructive notice of the defects.³¹⁴ There may be such contributory negligence on the part of the plaintiff as will bar a recovery. An unguarded excavation in a street does not render the city liable to a plaintiff who was driving in such street at

³⁰⁶ *Elias v. City of Rochester*, 61 N. Y. S. 712; s. c. 49 App. Div. (N. Y.) 597.

³⁰⁷ *Burger v. Philadelphia*, 196 Pa. St. 41; s. c. 46 Atl. 262.

³⁰⁸ *City of Dallas v. Meyers* (Tex. Civ. App.), 55 S. W. 742.

³⁰⁹ *Sprague v. City of Rochester*, 159 N. Y. 20; s. c. 53 N. E. 697.

³¹⁰ *Foy v. City of Winston*, 126 N. C. 381; s. c. 35 S. E. 609; *Parker v. City of Boston*, 175 Mass. 501; s. c. 56 N. E. 718; *Allen v. Cook*, 21 R. I. 525; s. c. 45 Atl. 148; *City of Mt. Vernon v. Hoehn*, 22 Ind. App. 282; s. c. 53 N. E. 654.

³¹¹ *City of Kansas City v. Orr* (Kan.), 61 Pac. 397.

³¹² *Carvin v. City of St. Louis*, 151 Mo. 334; s. c. 52 S. W. 210.

³¹³ An obstruction placed in a street by an officer, in the discharge of his duty, if allowed to remain several days is negligence: *Saylor v. City of Montesano*, 11 Wash. 328; s. c. 39 Pac. 653. And so is piling lumber in the street: *Senhenn v. City of Evansville*, 140 Ind. 675; s. c. 40 N. E. 69. It is negligence in law for a manufacturer to obstruct the street for weeks in front of his premises: *Gerdes v. Christopher & Co.*, 124 Mo. 347; s. c. 27 S. W. 615.

³¹⁴ *City of Denver v. Sherret*, 88 Fed. 226.

an immoderate gait and in violation of an ordinance.³¹⁵ It is contributory negligence in a bicycle rider who is riding at an unlawful speed with his head down and not looking or using ordinary care to avoid an obstruction, and he can not recover although the city was guilty of negligence in not giving proper warning of the obstruction.³¹⁶ It is not necessary to entitle the plaintiff to recover for personal injuries that he be absolutely free from any negligence, as in such case he would be required to exercise extraordinary care.³¹⁷ Where a person has no reason to suspect an obstruction, and the light is not sufficient to detect it, and he is injured, there is no contributory negligence.³¹⁸ (e) *Who placed the obstruction not material*: In determining the question of liability it is not material who placed the obstruction in the street if there is notice, actual or constructive.³¹⁹ The city is liable for an obstruction placed in a street by a third party without regard to whether it was such as persons of reasonable prudence and foresight would deem dangerous or not.³²⁰ Failure of a railroad to restore a street according to agreement does not relieve the municipality.³²¹ (f) *Exemption from liability by charter*: In some cases the legislature, by charter provisions, has undertaken to exempt cities from liability. A provision in a charter exempting the city from liability for failure to repair a roadway or keep the same free from obstructions unless notice has been given has no application to an injury caused by a fallen wire the city had negligently erected.³²² The city is liable for failure to keep its streets in repair although the charter in terms does not impose the duty upon it where it has assumed control over streets.³²³ (g) *Nature and character of obstructions*: Where

³¹⁵ *Carswell v. Mayor &c.*, 2 Marv. (Del.) 360; s. c. 43 Atl. 169.

³¹⁶ *Anderson v. Mayor &c.*, 2 Penn. (Del.) 28; s. c. 43 Atl. 841.

³¹⁷ *Cowie v. City of Seattle*, 22 Wash. 659; s. c. 62 Pac. 121.

³¹⁸ *Collett v. Mayor &c.*, 64 N. Y. S. 693; s. c. 51 App. Div. (N. Y.) 394.

³¹⁹ *Senhenn v. City of Evansville*, 140 Ind. 675; s. c. 40 N. E. 69; *Dillon v. City of Raleigh*, 124 N. C. 184; s. c. 32 S. E. 548.

³²⁰ It is not an excuse for obstructing a sidewalk that the person so obstructing is a constable and is engaged in removing furniture from a house under an execution: *Commonwealth v. Lennon*, 172 Mass. 434; s.

c. 52 N. E. 521; *Whittall v. City of New York*, 64 N. Y. S. 250.

³²¹ *Galveston &c. R. Co. v. White* (Tex. Civ. App.), 32 S. W. 186. Cf. *Boyle v. Borough of Hazleton*, 171 Pa. St. 167; s. c. 33 Atl. 172. Where a pedestrian trips on a railing erected by an adjoining owner on the outside edge of the sidewalk the city is not liable, the sidewalk being unobstructed and sufficient to accommodate the public: *Oliver v. City of Denver*, 13 Colo. App. 345; s. c. 57 Pac. 729.

³²² *Twist v. City of Rochester*, 55 N. Y. S. 850; s. c. 37 App. Div. (N. Y.) 307.

³²³ *City of Greensboro v. McGibbony*, 93 Ga. 672; s. c. 20 S. E. 37.

a person engaged in the construction of buildings on abutting property is in the temporary use of the street for depositing building materials, the city is bound to use vigilance in the protection of the public against the encroachments.³²⁴ The city is jointly liable with a contractor for an injury resulting from placing building material in a street by a contractor where the material occupied a greater part of the street than had been allowed by the permit and no lantern was placed in the street to give warning.³²⁵ It is negligence to leave building material piled in the street at night without a warning signal.³²⁶ A city by permitting timber to be piled in a street in an insecure manner whereby a child playing thereon is injured becomes liable.³²⁷ A contractor, using a portion of a street for the deposit of building material, is not obliged to keep such space so used in a proper condition for public travel or a play ground for children.³²⁸ But the obstruction must be such as to be reasonably safe in view of the fact that pedestrians would probably step on, and children play about, it.³²⁹ A contractor is liable for a personal injury growing out of piling rails in a street by a subcontractor in a careless manner.³³⁰ A contractor is liable for an injury resulting from sand ordered by him and deposited in the street although it is claimed that the sand is not what was ordered and the seller was ordered to remove it.³³¹ Where a billboard is constructed by a person in a substantial manner and is blown over by an extraordinary wind the city is not liable for an injury therefrom.³³² An ordinance prohibiting the removal of buildings on streets without permission of the mayor or other officer is valid and the duties of the mayor are administrative.³³³ Extending bay windows beyond the building line is not to be sanctioned by custom.³³⁴ The city is not liable for a truck left standing in the street, unless it had been there for a sufficient time to make it the duty of the city to remove it.³³⁵ A reasonable use of streets in front of a hotel by

³²⁴ *City of Kansas City v. McDonald*, 60 Kan. 481; s. c. 57 Pac. 123.

³²⁵ *Rommeney v. City of New York*, 63 N. Y. S. 186; s. c. 49 App. Div. (N. Y.) 64; *Koch v. City of Williamsport*, 195 Pa. St. 488; s. c. 46 Atl. 67.

³²⁶ *Van Vranken v. Village of Clifton Springs*, 33 N. Y. S. 329; s. c. 86 Hun (N. Y.) 67.

³²⁷ *Ricketts v. Corporation &c. of Markdale*, 31 Ont. 610.

³²⁸ *Pueschell v. Kansas City W. & I. Works*, 79 Mo. App. 459.

³²⁹ *Ramsey v. National Contracting*

Co., 63 N. Y. S. 286; s. c. 49 App. Div. (N. Y.) 11.

³³⁰ *Ramsey v. National Contracting Co.*, *supra*.

³³¹ *Rommeney v. City of New York*, 63 N. Y. S. 186; s. c. 49 App. Div. (N. Y.) 64.

³³² *Village of Oak Harbor v. Kallager*, 52 Ohio St. 183; s. c. 39 N. E. 144.

³³³ *City of Eureka v. Wilson*, 15 Utah 53; s. c. 48 Pac. 41.

³³⁴ *Broadbelt v. Loew*, 44 N. Y. S. 159; s. c. 15 App. Div. (N. Y.) 343.

³³⁵ *Farley v. Mayor &c.*, 41 N. Y. S.

carriages is legitimate and proper, and what constitutes such reasonable use is to be determined by the municipal authorities, and can not be controlled by the courts except in a case of clear abuse.³³⁶ A city has no implied power to authorize the obstruction of sidewalks by fruit stands.³³⁷ Ice forming an obstruction in a street does not render the city liable for an injury in the absence of notice, or the continued dangerous condition for such length of time as to raise a presumption of notice.³³⁸ A boulder the size of a bushel basket so placed as to protect a tree by the sidewalk, but which is covered with snow and against which a cutter was driven and a passenger injured, will not render the city liable.³³⁹ While the city may be under no obligation to construct a crossing over an alley and may leave it in its natural state, yet if it allows persons to place loose boards across such alley which become dangerous it will be liable to the same extent as if it constructed a crossing and permitted it to become out of repair.³⁴⁰ The city has a right to stretch wires across a street for the benefit of sick residents thereon, but in doing so it must give such warnings as will reasonably notify all persons using the street that it is dangerous.³⁴¹ Where the city permits a mowing machine to be left standing in a street and a person is injured by being thrown thereon from a team of horses running away, the negligence of the city is the proximate cause.³⁴² Where a steam roller used in repairing a street was left standing at the side of a principal street, causing a horse of ordinary gentleness to shy and become unmanageable, and plaintiff, on the bit breaking, jumped out of the buggy and was injured, it renders the city liable.³⁴³ The city's liability for injury caused by rubbish in the street must be based on the negligence in not removing the rubbish from the street in a reasonable time after notice.³⁴⁴ Where there is a dangerous excavation in a sidewalk it is negligence in the city to permit it to remain unguarded

622; s. c. 9 App. Div. (N. Y.) 536. And see *Studeor v. Village of Gouverneur*, 44 N. Y. S. 122; s. c. 15 App. Div. (N. Y.) 229.

³³⁶ *People v. Brookfield*, 39 N. Y. S. 673; s. c. 6 App. Div. (N. Y.) 398.

³³⁷ *Costello v. State*, 108 Ala. 45; s. c. 18 So. 820.

³³⁸ *Ransom v. City of Belvidere*, 87 Ill. App. 167; *Corey v. City of Ann Arbor*, 124 Mich. 134; s. c. 82 N. W. 804.

³³⁹ *Dougherty v. Trustees &c.*, 159 N. Y. 154; s. c. 53 N. E. 799.

³⁴⁰ *City of Springfield v. Tomlinson*, 79 Ill. App. 399.

³⁴¹ *Anderson v. Mayor &c.*, 2 Penn. (Del.) 28; s. c. 43 Atl. 841.

³⁴² *City of Mt. Vernon v. Hoehn*, 22 Ind. App. 282; s. c. 53 N. E. 654.

³⁴³ *Halstead v. Village of Warsaw*, 59 N. Y. S. 518; s. c. 43 App. Div. (N. Y.) 39. Whether rubbish in a street is of such character as to frighten a horse is a question of fact: *Barr v. Village of Bainbridge*, 59 N. Y. S. 132; s. c. 42 App. Div. (N. Y.) 628.

³⁴⁴ *Badgley v. City of St. Louis*, 149 Mo. 122; s. c. 50 S. W. 817.

and without a light to warn persons at night.³⁴⁵ Inequalities in a sidewalk to the extent of six inches which have existed for twelve months do not as a matter of law constitute negligence.³⁴⁶ Where the city knowingly permits an opening to be made by an owner in a sidewalk and used in a negligent manner as a hatchway it is liable for an injury caused by such hatchway.³⁴⁷ It is negligence to allow a box to remain on a much used sidewalk one day and night.³⁴⁸ The city is liable for the unsafe and defective condition caused by a water-shut-off box placed in a sidewalk much used for travel, though it is the usual contrivance used in cities for the purpose.³⁴⁹ An ordinance which prohibits the moving of any building upon or across the streets of a city without the written permission of the mayor or other city official is not a denial of the equal protection of the law.³⁵⁰ (h) *Removal of obstructions*: The summary removal of obstructions in a street will not be sustained where the legal existence of the street is in dispute.³⁵¹ The authority to remove a sign suspended over a sidewalk is not by reason of the fee to the street being in the city but by reason of the sign suspended over the sidewalk interfering with the use of the sidewalk by the general public, or danger to the safety of pedestrians.³⁵² A charter providing that any one maintaining a projection over a sidewalk shall be guilty of a misdemeanor does not give express authority to pass a general ordinance requiring all signs projecting over the sidewalk to be taken down although the fee is in the city.³⁵³ Where a private way has become public by continuous use for thirty years and the repair thereof by the city, the city council on petition of a property-owner has authority to remove an obstruction placed in the street.³⁵⁴ An obstruction may be forcibly removed by a city.³⁵⁵ (i) *Notice of injury—Statutory*: In some states, as we have already seen, and as a precautionary measure against fraudulent claims against the municipality based on alleged personal injury from defects in the sidewalks and obstructions in the streets, statutes have been enacted

³⁴⁵ O'Hara v. City of Buffalo, 57 N. Y. S. 367; s. c. 39 App. Div. (N. Y.) 443.

³⁴⁶ City of Hartford v. Graves, 8 Kan. App. 677; s. c. 57 Pac. 133.

³⁴⁷ Whitty v. City of Oshkosh, 106 Wis. 87; s. c. 81 N. W. 992.

³⁴⁸ Mayor &c. v. Tayloe, 105 Ala. 170; s. c. 16 So. 576.

³⁴⁹ Redford v. City of Woburn, 176 Mass. 520; s. c. 57 N. E. 1008.

³⁵⁰ Wilson v. Eureka City, 173 U. S. 32; s. c. 19 S. Ct. 317.

³⁵¹ State v. Mayor &c., 57 N. J. L. 252; s. c. 30 Atl. 628.

³⁵² State v. Higgs, 126 N. C. 1014; s. c. 35 S. E. 473.

³⁵³ State v. Higgs, supra.

³⁵⁴ Carlisle v. Wilson, 110 Ga. 860; s. c. 36 S. E. 54.

³⁵⁵ City of Cape May v. Cape May &c. R. Co., 60 N. J. L. 224; s. c. 37 Atl. 892; Delaware &c. R. Co. v. City of Buffalo, 158 N. Y. 266; s. c. 53 N. E. 44.

requiring all persons injured on the streets and sidewalks, and as a condition precedent to a subsequent action, to notify the municipality of the nature, time and place of the alleged injury. Any one familiar with the number and general nature of personal injury suits and the opportunities for the perpetration of fraud upon the municipality, particularly in large cities, will recognize the justice and necessity of such legislation. If the claim is bona fide certainly no injustice to the claimant can result from such requirement and the city is protected and afforded means of investigation at or near the time of the alleged injury.³⁵⁶ Notice by attorneys for a married woman of personal injuries from a defective sidewalk will not be sufficient to support an action by her husband for lost services growing out of an injury.³⁵⁷ Where a statute requires ninety days notice of an injury from a defective sidewalk, and the testimony of plaintiff was that he sent a person to a lawyer to have notice served but he did not know the exact date, it is not sufficient.³⁵⁸ A notice that an injury was caused by stepping into a hole in the sidewalk is not sufficient where the injury was caused by a loose board in the sidewalk which turned and caused plaintiff's foot to slip into a hole.³⁵⁹ An insufficient notice of a claim is not rendered valid by nature's removal of the cause prior to the presentation of the claim.³⁶⁰ Where a charter requires notice of all claims for damages for personal injuries in writing within four months, stating the time when and the place at which the injuries were received with the cause, nature and extent of the injuries, and the injury was caused by accumulations of snow and ice, a notice that the injuries were caused by defects and obstructions in the sidewalks is not sufficient.³⁶¹ A notice of a claim for personal injury which specifies the time and place as "the 6th day of March on Barber Ave.," is not sufficient under laws of New York, 1889, ch. 440.³⁶² A con-

³⁵⁶ *McKeague v. City of Green Bay*, 106 Wis. 577; s. c. 82 N. W. 708. Cf. *Engstrom v. City of Minneapolis*, 78 Minn. 200; s. c. 80 N. W. 962; *Krall v. City of New York*, 44 App. Div. (N. Y.) 259; s. c. 60 N. Y. S. 661.

³⁵⁷ *Maloney v. Cook*, 21 R. I. 471; s. c. 44 Atl. 692.

³⁵⁸ *Hildman v. City of Phillips*, 106 Wis. 611; s. c. 82 N. W. 566.

³⁵⁹ *Gagan v. City of Janesville*, 106 Wis. 662; s. c. 82 N. W. 558.

³⁶⁰ *Mears v. City of Spokane*, 22 Wash. 323; s. c. 60 Pac. 1127.

³⁶¹ *Mears v. City of Spokane*, 22 Wash. 323; s. c. 60 Pac. 1127. Cf.

Noonan v. City of Lawrence, 130 Mass. 161; *Miles v. City of Lynn*, 130 Mass. 398; *Van Loan v. Village of Lake Mills*, 88 Wis. 430; s. c. 60 N. W. 710; *Lord v. City of Saco*, 87 Maine 231; s. c. 32 Atl. 887; *Johnson v. City of Troy*, 48 N. Y. S. 998.

³⁶² *Lee v. Village of Greenwich*, 63 N. Y. S. 160; s. c. 48 App. Div. (N. Y.) 391. A notice of a claim filed in April is not affected by a law in force on July 1 of the same year: *Lee v. Village of Greenwich*, 63 N. Y. S. 160; s. c. 48 App. Div. (N. Y.) 391. Minn. Laws 1897, ch. 248, repeal the St. Paul charter, § 19, in

tractor is liable to the city for an obstruction placed in the streets by the city's consent, but which is unguarded, where a person is injured thereby and the judgment is paid by the city.³⁶³ (j) *Obstructions sometimes allowable*: "The right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations. The carriage and delivery of fruit, grain, seeds, etc., are legitimate uses of a street, and may result in a temporary obstruction to the right of public transit. So the improvement of the street or public highway itself may occasion impediments to its uninterrupted use by the public, and so of the improvement of adjoining lots by digging cellars, by building, etc.; this may occasion a reasonable necessity for using the street or sidewalk for the deposit of material. Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to or limitations of it. They can be justified when and only so long as they are reasonably necessary. There need be no absolute necessity; it suffices that the necessity is a reasonable one. But this will never justify the leaving of the street or way in an unsafe and dangerous condition or its use in an unreasonable manner or for an unreasonable time."^{363a}

The supreme court of Texas has applied this doctrine and held that one who contracts to build a state capitol in a city, for instance, has no right, without the consent of the municipal authorities, to lay and operate a steam railway in the streets for the purpose of transporting materials, although they are of such a nature that the railway is a necessity; and, therefore, the council in granting the privilege may regulate the manner of using the road, prohibit its sale or transfer, and provide that the contractor shall be primarily liable for all injuries to persons and property arising from the construction and use of the road for which the city may be liable.³⁶⁴ And where a city has granted a right to build a street railroad for such a purpose to be used by the grantee while building a state capitol, an agreement by the grantee giving a subcontractor a

reference to giving notice of an injury from defective street: *Nicol v. City of St. Paul*, 80 Minn. 415; s. c. 83 N. W. 375.

³⁶³ *City of New York v. Brady*, 30 N. Y. S. 1121; s. c. 81 Hun (N. Y.) 440. Where notice of a claim is required the notice is sufficient if it is specific enough to identify the place where the injury occurred: *City of Ottawa v. Black*, 10 Kan. App. 439; s. c. 61 Pac. 985. When the statute bars an action for personal injury from a defective street in ninety

days, unless written notice specifying the time, place and circumstances of the injury is served on the city in sixty days from the time of the injury, a letter from plaintiff's attorney in regard to the injury, specifying the time and place, but omitting the circumstances, is not sufficient: *Giles v. City of Shenandoah*, 111 Iowa 83; s. c. 82 N. W. 466.

^{363a} *Dillon Munic. Corp.* 730.

³⁶⁴ *Taylor v. Dunn*, 80 Tex. 652; s. c. 16 S. W. 732.

right to use the road while engaged in erecting such building was not a violation of the condition, so as to forfeit the privilege and render the road a nuisance.³⁶⁵ The effect of requiring a contractor to be liable for injuries resulting from the construction and use of such road, in an ordinance granting him the right to construct the railway in its streets, is to make the contractor primarily liable for injuries for which the city would be liable; it gives no right of action for any injury caused by the negligence of a subcontractor to whom such a road may have been transferred.³⁶⁶ Where such contractors are required to give bond for the removal of such road at a certain time, as well as all rubbish, etc., the contract is to indemnify the city for any expenses it may incur in restoring the streets to their original condition, and does not inure to the benefit of any person who may have been injured by the negligence of a subcontractor operating the road.³⁶⁷

§ 1311. **Removal of shade trees.**—A city may, without notice to an abutting landowner, remove shade trees which have been growing on a sidewalk of a public street if they constitute an obstruction to public travel; and whether or not such trees are an obstruction must be de-

³⁶⁵ Taylor v. Dunn, 80 Tex. 652; s. c. 16 S. W. 732.

³⁶⁶ Taylor v. Dunn, 80 Tex. 652; s. c. 16 S. W. 732. See also, Becker v. Keokuk Water-works, 79 Iowa 419; s. c. 44 N. W. 694; Clark v. City of Des Moines, 19 Iowa 199, 212; McPherson v. Foster, 43 Iowa 48, 57; Blake v. Ferris, 5 N. Y. 48; City of Kansas v. O'Connell, 99 Mo. 357; s. c. 12 S. W. 791. Cf. Water Co. v. Ware, 16 Wall. 566. The correctness of the decision in this case the Texas supreme court respectfully doubts.

³⁶⁷ Taylor v. Dunn, 80 Tex. 652; s. c. 16 S. W. 732. See Incorporated Town of Spencer v. Andrew, 82 Iowa 14; s. c. 47 N. W. 1007, holding that the statutes authorizing the town "to provide for the measuring or weighing of hay, coal," etc., empowered it to grant to individual dealers the right to set scales in the public streets in front of their places of business in such a way as not to be an obstruction to travel. The court said:—"If it may be said that this power is not dele-

gated by statute, it is certainly included in the trust relation and purpose under which cities and towns hold title to and exercise control over the public streets and alleys." See also, Heath v. Des Moines &c. R. Co., 61 Iowa 11; s. c. 15 N. W. 573; Davis v. Town of Anita, 73 Iowa 325; s. c. 35 N. W. 244, where an ordinance appointed a weigher and declared a certain scale in the town to be "city scales," under authority of the same provision of the statute; Emerson v. Babcock, 66 Iowa 258; s. c. 23 N. W. 656. The court in Incorporated Town of Spencer v. Andrew, 82 Iowa 14; s. c. 47 N. W. 1007, held the town estopped from revoking the license for these scales, as it was granted under authority, and the licensees having acted thereupon in preparing for them, but said:—"If, from any cause, such as change in the travel or business, the construction of a scale by the town, or the condition or management of this scale, public interests require its removal, then the council may revoke the permission."

terminated by the proper city authorities, and their determination can not be reviewed by the courts unless they have clearly abused their discretion.³⁶⁸ It is not necessary, in order that trees shall constitute an obstruction so as to authorize their removal, that they should interrupt or stop travel.³⁶⁹ Permanent and valuable improvements made in good faith, and where the right of the city is doubtful, are not subject to the ample power given in a city charter to its authorities to remove, in a summary manner, any nuisance, obstruction or encroachment on the streets of the city. Trees may be removed by city authorities from streets when necessary to the proper construction of a sidewalk.³⁷⁰ The determination of a council that trees in the middle of a sidewalk are a nuisance is not reviewable by the courts.³⁷¹ The city has a right to remove trees to make room for a sidewalk although the fee does not belong to the city.³⁷² A statute giving the right to remove trees whenever required by the public convenience does not give the right to remove them arbitrarily.³⁷³ It is the duty of the city to remove a tree from the sidewalk and not the owner of the premises.³⁷⁴

§ 1312. Surface water.—Where by paving a street the surface water is collected and caused to overflow the sidewalks and flood plaintiff's basement the city is liable for the damages, there being no cess-pools or other escape.³⁷⁵ But not so if plaintiff's property is situated in a wet and marshy location and the work of grading was properly done.³⁷⁶ The city may properly divert surface water if

³⁶⁸ *Chase v. City of Oshkosh*, 81 Wis. 313; s. c. 51 N. W. 560, an action by a lot-owner against the city for the destruction of trees by its authorized agents, in which the court held that, no abuse of discretion on the part of the city authorities being shown, it was error to submit to the jury the question whether the trees were an obstruction.

³⁶⁹ *State v. Leaver*, 62 Wis. 387, 392; s. c. 22 N. W. 576. A permanent obstruction, such as trees standing within a sidewalk or traveled street, or stone columns which may interfere with public travel, constitutes per se a public nuisance, and may be summarily removed by direction of the authorities of a mu-

nicipality: *Chase v. City of Oshkosh*, 81 Wis. 313; s. c. 51 N. W. 560.

³⁷⁰ *Wilson v. Simmons*, 89 Maine 242; s. c. 36 Atl. 380.

³⁷¹ *Vanderhurst v. Tholcke*, 113 Cal. 147; s. c. 45 Pac. 266. Injunction against the removal of trees may be granted: *City of Atlanta v. Holiday*, 96 Ga. 546; s. c. 23 S. E. 509.

³⁷² *City of Mt. Carmel v. Shaw*, 155 Ill. 37; s. c. 39 N. E. 584.

³⁷³ *Ellison v. Allen*, 30 N. Y. S. 441; s. c. 62 N. Y. St. 274.

³⁷⁴ *Blackwell v. Hill*, 76 Mo. App. 46.

³⁷⁵ *Stanford v. City of San Francisco*, 111 Cal. 198; s. c. 43 Pac. 605.

³⁷⁶ *Benson v. Mayor &c.*, 9 *Houst. (Del.)* 359; s. c. 32 Atl. 1047.

there is no negligence in the manner of the work.³⁷⁷ Where the city by the construction of a reservoir for water supply and the sinking of wells cut off the supply of water to a stream, a lower owner may recover damages.³⁷⁸ Surface water can not be collected by the city and thrown upon plaintiff's land to his injury.³⁷⁹

§ 1313. **Awnings.**—The New York Consolidation Act confers upon the common council power “to regulate the use of streets and sidewalks for signs, sign-posts, awnings, awning-posts,” etc. In a different section, however, it is provided that “they shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk except the temporary occupation thereof during the erection or repair of a building on a lot opposite the same.” In an action to enjoin the city authorities from removing an awning or structure in front of plaintiff's place of business—a permanent iron structure covering the whole sidewalk and extending slightly over the curbstone—the court of appeals of New York, premising that the legislature had power to authorize structures in streets, that, without such authority, and under the principles of the common law, would be held to be encroachments and obstructions, and this power could be delegated to the governing body of a municipal corporation, proceed to scrutinize the provisions of the act to determine whether that power had actually been conferred in the case in hand. It was held that an awning was an obstruction that was intended to be excepted from the general prohibitory words. The awning, having been erected in compliance with an ordinance, could be abated only by a repeal or modification of the ordinance.³⁸⁰ An ordinance directing the removal of all awnings is void.³⁸¹ An awning not constructed in accordance with a city ordinance may be removed and equity will not interfere.³⁸² The maintenance of an awning for twenty years does not give a prescriptive right to its continued maintenance.³⁸³

§ 1314. **Control of wharves.**—As to property held for wharves, the supreme court of Kentucky said in one case: “The power of a

³⁷⁷ *City of Kearney v. Themanson*, 48 Neb. 74; s. c. 66 N. W. 996.

³⁷⁸ *Smith v. City of Brooklyn*, 46 N. Y. S. 141; s. c. 18 App. Div. (N. Y.) 340.

³⁷⁹ *City of Lebanon v. Twiford*, 13 Ind. App. 384; s. c. 41 N. E. 844. See *McCarthy v. Village of Far Rockaway*, 38 N. Y. S. 989.

³⁸⁰ *Hoey v. Gilroy*, 129 N. Y. 132; 29 N. E. 85; reversing s. c. 14 N. Y. S. 159. Cf. *Farrel v. Mayor &c.*, 5 N. Y. S. 672; s. c. 20 N. Y. St. 12.

³⁸¹ *Hisey v. City of Mexico*, 1 Mo. App. Repr. 393.

³⁸² *Simis v. Brookfield*, 34 N. Y. S. 695; s. c. 13 Misc. (N. Y.) 569.

³⁸³ *Simis v. Brookfield*, supra.

municipal corporation to acquire land for the purpose of erecting wharves thereon and to charge wharfage is not a necessary incident of its charter, but must, like all its other powers, be derived directly from the legislature; of course to be exercised within the limits and upon conditions of the grant.³⁸⁴ And looking to the nature and purpose of such special grant, it must be regarded as a trust involving duties and obligations to the public and individuals which can not be ignored or shifted; for the power to acquire implies the duty of the municipality, through its governing head, to maintain and preserve wharf property for the benefit of the public, without discrimination or unreasonable charges for individual use. * * * The wharf property being so held [in trust for use of the public, and in aid of trade and commerce], the city * * * can not transfer its title or possession, nor, according to a plain and well-settled principle, can the general council which is by statute invested with power of control, and burdened with the duty of maintaining, preserving and operating the wharves, either delegate the power or disable itself from performing the duties. It is even more manifest that the 'Commissioners of the Sinking Fund,' which is a distinct corporation created by that name for specified purposes, and invested with limited power, can not hold or control the wharf property, authority to do so being nowhere given by its charter, nor would it be either provident or consistent with the purpose of its creation to so invest it.³⁸⁵ Taxpayers whose private interests are subserved by the maintenance of wharves may sue to restrain by injunction the passage of an ordinance by a city council authorizing the mayor to convey property which the city holds under a legislative act, and which was paid for by taxation, for the purpose of erecting wharves thereon.³⁸⁶

³⁸⁴ *Dillon Munic. Corp.*, § 110.

³⁸⁵ *Roberts v. City of Louisville*, 92 Ky. 95; s. c. 17 S. W. 216; 13 Ky. L. 406.

³⁸⁶ *Roberts v. City of Louisville*, 92 Ky. 95; s. c. 17 S. W. 216; 13 Ky. L. 406. After referring to and commenting on *Oliver v. City of Worcester*, 102 Mass. 489; *Des Moines Gas Co. v. City of Des Moines*, 44 Iowa 505; and *People v. Dwyer*, 90 N. Y. 402, the Kentucky court said:—"In our opinion the general proposition that a court of equity may not enjoin the passage of a municipal ordinance must be confined in its application to subjects over

which the corporation, in its governmental or public character, has discretionary authority; and if it be conceded that taxable inhabitants have a right to resort to equity at all times to restrain a municipal corporation and its officers from making an illegal or wrongful disposition of corporate property, whereby the plaintiffs will be injuriously affected, it reasonably follows the power exists to enjoin the passage of an ordinance authorizing the act whenever irreparable injury will be done to the plaintiffs and they have no adequate remedy at law; for, from its nature, a preventive rem-

And the withdrawal of such an ordinance will not defeat the injunction.³⁸⁷

§ 1315. Limit upon liability in control of docks.—Though the charter of a city may make its common council commissioners of highways of the city, with power to make ordinances “in relation to the construction, repairs, care and use of the markets, docks, wharves, piers, slips and squares of the city,” this does not impose upon the city the duty of removing obstructions from the river on which the wharves are located. And it will not be liable to any dock owner for damages to his business growing out of the fact that there is an obstruction—as, for instance, a sunken boat which interferes with the navigation of the stream.³⁸⁸ And this would be true though the city council may have passed an ordinance authorizing its street commissioner, in case of a boat being sunk in the harbor, after notification to the owner and his failure to remove it, to take possession, remove and sell the same, or so much of its load as would pay the expense of the removal.³⁸⁹ Such an ordinance being in excess of the legislative power of the common council is void in so far as it directs the sale of private property.³⁹⁰ So far as the state has authorized the city to aid its commerce by removal of obstructions in a river, the authority is in the nature of a privilege, which under its charter the city ought to exercise for the general corporate welfare, but not to relieve proper owners of docks from proper private expenses.³⁹¹ Such a river is not a highway of the city.³⁹²

edy may be applied at the inception of a wrongful act, in fact, when it is about to be done, or is threatened.”

³⁸⁷ *Roberts v. City of Louisville*, 92 Ky. 95; s. c. 17 S. W. 216; 13 Ky. L. 406. The court summed up as follows:—“We think a court of equity has not only the power to restrain the passage of an ordinance authorizing an illegal or wrongful disposition of property acquired and held, as is the case of the wharf property, but if needful to compel the general council to perform the duty of preserving, protecting and maintaining it for the purpose intended, though, of course, leaving it to the discretion of that body as to the manner of discharging its trust.”

³⁸⁸ *Coonley v. City of Albany*, 10 N. Y. S. 512; s. c. 57 Hun (N. Y.) 327.

³⁸⁹ *Coonley v. City of Albany*,

10 N. Y. S. 512; s. c. 57 Hun (N. Y.) 327.

³⁹⁰ *Coonley v. City of Albany*, 10 N. Y. S. 512; s. c. 57 Hun (N. Y.) 327. A river which is a part of the highway for state, interstate and foreign commerce is subject to regulation and improvement by congress. The state may exercise such control as does not interfere with the power vested in congress, and may require a city to provide such control with respect to the portion of the river within its limits: *Mobile Co. v. Kimball*, 102 U. S. 691.

³⁹¹ *Coonley v. City of Albany*, 10 N. Y. S. 512; s. c. 57 Hun (N. Y.) 327.

³⁹² *Seaman v. Mayor &c.*, 80 N. Y. 239. Where the legislature has dedicated property along a navigable river to a city for a public

§ 1316. **Reconstruction and repair of sidewalks, streets, etc.**^{392a}—

(a) *Reconstruction*: There is a difference in regard to the duty of the municipality in the matter of reconstructing street and sidewalks and the repair thereof. The reconstruction is more nearly allied to the legislative functions of the municipality in which there is more or less discretion permitted, whereas the repair is a question of legal obligation and duty to the public. The rebuilding of a pavement, though done partly with old material, constitutes a reconstruction and not a repair.³⁹³ Where all the old paving stones are replaced with new ones and the street grade changed, it is a reconstruction and not a repair.³⁹⁴ Where there is an ordinance ordering the reconstruction of a sidewalk in a square, lots in front of which the sidewalks are sufficient may be excepted.³⁹⁵ Power to construct or reconstruct sidewalks includes power to remove to an established line.³⁹⁶ A city is not liable for taking up and carrying away a sidewalk laid by an abutting owner where a better walk is substituted in its place.³⁹⁷ (b) *Repair and results of failure*: This subject has been considered under defects and obstructions,³⁹⁸ and will be considered in this connection only briefly. As has been seen, the degree of duty and responsibility of the municipality in reference to a particular street is based upon its having accepted it as a street. The mere user of a street by the public without hindrance of the city, is not sufficient to constitute it a city street and make the city liable for a failure to repair. There must be some affirmative act by the city authorities over the street to render the city liable for failure to repair.³⁹⁹ Nor is the opening for ingress into an unaccepted street,

landing, including power to grade and improve, and collect tolls for the use, the city has power to erect and maintain docks and wharves to facilitate the loading and unloading of vessels: *Reighard v. Flinn*, 29 Pittsb. Leg. J. (N. S.) 338. Lease by city of wharf space for ice-house valid under St. Louis city charter: *Cummings v. Huse & Loomis Ice & C. Co.*, 156 Mo. 28; s. c. 56 S. W. 282.

^{392a} See § 1138, ante.

³⁹³ *Levi v. Coyne*, 22 Ky. L. 493; s. c. 57 S. W. 790.

³⁹⁴ *Ritterskamp v. Stifel*, 59 Mo. App. 510.

³⁹⁵ *Barrett v. Falls City Artificial Stone Co.*, 21 Ky. L. 669; s. c. 54 S. W. 836; *Wise v. Foote*, 81 Ky. 10;

Bush v. Lisle, 89 Ky. 393, 400; s. c. 12 S. W. 762; *Barlow v. Waters*, 16 Ky. L. 426; s. c. 28 S. W. 785.

³⁹⁶ *Moore v. Village of Fairport*, 32 N. Y. S. 633.

³⁹⁷ *Snyder v. City of Lexington*, 20 Ky. L. 1562; s. c. 49 S. W. 765.

³⁹⁸ §§ 1290, 1304, 1310, ante.

³⁹⁹ *Downend v. Kansas City*, 156 Mo. 60; s. c. 56 S. W. 902. Cf. *Baldwin v. City of Springfield*, 141 Mo. 205, 212; s. c. 42 S. W. 717; *Bruck v. Collier*, 56 Mo. 160; *Landis v. Hamilton*, 77 Mo. 554, 563; *Meiners v. City of St. Louis*, 130 Mo. 274, 284; s. c. 32 S. W. 637; *Garnett v. City of Slater*, 56 Mo. App. 207, 212; *Mayberry v. Inhabitants &c.*, 56 Maine 342; *State v. Wilson*, 42

nor the placing of a light at such opening, such an act of affirmative jurisdiction as to amount to an acceptance of such street.⁴⁰⁰ Although the approval of plats vests the fee of the streets in the city, yet the acceptance of such streets does not render the city liable for failure to repair, the approval of the plat being merely a ministerial act of the council.⁴⁰¹ A city by grading a street assumes the duty of keeping it in repair.⁴⁰² (c) *Degree of care required*: The city is required to exercise reasonable care in keeping its streets in repair although they are not frequently used by the public.⁴⁰³ What is meant by reasonably safe condition of a sidewalk is, that it is reasonably safe for pedestrians though it may not be for bicycle riders.⁴⁰⁴ It is not the duty of a municipality to make its streets reasonably safe for runaway or unmanageable horses.⁴⁰⁵ The city is bound to use reasonable diligence to repair defects and unsafe condition of the streets, and diligence is measured by the location of the streets, and the volume of travel over the street, etc.⁴⁰⁶ When a city opens a street for public travel it must keep such street in a reasonably safe condition for travel.⁴⁰⁷ The rule of law is that a city is bound to see that its streets and sidewalks are kept and maintained in such a condition that a person, by ordinary care, can avoid injury,⁴⁰⁸ and it is the duty of the city to keep its streets in a reasonably safe condition under all the attendant circumstances, but the city is by no means an insurer against all accidents that may occur.⁴⁰⁹ The use of the street, which meas-

Maine 9, 24; *Folsom v. Town of Underhill*, 36 Vt. 580; *City of Oswego v. Canal Co.*, 6 N. Y. 257; *Speir v. City of New Utrecht*, 121 N. Y. 420, 429; s. c. 24 N. E. 692; *Holmes v. Mayor &c.*, 12 N. J. Eq. 299; *Trustees &c. v. Mayor &c.*, 33 N. J. L. 13; *Gilder v. City of Brenham*, 67 Tex. 345; s. c. 3 S. W. 309; *People v. Commissioners &c.*, 52 Ill. 498; *Willey v. People*, 36 Ill. App. 609, 615. But see *Maus v. City of Springfield*, 101 Mo. 613; s. c. 14 S. W. 630.

⁴⁰⁰ *Downend v. Kansas City*, 156 Mo. 60; s. c. 56 S. W. 902.

⁴⁰¹ *Downend v. Kansas City*, *supra*.

⁴⁰² *City of Ord v. Nash*, 50 Neb. 335; s. c. 69 Neb. 964.

⁴⁰³ *City of South Omaha v. Powell*, 50 Neb. 798; s. c. 70 N. W. 391.

⁴⁰⁴ *Morrison v. City of Syracuse*, 61 N. Y. S. 313; s. c. 45 App. Div. (N. Y.) 421. Cf. *Sutphen v. Town of North Hempstead*, 80 Hun (N. Y.)

409; s. c. 30 N. Y. S. 128; *Leslie v. City of Grand Rapids*, 120 Mich. 28; s. c. 78 N. W. 885; *Wheeler v. City of Boone*, 108 Iowa 235; s. c. 78 N. W. 909.

⁴⁰⁵ *Hungerman v. City of Wheeling*, 46 W. Va. 761; s. c. 34 S. E. 778.

⁴⁰⁶ *City of Denver v. Moewes*, 15 Colo. App. 28; s. c. 60 Pac. 986; *Pierce v. Mayor &c.*, 2 Marv. (Del.) 306; s. c. 43 Atl. 162.

⁴⁰⁷ *Kassman v. City of St. Louis*, 153 Mo. 293; s. c. 54 S. W. 513. Cf. *Hunter v. Weston*, 111 Ill. 184; *Meiners v. City of St. Louis*, 130 Mo. 274, 285; s. c. 32 S. W. 637; *Vogelgesang v. City of St. Louis*, 139 Mo. 127, 135; s. c. 40 S. W. 653; *Welsh v. City of St. Louis*, 73 Mo. 71; *Walker v. City of Kansas City*, 99 Mo. 647, 652; s. c. 12 S. W. 894.

⁴⁰⁸ *Murphy v. Dayton*, 8 Ohio Com. Pl. 354.

⁴⁰⁹ *City of Denver v. Moewes*, 15

ures the degree of care exacted, has reference to business, commerce or pleasure,⁴¹⁰ and the care extends to the repair of a viaduct constructed for the convenience of the public over railroad tracks.⁴¹¹ It is the duty of the city to keep its streets in a reasonably safe condition for those who have occasion to use them, and it is no defense that a railroad company has contracted with the city to keep its tracks in a suitable and safe condition at a point in the street where an injury is sustained.⁴¹² The city is liable notwithstanding the lot owner is by ordinance required to build and repair, where the city is made liable by statute for an injury growing out of insufficiency or want of repair.⁴¹³ The liability of a municipality for an injury growing out of non-repair of its streets is independent of a statute authorizing suit,⁴¹⁴ but in the absence of a statute there is no liability by an abutting owner for an injury through a defective sidewalk.⁴¹⁵ Where it appears that the plan of a bicycle path was devised by the city engineer and adopted by the city, but not known to or adopted by the city council, the city is liable for an injury caused by an obstruction.⁴¹⁶ Where the statute makes it the duty of a department

Colo. App. 28; s. c. 60 Pac. 986; *City of Denver v. Dunsmore*, 7 Colo. 328; s. c. 3 Pac. 705; *City of Boulder v. Niles*, 9 Colo. 415, 418; s. c. 12 Pac. 632; *City of Denver v. Aaron*, 6 Colo. App. 232, 234; s. c. 40 Pac. 587; *Turner v. City of Newburgh*, 109 N. Y. 301; s. c. 16 N. E. 344.

⁴¹⁰ *City of Kansas City v. Orr*, 62 Kan. 61; s. c. 61 Pac. 397.

⁴¹¹ *City of Denver v. Baldasari* (Colo. App.), 61 Pac. 190.

⁴¹² *City of Kansas City v. Orr*, 62 Kan. 61; s. c. 61 Pac. 397; *Railway Co. v. Stone*, 54 Kan. 83; s. c. 37 Pac. 1012; *Fletcher v. City of Ellsworth*, 53 Kan. 751; s. c. 37 Pac. 115; *City of Kansas City v. Hart*, 60 Kan. 684; s. c. 57 Pac. 938; *Duffy v. City of Dubuque*, 63 Iowa 171; s. c. 18 N. W. 900; *McGarry v. Loomis*, 63 N. Y. 104; *Rehberg v. Mayor &c.*, 91 N. Y. 137; *McGuire v. Spence*, 91 N. Y. 303; *Parker v. Mayor &c.*, 39 Ga. 725; *Grogan v. Broadway Foundry Co.*, 87 Mo. 321.

⁴¹³ *Fife v. City of Oshkosh*, 89 Wis. 540; s. c. 62 N. W. 541; *Cooper v. Village of Waterloo*, 88 Wis. 433; s. c. 60 N. W. 714. The city is liable

for an injury caused by a defective sidewalk, although the charter provides that property owners shall pay for the construction and repair of sidewalks and authorizes the city to construct and repair only after failure of the owner on notice: *City of Dallas v. Meyers* (Tex. Civ. App.), 55 S. W. 742. Cf. *City of Dallas v. Jones* (Tex. Civ. App.), 54 S. W. 606.

⁴¹⁴ *City of Jacksonville v. Smith*, 78 Fed. 292.

⁴¹⁵ *Martinovich v. Wooley*, 128 Cal. 141; s. c. 60 Pac. 760. An obstruction in a street which is a nuisance of which the city, having notice and refusing to act, is liable: *City of Zanesville v. Farman*, 53 Ohio St. 605; s. c. 42 N. E. 703. A street that has become covered one and one-half to two inches in mud does not render the city liable to a pedestrian who is injured by a slip and fall on the street: *O'Reilly v. City of Syracuse*, 63 N. Y. S. 520; s. c. 49 App. Div. (N. Y.) 538.

⁴¹⁶ *Collett v. City of New York*, 64 N. Y. S. 693; s. c. 57 App. Div. (N. Y.) 394.

of the city to have general supervision of the streets and to keep them in repair, the city is liable for neglect to repair a decayed sidewalk.⁴¹⁷ Where plaintiff was injured by falling from a bridge forming part of a street by reason of a defective railing, against which he was leaning while engaged in conversation with another, it was held that the use to which the street was being put did not prevent his right of recovery.⁴¹⁸ Where an adjoining property owner builds a milk stand slightly over the traveled part of a highway, it is such want of repair as will render the municipality liable, where such obstruction has existed for three years and no steps are taken for a removal.⁴¹⁹ The city is not liable for an injury caused by plaintiff's horse becoming frightened at merchandise negligently allowed to be displayed on the street.⁴²⁰ A charter which limits the city's liability for damages to such as arise from defects caused by the city or its agents, is within the legislative power and constitutional.⁴²¹ If the plan adopted by a city for the construction of a public highway renders the construction unsafe for the traveling public, it is liable for injuries growing out of such construction if it does not use reasonable care in warning persons of the danger.⁴²² It is not a defense for injury from a defective sidewalk, that a city has exhausted its means for the care of streets,⁴²³ nor is it a defense that the city requires property owners to keep sidewalks in repair.⁴²⁴ Where a contractor is required to replace defective work at any time within two years, and in case of a failure the city is to replace it and recover the expense of the contractor and his bondsmen, it is not an expenditure for repairs of the streets.⁴²⁵

§ 1317. **Sewers.**^{425a}—A drain passing through private ground, but receiving the drainage of more than one building, is a sewer within the meaning of a public health act.⁴²⁶ The construction of a sewer

⁴¹⁷ *City of Evansville v. Frazer*, 24 Ind. App. 628; s. c. 56 N. E. 729.

⁴¹⁸ *City of Whitewright v. Taylor*, 23 Tex. Civ. App. 486; s. c. 57 S. W. 311.

⁴¹⁹ *Huffman v. Bayham Tp.*, 26 Ont. App. 514. There is no common law liability of municipalities for injury from failure to repair highways or sidewalks: *Roberts v. City of Detroit*, 102 Mich. 64; s. c. 60 N. W. 450.

⁴²⁰ *Dunn v. Town of Barnwell*, 43 S. C. 398; s. c. 21 S. E. 315.

⁴²¹ *Mayor &c. v. Starr*, 112 Ala. 98;

s. c. 20 So. 424; *Mayor &c. v. Ewing*, 2 Pen. (Del.) 66; s. c. 43 Atl. 305.

⁴²² *Collett v. Mayor &c.*, 64 N. Y. S. 693; s. c. 51 App. Div. (N. Y.) 394.

⁴²³ *Lord v. City of Mobile*, 113 Ala. 360; s. c. 21 So. 366.

⁴²⁴ *City of Belton v. Turner* (Tex. Civ. App.), 27 S. W. 831; *Lord v. City of Mobile*, 113 Ala. 360; s. c. 21 So. 366.

⁴²⁵ *Allen v. City of Davenport*, 107 Iowa 90; s. c. 77 N. W. 532.

^{425a} See § 1165, ante.

⁴²⁶ *Travis v. Uttley*, 1 Q. B. 233.

is a private municipal enterprise.⁴²⁷ The city is not required to construct a sewer to suit the convenience of individual owners. The general use of adjoining owners is the criterion.⁴²⁸ An injury growing out of the discharge of a sewer near plaintiff's residence, results from the use and not the construction.⁴²⁹ The city is not required to make the connections with a new sewer.⁴³⁰ The duty of keeping the common sewers in repair and free from obstructions, after they have been constructed and have become the property of the city, is a ministerial duty, for the neglect of which the city is responsible to any person injured. And the same duty rests upon the city to actually construct them with reasonable care and skill.⁴³¹ Openings in sewers must be kept reasonably safe.⁴³² Stopping an outlet to an old sewer and flooding plaintiff's property will render the city liable.⁴³³ Where a new sewer is constructed, which was within the knowledge of plaintiff, and he negligently omitted to connect his premises with it, and is damaged from the walling up of the old sewer, he can not recover.⁴³⁴ The city is liable for failure to keep sewers in repair, or safe condition.⁴³⁵ Where plaintiff's land was continually flooded by the backing up of surface water through a defect in the construction of a sewer, he is entitled to recover damages notwithstanding he purchased his premises subsequent to the construction, such sewer not being considered permanent.⁴³⁶ Where it is the duty of the city to construct a sewer and a contractor leaves an unguarded catch-basin open, from which injury ensues, the city is liable.⁴³⁷ Where the city does not collect the water and discharge it on plaintiff's property, other than it would have naturally been discharged thereon, it is not liable.⁴³⁸ A sewer excavated by a private citizen through a sidewalk and left unguarded for eight days, is sufficient notice to bind the

⁴²⁷ *Ostrander v. City of Lansing*, 111 Mich. 693; s. c. 70 N. W. 332; *Donahoe v. Kansas City*, 136 Mo. 657; s. c. 38 S. W. 571.

⁴²⁸ *Roberts v. City of Montreal*, 16 Rap. Jud. Que. C. S. 342.

⁴²⁹ *Moody v. Village of Saratoga*, 45 N. Y. S. 365; s. c. 17 App. Div. (N. Y.) 207.

⁴³⁰ *O'Brien v. City of Worcester*, 172 Mass. 348; s. c. 52 N. E. 385.

⁴³¹ *Bates v. Inhabitants &c.*, 151 Mass. 174; s. c. 23 N. E. 1070.

⁴³² *City of Chicago v. Seben*, 62 Ill. App. 248.

⁴³³ *Schroeder v. City of Baraboo*, 93 Wis. 95; s. c. 67 N. W. 27.

⁴³⁴ *O'Brien v. City of Worcester*, 172 Mass. 348; s. c. 52 N. E. 385.

⁴³⁵ *Burnett v. Mayor &c.*, 55 N. Y. S. 893; s. c. 36 App. Div. (N. Y.) 458.

⁴³⁶ *City of New Albany v. Lines*, 21 Ind. App. 380; s. c. 51 N. E. 346.

⁴³⁷ *Baker v. City of Grand Rapids*, 111 Mich. 447; s. c. 69 N. W. 740. City is not liable for surface water from street upon plaintiff's premises: *Jordon v. City of Benwood*, 42 W. Va. 312; s. c. 26 S. E. 266; 36 L. R. A. 519.

⁴³⁸ *Knostman v. City of Davenport*, 99 Iowa 589; s. c. 68 N. W. 887.

city.⁴³⁹ Mere inadequacy of a sewer to carry off surface water is not ground for recovery. In constructing a sewer a municipality exercises a judicial discretion and is not responsible for an error of judgment in furnishing a sewer inadequate for the purposes contemplated.⁴⁴⁰ In devising a plan of construction the city has a large legislative discretion and when in this there is good faith, the rule is that the city is not liable for injuries that are incidental in their nature and solely attributable to the plan,⁴⁴¹ though it would be for negligence in carrying out the plan. Where the city adopts a system reasonably safe, it is not guilty of negligence if it does not adopt the most approved system.⁴⁴² The expense of the general construction of sewers for the whole city, should be by general taxation.⁴⁴³ A swamp several hundred feet away from property assessed can not be drained at the expense of property owners.⁴⁴⁴

§ 1318. Establishing grade of streets.—Power to lay out, open, grade and otherwise improve streets and keep them in repair, authorizes the establishing of a grade.⁴⁴⁵ The power to grade is usually conveyed in express terms, and the exercise of the power rests in the discretion of the municipality, of which it, and not the courts, is the judge of the expediency and necessity.⁴⁴⁶ The municipality may

⁴³⁹ *O'Hara v. City of Buffalo*, 57 N. Y. S. 367.

⁴⁴⁰ *Bealafeld v. Borough of Verona*, 188 Pa. St. 627; s. c. 41 Atl. 651; *Fair v. City of Philadelphia*, 88 Pa. St. 309.

⁴⁴¹ *King v. City of Kansas City*, 58 Kan. 334; s. c. 49 Pac. 88.

⁴⁴² *Uppington v. City of New York*, 58 N. Y. S. 533.

⁴⁴³ *Sears v. Street Com'rs &c.*, 173 Mass. 350; s. c. 53 N. E. 876.

⁴⁴⁴ *Hoag v. City of Mt. Vernon*, 58 N. Y. S. 581. The fact that a sewer crosses a tidal creek which has, by grant of the state, become private property, and as a stream is not of public utility, and where the prosecutors have no private interest in the stream, will not affect its validity: *Herbert v. City of Bayonne*, 64 N. J. L. 548; s. c. 46 Atl. 608. The extension of a sewer outside the municipal limits over property in a township not adjoining the mu-

nicipality denied in *Village of South Orange v. Whittingham*, 58 N. J. L. 655; s. c. 35 Atl. 407. Construction of Ill. private laws of 1869, and city and village act in relation to sewers: *Gray v. Town of Cicero*, 177 Ill. 459; s. c. 53 N. E. 91. Illinois Laws of 1885, p. 60, in relation to cities and village drains, does not apply to incorporated towns: *Gray v. Town of Cicero*, supra. The charter of Newark, N. J., gives the corporation the right to use the Passaic river as an outlet for sewers. See *Sayre v. Mayor of Newark*, 60 N. J. Eq. 361, on this subject; *Mayor &c. v. Sayre* (N. J.), 45 Atl. 985; *Stevens v. Patterson &c. R. Co.*, 34 N. J. L. 532.

⁴⁴⁵ *Burr v. Town of Newcastle*, 49 Ind. 322.

⁴⁴⁶ *Murphy v. Peoria*, 119 Ill. 509; s. c. 9 N. E. 895; *City of New Haven v. Sargent*, 38 Conn. 50; s. c. 9 Am. R. 360; *McCormack v. Patchin*, 53

impose upon a railroad company the duty of adopting its track and grade to new highways, in order to make the crossings safe and convenient.⁴⁴⁷ A city has a right to change its grades notwithstanding its grant of the right to a railroad company to build bridges on the streets.⁴⁴⁸ A motion that the grade of a street be as shown on a profile map presented therewith is a sufficient establishment of grade.⁴⁴⁹ Where a city is engaged in the lawful and necessary grading of a street, it is not liable for obstructing the flow of surface water from land abutting on a street.⁴⁵⁰ The city assumes the burden of establishing the grade, when an assessment is attacked, on all portions of the streets sought to be improved.⁴⁵¹ Change of grade may mean from the natural grade or that established by the authorities.⁴⁵² A change in grade of a town road after annexation does not entitle the owner to compensation.⁴⁵³ An ordinance fixing the grade of streets can not be enlarged so as to apply to other streets by a mere resolution of the council.⁴⁵⁴ The loss of an ordinance establishing a grade does not render the grade illegal.⁴⁵⁵ The grade of a street is within the discretion of city authorities and they can not be compelled by mandamus to exercise that discretion in a particular manner.⁴⁵⁶ A change of grade which increases surface water does not entitle the owner to damages unless its direct effect is to cast water in a mass on his lot.⁴⁵⁷ A statute providing for damages for a change of grade,

Mo. 33; s. c. 14 Am. R. 440; *Irving v. Ford*, 65 Mich. 241; s. c. 32 N. W. 601.

⁴⁴⁷ *State &c. Co. v. Commonwealth Ins. &c. Co.*, 39 Minn. 219; s. c. 39 N. W. 153; *Town of Westbrook's Appeal*, 57 Conn. 95; s. c. 16 Atl. 724; *Louisville &c. R. Co. v. Smith*, 91 Ind. 119; *Lake Erie &c. R. Co. v. Cluggish*, 143 Ind. 347; s. c. 42 N. E. 743; *Illinois &c. R. Co. v. City of Chicago*, 141 Ill. 586; s. c. 30 N. E. 1044; *Dyer Co. v. Railroad Co.*, 87 Tenn. 712; s. c. 11 S. W. 943. In the absence of statutory provisions see *Illinois &c. R. Co. v. City of Bloomington*, 76 Ill. 447; *Georgia R. &c. Co. v. Smith*, 128 U. S. 174; s. c. 9 S. Ct. 47; *Mayor &c. v. Cowen*, 88 Md. 447; s. c. 41 Atl. 900; 71 Am. St. 433; *State v. Mayor &c.*, 51 N. J. L. 428; s. c. 17 Atl. 971; *Chicago &c. R. Co. v. City of Milwaukee*, 97 Wis. 418; s. c. 72 N. W. 1118; *City of Kan-*

sas v. Kansas City &c. R. Co., 102 Mo. 633; s. c. 14 S. W. 1808.

⁴⁴⁸ *Railroad Co. v. City of Defiance*, 52 Ohio St. 262; s. c. 40 N. E. 89.

⁴⁴⁹ *Hosmer v. City of Gloversville*, 59 N. Y. S. 559.

⁴⁵⁰ *Lampe v. City of San Francisco*, 124 Cal. 546; s. c. 57 Pac. 461, 1001.

⁴⁵¹ *Brewster v. City of Peru*, 180 Ill. 124; s. c. 54 N. E. 233.

⁴⁵² *In re Greer*, 56 N. Y. S. 938; s. c. 39 App. Div. (N. Y.) 22.

⁴⁵³ *Hosmer v. City of Gloversville*, 59 N. Y. S. 559.

⁴⁵⁴ *Chicago &c. R. Co. v. City of Chicago*, 174 Ill. 439; s. c. 51 N. E. 596.

⁴⁵⁵ *Keehn v. McGillicuddy*, 15 Ind. App. 580; s. c. 44 N. E. 554.

⁴⁵⁶ *People v. Clark*, 58 N. Y. S. 12; s. c. 40 App. Div. (N. Y.) 214.

⁴⁵⁷ *McCray v. Town of Fairmount*, 46 W. Va. 442; s. c. 33 S. E. 245.

does not signify a level precisely established, but the surface as it exists.⁴⁵⁸ A change in the grade of a street can not be authorized by the street committee of a city council in the absence of authority in the charter or given by the council.⁴⁵⁹ The city is liable only for a change in an established grade and not for establishing a grade different from the natural grade.⁴⁶⁰

⁴⁵⁸ *McGar v. Borough of Bristol*, 71 Conn. 652; s. c. 42 Atl. 1000. see *Cole v. City of St. Louis*, 132 Mo. 633; s. c. 34 S. W. 469, where it

⁴⁵⁹ *Denison &c. R. Co. v. James*, 20 Tex. Civ. App. 358; s. c. 49 S. W. 660. was held that the city was liable for a change from the natural grades. To the same effect is *City of Har-*

⁴⁶⁰ *Keehn v. McGillicuddy*, 15 Ind. App. 580; s. c. 44 N. E. 554. But *vard v. Crouch*, 47 Neb. 133; s. c. 66 N. W. 276.

CHAPTER XXX.

POLICE POWERS.

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§ 1319. **Nature of the police power.**—The police power is defined by Blackstone as “the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good behavior and good manners, and to be decent, industrious and inoffensive in their respective stations.”¹ “That

¹ 4 Blackstone Commentaries, 162. “There is also the general police power of the state, by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity, of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made:” *Thorpe v. Rutland &c. R. Co.*, 27 Vt. 140.

power," said the court of appeals of New York, "is very broad and comprehensive, and is exercised to promote the health, comfort, safety and general welfare of society. * * * Under it the conduct of an individual and the use of property may be regulated, so as to interfere to some extent with the freedom of the one and the enjoyment of the other."² Compensation has never been a condition of its exercise, even when attended with inconvenience or pecuniary loss, as each member of a community is presumed to be benefited by that which promotes the general welfare. All authorities agree that the constitution presupposes the existence of the police power, and is to be construed with reference to that fact.³ It is not possible to give an accurate definition of police power nor to outline the scope of its exercise. "It is much easier to perceive and realize the existence and source of this power than to mark its boundaries or prescribe limits to its exercise."⁴ Laws and regulations necessary for the protection of the health, morals and safety of society, are strictly within the legitimate exercise of the police powers. The exercise of these powers is inherent in the state as a sovereignty and does not depend on constitutional authority, though there may be constitutional limitations. It is an exercise of the inherent sovereignty of the state. The police power is one which remains constantly under the control of the legislative authority and a city council can neither bind itself nor its successors to contracts prejudicial to the peace, good order, health or morals of its inhabitants.⁵ The most important of police powers is that of caring for the health of a community, and that is inherent in the municipality and may be exercised whether expressly granted or not.⁶ The city has no power to divest itself of the right to exer-

² In *re Jacobs*, 98 N. Y. 98, 108, quoted and approved in *Village of Carthage v. Frederick*, 122 N. Y. 268, 277; s. c. 25 N. E. 480. "All property is held subject to the general police power of the state to so regulate and control its use in a proper case as to secure the general safety and the public welfare:" *People v. Gillson*, 109 N. Y. 389, 398; s. c. 17 N. E. 343; 1 *Dillon Munic. Corp.*, § 212. "Police power authorizes all regulations tending to promote the public health, morals, security and comfort of the community:" *Horr & Bemis Munic. Police Ordinances*, § 212.

³ *Village of Carthage v. Frederick*, 122 N. Y. 268, 273; s. c. 25 N. E. 480;

2 *Hare Am. Const. Law*, 766; *Anderson Law Dict.*, tit. "Police;" *Sedgwick Statutory and Constitutional Law*, 435; *Tiedeman Limitations of Police Power*, 12; *Potter's Dwarrior on Statutes*, 458.

⁴ *Chief Justice Shaw in Commonwealth v. Alger*, 7 Cush. (Mass.) 53; *Chicago & c. R. Co. v. State & c.*, 47 Neb. 549; s. c. 66 N. W. 624; 41 L. R. A. 481.

⁵ *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1; s. c. 19 S. Ct. 77.

⁶ *Gundling v. City of Chicago*, 176 Ill. 340; s. c. 52 N. E. 44; *Ferguson v. City of Selma*, 43 Ala. 398, 400.

cise police power.⁷ Police ordinances are such as conduce to the promotion of comfort, safety, health, convenience and general welfare of the public.⁸

§ 1320. Exercise of police powers by municipal corporations.—

Municipal corporations have exercised the police power eo nomine for time out of mind by making regulations to preserve order, to promote freedom of communication and to facilitate the transaction of business in crowded communities; and this power of local legislation may be conferred upon the smallest village that the legislature sees fit to incorporate as well as upon the largest city in the state.⁹ The extent of their police powers depends upon the limitations of their charters.¹⁰ The power to be exercised is frequently restricted to the one phrase "police powers," and the ordinances must then be reasonable regulations upon subjects which are recognized as falling within the scope of such powers. "A grant of police power, however, can never be taken to authorize ordinances upon some subject which is partially or imperfectly given to the control of the corporation by an express grant, for the existence of the express grant shows that the legislative mind was specially directed to that subject, and the grant must be taken as the limit of its intention. And where nearly all the ordinary police powers are made the subjects of express grants, only such additional ones can be exercised under a general grant of police power as are absolutely essential to the welfare of the community."¹¹

§ 1321. Delegation of police power.—The legislature may delegate to a municipality the power to adopt ordinances on matters of local importance although there are general statutes on the same subject.¹² An ordinance legally referable to any one of several delegated powers is valid.¹³ The legislature may delegate power to a municipality to impose a license tax on business and professions.¹⁴ When the legislature has delegated the exercise of police power to a municipality, the right of delegation ceases with the latter. It is not within the power

⁷ *Shea v. City of Muncie*, 148 Ind. 14; s. c. 46 N. E. 138.

⁸ *Wice v. Chicago &c. R. Co.*, 193 Ill. 351; s. c. 61 N. E. 1084.

⁹ *Village of Carthage v. Frederick*, 122 N. Y. 268, 273, 277; s. c. 25 N. E. 480.

¹⁰ *Tiedeman Limitations of Police Power*, 12.

¹¹ *Horr & Bemis Munic. Police Ordinances*, § 211.

¹² *City of New Orleans v. Collins*, 52 La. An. 973; s. c. 27 So. 532; *City of Greenville v. Kemmis*, 58 S. C. 427; s. c. 36 S. E. 727.

¹³ *City of New Orleans v. Collins*, 52 La. An. 973; s. c. 27 So. 532.

¹⁴ *Nashville &c. R. Co. v. City of Attalla*, 118 Ala. 362; s. c. 24 So. 450.

of a city council to delegate the discretion which exists in it alone,¹⁵ but a city may delegate to an officer or committee the discretion to grant permission to erect buildings in accordance with such restrictions as the council may impose,¹⁶ or it may delegate to an officer power to determine whether a state of things exists which will authorize the doing of a thing.¹⁷ A city can not make a contract by which the free exercise of the police power of the state granted to it may be abridged, limited or destroyed.¹⁸

§ 1322. Scope of municipal legislation for police regulation.—Municipal legislation which has for its object the protection of the health, morals, etc., of the municipality, is entitled to liberal construction, and the scope, if within constitutional limits, is very largely within the discretion of the council and not subject to judicial interference. When a city council considers some occupation or thing dangerous to the health of the community, and in the exercise of its discretion passes an ordinance to prevent such danger, it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community, and municipalities are allowed a greater degree of liberty of legislation in this direction than any other.¹⁹ But the governing body of a city does not represent the city and does not act as its agent, nor under color of its authority, where it legislates on matters beyond its jurisdiction.²⁰

§ 1323. Limitations on exercise of police power.—The right to appropriate private property to public use lies dormant in the state until legislative action is had pointing out the occasions, the modes, conditions and agencies for its appropriation.²¹ The extraordinary power of seizing private property for public use, either by the police force, or by the state militia, under the control of the mayor, and to impose liability upon the city for the seizure, can only be justified by the existence and nature of the emergency. If, as a question of fact, the exercise of such power is necessary to protect life and valuable property from destruction, then an emergency exists and the taking of private property may be justified, for which compensation

¹⁵ *Hengst v. City of Cincinnati*, 7 Ohio N. P. 1.

¹⁶ *Eureka City v. Wilson*, 15 Utah 67; s. c. 48 Pac. 150.

¹⁷ *Eureka City v. Wilson*, 15 Utah 53; s. c. 48 Pac. 41.

¹⁸ *City of McKeesport v. McKeesport & C. R. Co.*, 2 Pa. Super. Ct. 242.

¹⁹ *Gundling v. City of Chicago*, 176 Ill. 340; s. c. 52 N. E. 44.

²⁰ *Wabaska Electric Co. v. City of Wymore*, 60 Neb. 199; s. c. 82 N. W. 626.

²¹ *Wallace v. City of Richmond*, 94 Va. 204; s. c. 26 S. E. 586; 36 L. R. A. 554.

to the owner will be allowed.²² To justify the taking of private property in cases of public danger, the danger must be immediate and impending; or the necessity urgent for the public service such as will admit of no delay, and where the action of the civil authority would be too late.²³ Where the mayor of the city calls upon the governor for troops, and they are ordered to report to him, and he orders the police department to take possession of private property upon which to quarter the troops, he acts in his official capacity in giving such orders. He is not, however, specially authorized to incur a liability for the city, except where provision has been expressly made and authority conferred by law. He is not authorized to take or damage property of private individuals for public use.²⁴ An ordinance making it unlawful for any person other than father, brother or male relative to associate, escort, converse or loiter with a common prostitute by day or by night upon any of the streets and alleys of the city, is invalid, as unreasonable, in that any person may properly transact any legitimate business with such prostitutes, and a mother or sister should also be excepted.²⁵ An ordinance making it unlawful for any woman to go in and out of a saloon, or to frequent, loaf or stand around the building where such saloon is kept, and providing for the punishment of a saloon keeper permitting a violation of the ordinance, is void as being an unreasonable interference with individual liberty.²⁶ The city, in the exercise of its police power, can not by ordinance impose a civil liability on a street railway company in the operation of its cars for neglect.²⁷

§ 1324. Power to regulate.—One of the methods employed in the exercise of the police power vested in municipalities is that of regulation of the business, vocation, or employment in which persons and corporations engage in the corporate limits. Any occupation which is of such a nature and character as to be liable to create a nuisance, and thus become an annoyance and inconvenience to the general public, is a legitimate subject for police regulation, if it is

²² *Chicago League Ball Club v. City of Chicago*, 77 Ill. App. 124; *Mitchell v. Harmony*, 13 How. 115; *United States v. Pacific Railroad*, 120 U. S. 227; s. c. 7 S. Ct. 490; *United States v. Russell*, 13 Wall. 623; *City of Pekin v. Brereton*, 67 Ill. 477; *City of Elgin v. Eaton*, 83 Ill. 535; *Nevins v. City of Peoria*, 41 Ill. 502; *Bishop v. Mayor &c.*, 7 Ga. 200.

²³ *Chicago League Ball Club v. City*

of Chicago, 77 Ill. App. 124; *Mitchell v. Harmony*, 13 How. 115.

²⁴ *Chicago League Ball Club v. City of Chicago*, supra.

²⁵ *Hechinger v. City of Maysville*, 22 Ky. L. 486; s. c. 57 S. W. 619.

²⁶ *Gastineau v. Commonwealth*, 22 Ky. L. 157; s. c. 56 S. W. 705.

²⁷ *Sanders v. Southern &c. R. Co.*, 147 Mo. 411; s. c. 48 S. W. 855.

reasonable.²⁸ The right to regulate exists where the business or occupation is legal in itself, but where a certain degree of restraint is necessary in the interest of public health, morals and general welfare.

§ 1325. Power to prohibit.—There are many things in which people engage, particularly in large cities, which are illegal and immoral per se, such as gambling, and these the municipality has a right to absolutely prohibit. They may be detrimental to the public health, public morals, or the general welfare, peace and good order of the community. No limit or measure can be applied to this class of municipal prohibition, and, generally, it rests in the legislative discretion and judgment of the governing body of the municipality. It has been held to be a legitimate exercise of the power of prohibition in the following instances: An ordinance prohibiting owners of fruit stands from selling anything but fruit;²⁹ an ordinance prohibiting the public selling in the streets;³⁰ a statute prohibiting the use of soft coal in factories and coal mines within a specified distance of the city hall;³¹ to prohibit the sale of vegetables and fruits within six squares of a public market;³² an ordinance prohibiting the entry on private premises without the consent of the owner or occupant or trespassing on the same;³³ an ordinance prohibiting the sale of perishable foods, as potatoes, cabbages, onions, etc., in railway depots or landings except in unbroken packages;³⁴ an ordinance to prohibit the collecting, storing and dealing in old rags, papers and such refuse without a license;³⁵ an ordinance prohibiting bill boards more than — feet high without permission of the council;³⁶ an ordinance prohibiting drunkenness.³⁷ But a city has no power to suppress a lawful business which

²⁸ *Welsh v. Boston*, 126 Mass. 442(n); *Bittenhaus v. Johnston*, 92 Wis. 588, 595; s. c. 66 N. W. 805; 32 L. R. A. 380; *State v. Orr*, 68 Conn. 101; s. c. 35 Atl. 770; 28 L. R. A. 274; *Raymond v. Fish*, 51 Conn. 80; s. c. 50 Am. R. 3; *Munn v. Illinois*, 94 U. S. 113.

²⁹ *City of New Orleans v. Graffina*, 52 La. An. 1082; s. c. 27 So. 590.

³⁰ *Commonwealth v. Reid*, 175 Mass. 325; s. c. 56 N. E. 617.

³¹ *City of Brooklyn v. Nassau & C. R. Co.*, 61 N. Y. S. 33; s. c. 44 App. Div. (N. Y.) 462.

³² *State v. Namias*, 49 La. An. 618; s. c. 21 So. 852. The regulation of a public market is a proper exercise of police power and is a protection

to the public health: *City of New Orleans v. Graffina*, 52 La. An. 1082; s. c. 27 So. 590.

³³ *Saxton v. City of Peoria*, 75 Ill. App. 397.

³⁴ *State v. Davidson*, 50 La. An. 1297; s. c. 24 So. 321.

³⁵ *Commonwealth v. Hubley*, 172 Mass. 58; s. c. 51 N. E. 448.

³⁶ *City of Rochester v. West*, 53 N. Y. S. 1101; s. c. 31 App. Div. (N. Y.) 635.

³⁷ *Village of Green City v. Holsinger*, 76 Mo. App. 567. May prohibit distribution of handbills which, when thrown on the street, are calculated to frighten horses: *Wettengel v. City of Denver*, 20 Colo. 552; s. c. 39 Pac. 343.

is not a nuisance per se, as a livery stable,³⁸ and a license which amounts to a prohibition of the business licensed is illegal.³⁹ Under the general welfare clause of its charter, a city has not the power to absolutely prohibit drummers, cabmen and others from entering a passenger depôt with the owner's consent and soliciting custom and patrons.⁴⁰

§ 1326. **Regulation is not prohibition.**—Although a city may have power to regulate the sale of meat, butter and all other provisions, it does not authorize it to prohibit the sale of meat, fish, butter or other provisions where dry goods, clothing or drugs are sold.⁴¹ Power to regulate does not mean power to prohibit,⁴² and a city can not suppress that which it may regulate.⁴³ A city has no power to pass an ordinance which discriminates between different persons or firms engaged in the same line of business, fixing a revenue by the amount of sales per month.⁴⁴

§ 1327. **License.**—The regulation of a business or occupation is usually, and most effectually, accomplished by means of issuing a license provided for by ordinance, which is subject to cancellation for a violation of the terms and conditions. (a) *Scavengers*: Under a general power given to a city to make all regulations and pass ordinances expedient or necessary to the preservation of health, the suppression of disease, etc., a city council by ordinance may require scavengers to take out licenses and take out permits in the prosecution of their business.⁴⁵ An ordinance licensing scavengers and fixing a time when to clean closets and regulating the charges therefor and placing the power of deciding as to the competency of contractors for such work in the board of health, is in derogation of common right, and where there is no showing that the provisions are reasonable and just, such ordinance is invalid as to persons acting without license.⁴⁶ (b) *Barbers*: A statute requiring certain qualifi-

³⁸ *Town of Crowley v. West*, 52 La. An. 526; s. c. 27 So. 53. Cf. *Shilas v. Olinger*, 50 Iowa 571; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Harrison v. Brooks*, 20 Ga. 537; *Burditt v. Swenson*, 17 Tex. 489.

³⁹ *Morton v. Mayor &c.*, 111 Ga. 162; s. c. 36 S. E. 627.

⁴⁰ *Cosgrove v. City Council &c.*, 103 Ga. 835; s. c. 31 S. E. 445.

⁴¹ *City of Chicago v. Netcher*, 183 Ill. 104; s. c. 55 N. E. 707. Cf. *Kins-*

ley v. City of Chicago, 124 Ill. 359; s. c. 16 N. E. 260.

⁴² *In re Virgo*, 20 Ont. App. 435.

⁴³ *State v. Owen*, 50 La. An. 1181; s. c. 24 Sb. 187.

⁴⁴ *Ex parte McKenna*, 126 Cal. 429; s. c. 58 Pac. 916.

⁴⁵ *State v. McMahon*, 69 Minn. 265; s. c. 72 N. W. 79.

⁴⁶ *State v. Hill*, 126 N. C. 1139; s. c. 36 S. E. 326. Cf. *State v. Higgs*, 126 N. C. 1014; s. c. 35 S. E. 473;

cations and a license from those following the occupation of a barber, is a valid exercise of police power in the interest of public health and welfare.⁴⁷ (c) *Milk dealers*: The license of milk dealers or those engaged in retailing milk is usual and conducive to the public health, but power to license petty grocers, hucksters, and common victualers, and all other subjects that shall be deemed necessary for the preservation of health, is not authority to license milkmen.⁴⁸ (d) *Removal of kitchen refuse*: A license to remove kitchen refuse may be required.⁴⁹ (e) *Public scales*: An ordinance requiring the public weighing of corn, hay, and coal, and making a violation a misdemeanor, is reasonable and valid.⁵⁰ (f) *Sale of meats and provisions*: Where power is granted to a municipality to license and regulate the sale of meats, etc., and all other provisions, the meaning of "all other provisions" includes other articles of the character of those specifically enumerated and does not include cigarettes.⁵¹ The power

Mayor v. Radecke, 49 Md. 217. But see State v. Hord, 122 N. C. 1092; s. c. 29 S. E. 952; Hill v. Board &c., 72 N. C. 55; Boehm v. Mayor &c., 61 Md. 259; Brodnax v. Groom, 64 N. C. 244.

⁴⁷ State v. Zeno, 79 Minn. 80; s. c. 81 N. W. 748.

⁴⁸ State v. Smith, 67 Conn. 541; s. c. 35 Atl. 506.

⁴⁹ State v. Orr, 68 Conn. 101; s. c. 35 Atl. 770; 34 L. R. A. 279.

⁵⁰ City of St. Charles v. Elsner, 155 Mo. 671; s. c. 56 S. W. 291.

⁵¹ Gundling v. City of Chicago, 176 Ill. 340; s. c. 52 N. E. 44. The act of June 10, 1897, did not render void the ordinance of the city of Chicago requiring master plumbers to procure a license and pay a fee therefor: Wilkie v. City of Chicago, 188 Ill. 444; s. c. 58 N. E. 1004. The license of a second-hand dealer under act of August 23, 1871, as amended by act of March 3, 1891, is a valid municipal regulation: Lasley v. District of Columbia, 14 App. D. C. 407. An ordinance requiring a water company to take out a permit at a specified cost of \$6 before any street is opened, either to make connections or repair a leak, is reasonable and proper: Borough of Lans-

downe v. Springfield Water Co., 7 Del. Co. R. 506. Although a city has power to regulate its streets and prescribe the manner in which corporations shall exercise any privilege granted them in the use of streets, it can not impose a license fee for revenue on a railway using the street: City of Cape May v. Cape May Tr. Co., 64 N. J. L. 80; s. c. 44 Atl. 948. A city has no power to license a lottery, since the lottery is unlawful: Ex parte McKenna, 126 Cal. 429; s. c. 58 Pac. 916. A city has no right to collect a license tax from a resident of territory illegally annexed to the city: Douglas v. Kansas City, 147 Mo. 428; s. c. 48 S. W. 851. A municipal corporation has no power to require a license in order to carry on a certain pursuit unless it be expressly granted or arise by clear implication from language used: Ex parte Garza, 28 Tex. App. 381; s. c. 13 S. W. 779; 19 Am. St. 845; Goetler v. State, 45 Ark. 454 (ten-pin alley); Ordinary &c. v. Retailers &c., 42 Ga. 325; Fowle v. Common Council &c., 3 Peters 399; Sanders v. Town Com'rs &c., 30 Ga. 679; State &c. v. Mayor &c., 41 N. J. L. 71. Power to enact "by-laws relative to hucksters," etc., does not au-

to license is extensive and varied and the foregoing are given merely as illustrations of the exercise of the power.

§ 1328. **Privilege tax.**—Where the legislature has authorized it, and there are no constitutional limitations preventing, a privilege tax has been held legal. Power given to levy privilege taxes embraces only such privileges as have been previously taxed by the legislature, or such as may be by it thereafter taxed.⁵² A town may impose a privilege tax for revenue on tobacco buyers where the charter gives it power to levy and collect taxes on all persons, property and privileges liable for state taxation.⁵³ A statute authorizing a tax on manufacturing corporations and other corporations and institutions, is no authority for levying a tax on natural persons engaged in manufacturing.⁵⁴

§ 1329. **Regulation of telegraph and telephone lines in the streets.**—The construction and maintenance of telegraph and tele-

thorize the imposition of a license: *Dunham v. Trustees &c.*, 5 Cow. (N. Y.) 462; *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562; *City of St. Paul v. Stoltz*, 33 Minn. 233; s. c. 22 N. W. 634; *Charleston v. Oliver*, 16 S. C. 47; *Gale v. Village of Kalamazoo*, 23 Mich. 344; *Mayor &c. v. Bowman*, 39 Miss. 671; *House v. State*, 41 Miss. 737. An ordinance of the city of St. Louis imposing a license on persons selling sewing-machines as agents was held to be valid, under the provisions of the charter authorizing the city authorities to "license, tax and regulate agents, real-estate agents and brokers, financial agents and brokers, mercantile agents, insurance agents and all other business, trades, avocations or professions whatsoever; to license, tax, regulate or suppress all occupations, professions and trades not heretofore enumerated, of whatever name and character:" *City of St. Louis v. Bowler*, 94 Mo. 630; s. c. 7 S. W. 434. And where a city charter gave power to the common council to license numerous classes of persons and occupations, "and all other business, trades, avocations or professions

whatever," it was held that licenses might be required from ice dealers, as included in the term "merchants" in the classes specifically enumerated, even if not within the general words, as ejusdem generis with those particularly mentioned: *City of Kansas v. Vindquest*, 36 Mo. App. 584. See also, *Butler's Appeal*, 73 Pa. St. 448. Under the power "to license, regulate and restrain bar-rooms and drinking-shops," the business of keeping a bar-room may be licensed, and the sale of spirituous liquors without a license may be forbidden: *Ex parte Schneider*, 11 Or. 288; s. c. 8 Pac. 289.

⁵² *Trading Stamp Co. v. Memphis*, 101 Tenn. 181; s. c. 47 S. W. 136.

⁵³ *State v. Irvin*, 126 N. C. 989; s. c. 35 S. E. 430. A town may require a tax for the privilege of doing business to be paid in advance: *State v. Irvin*, supra. Kentucky St. authorizing cities to impose a tax of \$10 on attorneys is not unconstitutional: *Elliott v. City of Louisville*, 101 Ky. 262; s. c. 40 S. W. 690.

⁵⁴ *City of Joplin v. Leckie*, 78 Mo. App. 8.

phone lines in the public streets of a municipality is a matter peculiarly within the regulatory powers of the municipality. While a city may not, under its existing laws, prevent a telephone company from using the streets to erect and maintain a telephone line, it has power under its general police power to regulate the manner of construction and maintenance.⁵⁵ A city council has power to order the placing of telegraph and telephone wires under ground when in the exercise of discretion the public requires it. It can not act arbitrarily, however.⁵⁶ A statute authorizing a city to require telephone companies to move their wires to underground conduits is a proper exercise of police power.⁵⁷ And so, also, the city council may prescribe the manner of laying and using a pipe traversing a public street, where a corporation has obtained the right to lay a pipe for the transportation of oil.⁵⁸

§ 1330. Regulation of dangerous business.—Under power granted to regulate the carrying on of any dangerous business, make provision for the inspection of steam boilers and license engineers thereof, a city has power to prohibit owners of steam boilers from employing an engineer who has not obtained a permit or license, and to provide a penalty.⁵⁹

§ 1331. Regulation of buildings—Building permits, etc.—As a protection against fire a municipality may, as a legitimate exercise of police power, make reasonable regulations in regard to the construction, character and nature of buildings within the corporate limits. Prohibiting the erection of wooden buildings in fire limits is a proper exercise of police power,⁶⁰ and prohibition of the erection prevents the removal of such buildings from one portion of the limits to another.⁶¹ A permit to erect a dwelling, according to specifications submitted, is not violated by the erection of a building, the

⁵⁵ *City of Rochester v. Bell Tel. Co.*, 64 N. Y. S. 804; s. c. 52 App. Div. (N. Y.) 6.

⁵⁶ *Northwestern Tel. & Co. v. City of Minneapolis*, 81 Minn. 140; s. c. 83 N. W. 527; 86 N. W. 69.

⁵⁷ *City of Geneva v. Geneva Tel. Co.*, 62 N. Y. S. 172; s. c. 30 Misc. (N. Y.) 236. Cf. *People v. King*, 110 N. Y. 418, 423; s. c. 18 N. E. 245; *Stone v. Mississippi*, 101 U. S. 814; *People v. Squire*, 107 N. Y. 593; s. c. 14 N. E. 820; *American & Co. Tel. Co.*

v. Hess, 125 N. Y. 641; s. c. 26 N. E. 919; *Western U. Tel. Co. v. Mayor & c.*, 38 Fed. 552.

⁵⁸ *Benton v. City of Elizabeth*, 61 N. J. L. 693, 411; s. c. 39 Atl. 683, 906; 40 Atl. 1132.

⁵⁹ *City of St. Louis v. Meyrose Lamp Mfg. Co.*, 139 Mo. 560; s. c. 41 S. W. 244.

⁶⁰ *State v. O'Neill*, 49 La. An. 1171; s. c. 22 So. 352.

⁶¹ *Eureka City v. Wilson*, 15 Utah 67; s. c. 48 Pac. 150.

first floor to be used as a store and the second floor as a dwelling.⁶² Power to regulate the safety, height, and thickness of walls and buildings, does not authorize the passage of an ordinance providing a penalty for erecting a building without the approval of the city engineer.⁶³ Under the general power to pass such ordinances as may be deemed necessary and beneficial to the inhabitants, the authorities may pass an ordinance which they may judge necessary and beneficial, and it will be valid provided it be reasonable and consonant with the general powers and purposes of the corporation, and not inconsistent with the laws and policy of the state.⁶⁴ Thus it was held that such a grant of power would sustain an ordinance prohibiting any person from erecting any building within the limits of the town without a permit from the governing board.⁶⁵ There is some conflict in the authorities as to whether a municipal corporation possesses the inherent power to prohibit the erection of wooden buildings within prescribed limits and to cause their removal.⁶⁶ In speaking of such ordinances the supreme court of Michigan said: "Of the power of the common council to pass the ordinances in question we have no doubt. They contravene no provision of the constitution as we read it, and they were made in the exercise of a police power necessary to the safety of the city."⁶⁷ The same view was adopted in an elaborate opinion by the supreme court of Indiana.⁶⁸ But it was distinctly

⁶² *City of St. Louis v. Dorr*, 136 Mo. 370; s. c. 37 S. W. 1108.

⁶³ *State v. Zurich*, 49 La. An. 447; s. c. 21 So. 977. The city of New Orleans is authorized to punish the violation of its building ordinance by fine and imprisonment, or both, or imprisonment in default of payment of fine: *City of New Orleans v. Danneman*, 51 La. An. 1093; s. c. 25 So. 931.

⁶⁴ *Commissioners &c. v. Covey*, 74 Md. 262; s. c. 22 Atl. 266; citing 1 *Dillon Munic. Corp.*, §§ 316, 319; *Harrison v. Mayor &c.*, 1 Gill (Md.) 264; *Mayor &c. v. Radecke*, 49 Md. 217.

⁶⁵ *Commissioners &c. v. Covey*, 74 Md. 262; s. c. 22 Atl. 266, holding, also, that a fee of \$1 for such a permit was not unreasonable, and that the board had a discretion to grant or refuse a permit in each case.

⁶⁶ Judge Dillon says that cities may, "where this is consistent with the general and special legislation applicable to the municipality, establish fire limits and prevent erection therein of wooden buildings:" 1 *Dillon Munic. Corp.* (3d ed.), § 405.

⁶⁷ *Brady v. Northwestern Ins. Co.*, 11 Mich. 425.

⁶⁸ *Baumgartner v. Hasty*, 100 Ind. 575. See also, *Clark v. City of South Bend*, 85 Ind. 276; *Mayor &c. v. Hoffman*, 29 La. An. 651; *Wadleigh v. Gilman*, 12 Maine 403; *King v. Davenport*, 98 Ill. 305. That it is competent and proper for the legislature to confer power to make such regulations, see *Canepa v. Mayor &c.*, 92 Ala. 358; s. c. 9 So. 180; *Welch v. Hotchkiss*, 39 Conn. 140; *First Nat'l Bank v. Sarlls*, 129 Ind. 201; s. c. 28 N. E. 434 (the last case holding that where a city ordinance prohibits the erection of wooden buildings within

held in Texas that the power to establish fire limits could not be inferred from general terms used in a charter;⁶⁹ and in Pennsylvania that express authority or special circumstances indicating urgent necessity could alone justify such a regulation.⁷⁰

§ 1332. Regulating the removal of dead animals.—The city can not require the owner of a dead animal to remove it beyond the city limits and deposit it at such place only as the city may designate, or pay the expense of the city in so doing, if the owner contemplates the removal to and deposit in some other place beyond the limits where it will not become a nuisance.⁷¹ An ordinance authorizing the removal of dead animals and fixing charges therefor, is illegal, unless it gives the owner a right to remove them, or have them removed, before a prescribed time.⁷²

§ 1333. Regulating the removal of garbage.—It is a legitimate exercise of police power to require all refuse accumulations to be placed in receptacles for removal by the city.⁷³ The exclusive license to a person to remove all garbage is not an exclusive contract not authorized by the city charter, since the removal of garbage is not a

its fire limits, individuals who show a threatened violation of the ordinance, and that if unrestrained it will work irreparable injury to them and their property, are entitled to an injunction, though the building, if erected, would not be a nuisance per se); *Commissioners &c. v. Covey*, 74 Md. 262; s. c. 22 Atl. 266; *Alexander v. Town Council &c.*, 54 Miss. 659; *McCloskey v. Kreling*, 76 Cal. 511; s. c. 18 Pac. 433; *Ex parte Fiske*, 72 Cal. 125; s. c. 13 Pac. 310; *Ford v. Thralkill*, 84 Ga. 169; s. c. 10 S. E. 600; *Hine v. New Haven*, 40 Conn. 478; *Hubbard v. Town of Medford*, 20 Or. 315; s. c. 25 Pac. 640; *Klinger v. Bickel*, 117 Pa. St. 326; s. c. 11 Atl. 555; *Corporation of Knoxville v. Bird*, 12 Lea (Tenn.) 121; *City of Charleston v. Reed*, 27 W. Va. 681; *City of Troy v. Winters*, 4 T. & C. (N. Y.) 256; *City of Olympia v. Mann*, 1 Wash. 389; s. c. 25 Pac. 337; *Douglass v. Commonwealth*, 2 Rawle (Pa.) 262.

That such powers should be strictly construed, see *Village of Louisville v. Webster*, 108 Ill. 414; *Regina v. Howard*, 4 Ont. 377; s. c. 4 Am. & Eng. Corp. Cas. 377.

⁶⁹ *Pye v. Peterson*, 45 Tex. 312; citing especially, *Mayor &c. v. Thorne*, 7 Paige (N. Y.) 261.

⁷⁰ *Kneedler v. Borough of Norristown*, 100 Pa. St. 368. See also, *State v. Schuchardt*, 42 La. An. 49; s. c. 7 So. 67; *City of Keokuk v. Scroggs*, 39 Iowa 447; *Respublica v. Duquet*, 2 Yeates (Pa.) 493; *City of Des Moines v. Gilchrist*, 67 Iowa 210; s. c. 25 N. W. 136. "One would think that the necessity would be urgent in every case:" *Horr & Bemis Munic. Police Ordinances*, § 222.

⁷¹ *Schoen v. City of Atlanta*, 97 Ga. 697; s. c. 25 S. E. 380.

⁷² *Meyer v. Jones*, 20 Ky. L. 1632; s. c. 49 S. W. 809.

⁷³ *City of Grand Rapids v. DeVries*, 123 Mich. 570; s. c. 82 N. W. 269.

regulation of a trade, business or occupation, but is a legitimate exercise of the police power to remove a nuisance.⁷⁴ An ordinance providing for the disposition of garbage, defining it as any refuse accumulation of animal, fruit, or vegetable matter, liquid or otherwise, attending the preparation, use, cooking, dealing in or storing meat, fish, fowl, fruit or vegetables, is not void, since the refuse mentioned is a nuisance.⁷⁵ That a city has power to compel owners to abate nuisances does not prevent the city from taking measures to remove and reduce garbage at the expense of the city and thereby protect the public health.⁷⁶ A city having power to abate nuisances and provide for the health of the city, may enter into a contract for a term of years for the removal and reduction of its garbage.⁷⁷

§ 1334. Regulation of fire escapes.—Where a statute provides that within three months after its passage certain classes of buildings shall be provided with fire escapes, to be under the general direction of a designated officer, and in default making it the duty of such officer to serve a notice upon either or any of certain parties, including owners, lessees, and occupants, commanding such person or persons to erect such fire escapes, and also providing a penalty for non-compliance with such notice, but the act nowhere imposes the duty, on either of such persons, of erecting fire escapes, until the officer designates such person by the required notice the court can not determine who is liable.⁷⁸

§ 1335. Regulating livery stables.—An ordinance making it unlawful to locate, build or keep a livery stable in any block in which two-thirds of the buildings are residences unless the consent of the owners of a majority of the lots is obtained, is valid.⁷⁹ An ordinance providing that no livery stable shall be located on any block in the city without the written consent of the owners of one-half of the ground of said block, is void.⁸⁰ But an ordinance prohibiting livery

⁷⁴ *City of Grand Rapids v. De Vries*, 123 Mich. 570; s. c. 82 N. W. 269. *v. Doyle*, 120 Mich. 258; s. c. 79 N. W. 188. Powers of board of supervisors of city and county of San Francisco concerning garbage: *Sanitary Reduction Works v. California &c. Co.*, 94 Fed. 693.

⁷⁵ *City of Grand Rapids v. De Vries*, *supra*.

⁷⁶ *Balch v. City of Utica*, 59 N. Y. S. 513; s. c. 42 App. Div. (N. Y.) 562.

⁷⁷ *Balch v. City of Utica*, *supra*. Construction of ordinances of Grand Rapids concerning garbage: *De Lano*

⁷⁸ *McCulloch v. Ayer*, 96 Fed. 178.

⁷⁹ *City of Chicago v. Stratton*, 162 Ill. 494; s. c. 44 N. E. 853.

⁸⁰ *City of St. Louis v. Russell*, 116 Mo. 248; s. c. 22 S. W. 470.

stables, without consent, in residence districts, is reasonable and not void, and it may prohibit them in residence districts.⁸¹

§ 1336. **Abatement of nuisances.**—The general subject of nuisance is elsewhere fully considered.^{81a} The general power of the municipality over nuisances and their suppression is unquestioned. Under the power to remove nuisances, and to prohibit and suppress saloons, the city may pass an ordinance that every place where persons are in the habit of resorting to drink intoxicating liquors as a beverage, is a common nuisance.⁸² The council can not contract the authority to abate a nuisance, and hence, having given permission to run an engine in connection with a shop, it may forbid its use if it becomes a nuisance.^{82a}

§ 1337. **Property destroyed by a mob.**—It is a valid exercise of police power to make a city or county liable for property destroyed by a mob without reference to its ability or exercise of diligence.⁸³ Statutes making cities and counties liable for property destroyed by mobs exist in England and many of the states in this country and have been uniformly upheld by the courts. The principle upon which these laws are upheld is that they are within the general scope of legislative power, and is based upon the idea that every political subdivision should be responsible for the public peace and the preservation of private property, and is a police regulation, based upon public policy.⁸⁴ The liability in such case is without reference to the ability of the municipality or its exercise of diligence to prevent injury to property.⁸⁵

⁸¹ City of Chicago v. Stratton, 162 Ill. 494, 504; s. c. 44 N. E. 853.

^{81a} Ch. 26, ante.

⁸² City of Topeka v. Raynor, 60 Kan. 860; s. c. 55 Pac. 509.

^{82a} Wood v. City of Hinton, 47 W. Va. 645; s. c. 55 S. E. 824. Cf. Baumgartner v. Hasty, 100 Ind. 575; Meeker v. Rensselaer, 15 Wend. (N. Y.) 397. Power of city to remove a nuisance,—see City of St. Louis v. Heitzeberg Packing &c. Co., 141 Mo. 375; s. c. 42 S. W. 954; 39 L. R. A. 551; Balch v. City of Utica, 59 N. Y. S. 513; s. c. 42 App. Div. (N. Y.) 562.

⁸³ City of Chicago v. Manhattan Cement Co., 178 Ill. 372; s. c. 53 N. E. 68.

⁸⁴ City of Chicago v. Manhattan Cement Co., supra; Allegheny County v. Gibson, 90 Pa. St. 397; Darlington v. Mayor &c., 31 N. Y. 164; Davidson v. Mayor &c., 27 How. Pr. (N. Y.) 342; Luke v. City of Brooklyn, 43 Barb. (N. Y.) 54; In re Pennsylvania Hall, 5 Pa. St. 204; Underhill v. City of Manchester, 45 N. H. 214; Chadbourn v. Town of Newcastle, 48 N. H. 196; Williams v. City of New Orleans, 23 La. An. 507; City of Atchison v. Twine, 9 Kan. 350; Brightman v. Inhabitants &c., 65 Maine 426; Clear Lake &c. v. Lake Co., 45 Cal. 90.

⁸⁵ City of Chicago v. Manhattan Cement Co., 178 Ill. 372; s. c. 53 N. E. 68.

§ 1338. **Hawkers and peddlers.**—A peddler is one who sells from place to place or offers for sale commodities which he carries with him.⁸⁶ But a person who goes about delivering goods in the houses of his customers in pursuance of orders previously taken therefor, and takes orders for future delivery, is not a peddler.⁸⁷ The following are some of the instances in which the amount of the license fees exacted from hawkers and peddlers was declared not to be unreasonable and oppressive:—A license fee of \$2.50 per day.⁸⁸ A license fee of \$100 for one year, \$60 for six months, \$15 for one month, and \$5 for one day for peddling within the city of Duluth.⁸⁹ An ordinance which fixed the license of a peddler of meats “from a vehicle” at \$75 per quarter, and the license of all other peddlers at \$10, irrespective of the commodity peddled.⁹⁰ But under the charter of Bay City, Michigan, authorizing the city to license hawkers and peddlers, an ordinance requiring the payment of \$10 for the first day, and \$5 for each subsequent day, by foot-peddlers; \$20 for the first day, and \$15 for each subsequent day, where the peddler traveled with one horse; and \$25 for the first day, and \$15 for each subsequent day, where he traveled with two or more horses,—was adjudged to be so unreasona-

⁸⁶ *Horr & Bemis Munic. Police Ordinances*, § 272; citing *Cook v. Pennsylvania*, 97 U. S. 566.

⁸⁷ *Village of Stamford v. Fischer*, 17 N. Y. S. 609; s. c. 63 Hun (N. Y.) 123; *Village of Cerro Gordo v. Rawlings*, 135 Ill. 36; s. c. 25 N. E. 1006; following *Emmons v. City of Lewiston*, 132 Ill. 380; s. c. 24 N. E. 58. See also, *Ex parte Taylor*, 58 Miss. 478. A drummer who sells his principal's goods by sample, merely taking orders for them, does not require a license such as must be taken out by “hawkers, pedlers and merchants:” *City of Kansas v. Collins*, 34 Kan. 434; s. c. 8 Pac. 865; *City of Chicago v. Bartee*, 100 Ill. 61, the latter case holding, however, that a milkman is a pedler. As to who is a merchant, see *Burr v. City of Atlanta*, 64 Ga. 225. A charter gave to the common council the power to regulate the vending of vegetables, etc., and to

regulate and restrain hawking and peddling in the streets. An ordinance prohibiting the peddling of vegetables without a license was not void as discriminating in favor of some and against other forms of traffic: *Bradley v. City of Rochester*, 7 N. Y. S. 237. See also, *Village of Ballston Spa v. Markham*, 11 N. Y. S. 826; s. c. 58 Hun (N. Y.) 238; *Martin v. Town of Rosedale*, 130 Ind. 109; s. c. 29 N. E. 410. An ordinance prohibiting vehicles from stopping in the streets for more than twenty minutes is a valid police regulation and applies as much to licensed pedlers as to others: *Commonwealth v. Fenton*, 139 Mass. 195; s. c. 29 N. E. 653.

⁸⁸ *City of Cherokee v. Fox*, 34 Kan. 16; s. c. 7 Pac. 625.

⁸⁹ *City of Duluth v. Krupp*, 46 Minn. 435; s. c. 49 N. W. 235.

⁹⁰ *Ex parte Heylman*, 92 Cal. 492; s. c. 28 Pac. 675.

ble and prohibitory as to render it invalid.⁹¹ And a city ordinance requiring peddlers to pay as a license "not less than one nor more than twenty-five dollars for a fixed time, in the discretion of the mayor," was also held void for unreasonableness.⁹²

§ 1339. **Hackmen, draymen, etc.**—The provision in the charter of the city of Minneapolis authorizing the city council "to license and regulate hackmen, draymen, expressmen and all other persons engaged in carrying passengers, baggage or freight and to regulate their charges thereon," was held to apply only to those who were engaged in business as carriers of persons or property for hire, and not to those who, not being engaged in such business, merely hired out teams and vehicles to those who had property to transport, the hirer himself using and controlling the team and vehicle.⁹³ A power granted to a city in its charter to "license, tax and regulate * * * street railroad cars and companies, hackney carriages, omnibuses and all other vehicles * * * and fix the rates for carriage of persons and of wagonage, drayage and cartage of property," confers no authority to impose a license on a vehicle used exclusively for the private purposes of its owner.^{93a} But where a city char-

⁹¹ *Brooks v. Mangan*, 86 Mich. 576; s. c. 49 N. W. 633.

⁹² *Town of State Center v. Barenstein*, 66 Iowa 249; s. c. 23 N. W. 652.

⁹³ *State v. Robinson*, 42 Minn. 107; s. c. 43 N. W. 833.

^{93a} *City of Hannibal v. Price*, 29 Mo. App. 280; *City of St. Louis v. Grone*, 46 Mo. 574. Act of Pennsylvania of April 3, 1851, § 2, authorizing boroughs to make such ordinances, not inconsistent with the laws of the commonwealth, as they shall deem necessary for their good order and government, which is followed by twenty-five other sections, specifying minutely the subjects that may be so regulated by ordinance, none of which refers to the licensing of vehicles, does not authorize an ordinance requiring such license: *Borough of Millers-town v. Bell*, 123 Pa. St. 151; s. c. 16 Atl. 612; 23 W. N. C. (Pa.) 78. Act of New Jersey of March 25, 1881, conferring on municipal corpora-

tions the power to license and regulate hack owners and drivers, and to prohibit unlicensed persons and vehicles from engaging in such capacities, warrants the imposition of a reasonable pecuniary penalty for a violation of an ordinance requiring such a license: *Haynes v. City of Cape May*, 52 N. J. L. 180; s. c. 19 Atl. 176. Public Statutes of Massachusetts, ch. 28, § 25, empower the mayor and aldermen of a city to regulate all vehicles used therein. Statutes of 1878, ch. 244, established a board of police commissioners in Boston, and provided that the council could empower the board to exercise all the powers conferred by the statutes on the board of aldermen, etc., in relation to regulating vehicles. Statutes of 1885, ch. 323, established a board of police in Boston, conferring on it the powers vested in the commissioners by the statutes of the state and the ordinances, by-laws, etc., of the city. Revised Ordinances of Boston, 1885,

ter confers the power to regulate the keeping and use of vehicles and to impose license taxes on them, an ordinance requiring every owner of a hack to take out a license at \$8 per annum, and pay the cost of numbering the hack, not exceeding twenty-five cents, is valid.^{93b}

§ 1340. **Auctioneers.**—Under a statute requiring auctioneers doing business in a city to give bond and obtain licenses, and giving power to the mayor of the city to grant such licenses, and also to revoke them for misconduct of the licensees, it was held that the mayor might on proper grounds refuse a license to an applicant although a sufficient bond was tendered. "Where, prior to the doing of a thing, an application for leave to do the same is a condition precedent, the power to refuse such leave in a proper case is necessarily implied," said the court. "A contrary theory applied to the particular case would be that immediately following the revocation of a license, upon the presentation of a proper bond the mayor would be required to re-issue it."⁹⁴

ch. 28, § 1, provides that the board of police shall exercise all powers conferred by the statutes of the state and the city ordinances on the board of aldermen or mayor and aldermen in relation to regulating vehicles. It was held that a rule of the board of police of Boston, providing that no person shall use "any hackney carriage unless he is licensed thereto by the board," and that every vehicle "used for the conveyance of persons for hire from place to place within the city, except a horse-car, shall be deemed a hackney carriage," is a reasonable exercise of the authority conferred on the board: *Commonwealth v. Page*, 155 Mass. 227; s. c. 29 N. E. 512.

^{93b} *Ex parte Gregory*, 20 Tex. App. 210; s. c. 54 Am. R. 516. But under a power to license draymen, a tax can not be imposed on the occupation itself: *City of Cincinnati v. Bryson*, 15 Ohio 625; 1 Dillon Munic. Corp. (4th ed.), § 358. Act of Kentucky of May 8, 1886, entitled "An act concerning license taxes in the city of Louisville," and among other things providing a license tax "for each vehicle running in said city of not less than \$2 nor more than \$30,"

confers on the council the right by ordinance to classify and grade the privilege according to the use made of the vehicle: *Smith v. City of Louisville*, 9 Ky. L. 779; s. c. 6 S. W. 911. A statute authorizing the imposition of a license tax on vehicles used for certain business purposes, by the municipality "in which the business is carried on or conducted," does not authorize a municipality to impose a tax on a vehicle temporarily and accidentally in the city on business of the nature described, since the situs of the business and not temporary presence determines the application of the tax: *Cary v. Mayor &c.*, 49 N. J. L. 110; s. c. 7 Atl. 42.

⁹⁴ *People v. Grant*, 12 N. Y. S. 889; s. c. 58 Hun (N. Y.) 611; s. c. affirmed, 126 N. Y. 473; 27 N. E. 964; citing *United States &c. Ins. Co. v. Poillon*, 7 N. Y. S. 834; s. c. 55 Hun (N. Y.) 606. "Whether or not proper cause existed for the refusal of the mayor in the case at bar," said the court, "can not be reviewed on mandamus, because mandamus will not issue unless the relator shows a clear legal right to the writ; and questions as to the weight of evidence, or as to whether the refusal

Under an authority given by statute "to regulate auctioneering and to regulate, license or prohibit the sale of goods, wares and merchandise imported into the corporation for the purpose of being sold at auction," it was held in a recent case in Ohio that a city ordinance which made it unlawful to sell at auction goods brought into the city for that purpose, except upon payment of a license fee of \$25 for each day and part of a day, was an unreasonable exercise of the powers granted and invalid.⁹⁵ A city of six or seven thousand inhabitants, authorized by its charter to license and regulate auctions and auctioneers, has not the right to impose a license fee of \$300. As a police regulation such a fee is unreasonable; if intended for revenue it is unauthorized.⁹⁶ In respect to exhibitions, amusements, etc., a larger discretion on the part of municipal corporations is recognized than in the case of trades and useful occupations, and the rule has of course a still broader application where the business is such as is liable to degenerate into a nuisance or such as tends to promote disorder or crime. But the business of an auctioneer is a lawful and useful one, and there would seem to be no reasonable warrant from its nature or the expenses that might be directly or indirectly incurred in regulating it for exacting so large

of the mayor has been arbitrary or not, must be brought to the attention of the court in a different manner, in order that it may obtain jurisdiction to review the same." A city, under the power to regulate the "ringing of bells and the crying of goods for sale at auction or otherwise, and to prevent disturbing noises in the streets," can not prohibit the auction sale of jeweler's goods after sunset: *City of Rochester v. Close*, 35 Hun (N. Y.) 208.

⁹⁵ *Sipe v. Murphy*, 49 Ohio St. 536; s. c. 31 N. E. 884. "The powers thus vested in cities," said the court, ". . . though general are not without limitation. It is not to be presumed from the language of the statute that it was the design of the legislature to authorize the passage of ordinances that would be unjust or oppressive, or unfair and partial, or in restraint of trade, or in contravention of public policy." It was held that the ordinance in question was obnoxious to each of the objec-

tions suggested. It was conceded that the council, in view of promoting the order, comfort and convenience of the inhabitants, might pass ordinances regulating sales at auction upon the streets and subject the occupation to such police regulations as public convenience and protection required, and the council might upon principles of equality, without discriminating against the goods imported, license the sale at auction of such imported goods, and when public safety or morals were endangered prohibit the sale. "But we do not find the reasonable intentment of the statute," continued the court, "to be to empower councils to arbitrarily prohibit, either by words of prohibition or by heavy license fee, the sale at public auction, . . . notwithstanding such goods may be of a harmless nature and even useful and beneficial to the community."

⁹⁶ *City of Mankato v. Fowler*, 32 Minn. 364; s. c. 20 N. W. 361.

a sum as a license fee, the result of which it appears is not to regulate but to suppress such business.⁹⁷

§ 1341. **Book canvassers—Interstate commerce.**—An ordinance of the city of Titusville, Pa., requiring the payment of a license fee from all persons soliciting orders for goods, books, etc., was held to be void as a regulation of interstate commerce so far as it applied to an agent soliciting orders for books to be filled on the approval of his principal in New York, notwithstanding the books were sent from a storehouse in Pittsburg, Pa., which was kept replenished from the main office in New York. The agent arrested for the violation of the ordinance was released by the federal court on habeas corpus.⁹⁸

§ 1342. **Intoxicating liquors.**—Where the sale of intoxicating liquor is prohibited by the constitution, it is of course incompetent for the legislature to authorize a municipal corporation to permit the sale of it under any conditions. But in the absence of such a restraint the power to regulate or license the traffic may be conferred upon the municipality;⁹⁹ and it is within the legislative discretion to confer an

⁹⁷ *City of Mankato v. Fowler*, 32 Minn. 364; s. c. 20 N. W. 361. In Illinois a more liberal rule of construction in reference to license fees obtains: *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Howland v. City of Chicago*, 108 Ill. 496, 500; *Braun v. City of Chicago*, 110 Ill. 186; *United States Distilling Co. v. City of Chicago*, 112 Ill. 19; *Dennehy v. City of Chicago*, 120 Ill. 627; s. c. 12 N. E. 227. It is there held that a power to license in a city charter includes a power to tax, and to fix such license at so high a rate as to become a source of revenue to the city: *Kinsley v. City of Chicago*, 124 Ill. 359; s. c. 16 N. E. 260.

⁹⁸ In *re Nichols*, 48 Fed. 164. The same principle applied in the case of the delivering the books sold by the agent: *In re Tyerman*, 48 Fed. 167. See also, *Robbins v. Shelby Co. Taxing Districts*, 120 U. S. 489; s. c. 7 S. Ct. 592; *Leloup v. Port of Mobile*, 127 U. S. 640; s. c. 8 S. Ct. 1380; *Asher v. Texas*, 128 U. S. 129; s. c.

9 S. Ct. 1; *Stoutenburgh v. Hennick*, 129 U. S. 141; s. c. 9 S. Ct. 256; *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 18; s. c. 11 S. Ct. 876; *In re White*, 43 Fed. 913, identical in point; *Ex parte Stockton*, 33 Fed. 95; *In re Kimmel*, 41 Fed. 775; *Case of Spain*, 47 Fed. 208; *Spellman v. City of New Orleans*, 45 Fed. 3.

⁹⁹ *Moundsville v. Fountain*, 27 W. Va. 182; *Jelly v. Dills*, 27 W. Va. 267; *Mason v. Trustees*, 4 Bush (Ky.) 406; *State v. Harper*, 42 La. An. 312; s. c. 7 So. 446. The constitution of California, art. 11, § 11, providing that "any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws," was held to authorize imposing a liquor license tax: *Ex parte Wolters*, 65 Cal. 269; s. c. 3 Pac. 894; *Ex parte Smith*, 38 Cal. 702; *People v. Martin*, 60 Cal. 153; *Ex parte Campbell*, 74 Cal. 20; s. c. 15 Pac. 318. See also, *Trageser v. Gray*, 73 Md. 250; s. c. 20 Atl. 905.

exclusive power in that behalf.¹⁰⁰ But general laws relating to the subject are not impliedly repealed by statutory or charter provisions enabling a municipal corporation to pass ordinances regulating the business.¹⁰¹ Under the statute of Illinois which empowers the president and board of trustees of villages "to license, regulate and prohibit the sale of intoxicating liquors," they may by ordinance provide for the issuing of licenses in one part of a village and prohibit the sale of intoxicating liquor in another part of the village.¹⁰² But an ordinance making it unlawful for any person to carry on the business of a liquor dealer without a license, which could only be obtained upon the "written consent of a majority of the board of police commissioners," or in default of that upon "the written recommendation of twelve citizens," was condemned as a violation of the fourteenth amendment of the constitution of the United States.¹⁰³

¹⁰⁰ *Huffsmith v. People*, 8 Colo. 175; s. c. 6 Pac. 157; *State v. Andrews*, 11 Neb. 523; s. c. 10 N. W. 410; *Bennet v. People*, 30 Ill. 389; *State v. Wheeler*, 27 Minn. 76; s. c. 6 N. W. 423; *Village of Coulterville v. Gillen*, 72 Ill. 599; *Phillips v. City of Tecumseh*, 5 Neb. 312; *Camp v. State*, 27 Ala. 53; *State v. Nolan*, 37 Minn. 16; s. c. 33 N. W. 36.

¹⁰¹ *Gardner v. People*, 20 Ill. 430; *Loeb v. City of Attica*, 82 Ind. 175; *Schroeder v. City Council*, 2 Treadw. Const. (S. C.) 726; *Town of New Hampton v. Conroy*, 56 Iowa 498; s. c. 9 N. W. 417; *State v. Witter*, 107 N. C. 792; s. c. 12 S. E. 328; *House v. State*, 41 Miss. 737. "But on the other hand, if supported by a sufficient grant of power, municipal corporations may make more detailed or more stringent regulations on the subject of the sale of intoxicants than those imposed by the general laws of the state: *City of Pekin v. Smelzel*, 21 Ill. 464. And an ordinance, though following a line parallel to that of the statute, will be sustained as valid, provided only that there is no necessary inconsistency between the two: *Mayson v. City of Atlanta*, 77 Ga. 662;" *Black Intoxicating*

Liquors, § 223, on "Conflict of ordinance with general law," and other cases there cited.

¹⁰² Where such ordinance makes no discrimination between persons, the discrimination that it makes between places can not be said to create a monopoly in the saloon business: *People v. Cregier*, 138 Ill. 401; s. c. 28 N. E. 812.

¹⁰³ *In re Christensen*, 43 Fed. 243. The case was held to fall precisely within the principle laid down, as follows, in *Yick Wo v. Hopkins*, 118 U. S. 356; s. c. 6 S. Ct. 1064:—"A municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality violates the provision of the constitution of the United States if it confers upon the municipal authorities arbitrary power at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or to the propriety of place selected for the carrying on of the business." See also, *Quong Woo, In re*, 13 Fed. 229; *In re Wo Lee*, 26 Fed. 471. But under the law of a state prohibiting the sale of liquors except under a

§ 1343. **Hack-stands and hotel-runners.**—An ordinance authorizing the depot marshal or any police officer to prescribe the place where omnibuses, hacks and other vehicles shall stand at a railroad depot while waiting for passengers, and requiring drivers to obey the directions of the police officer with reference thereto, is valid.¹⁰⁴ Under the provision of a village charter giving the trustees power “to restrain and prohibit all runners, solicitors or guides for boats, carriages, railroads, public houses, places of resort or for any other place or purpose whatsoever;” and under an ordinance of the village prohibiting such persons from soliciting, etc., “within the corporate limits of this village,”—it is as unlawful to do the prohibited acts on the private property of the defendant as in the public streets.¹⁰⁵

license upon a petition signed by a majority of the voters, the authorities are not bound to grant the license, though all the provisions of the law be complied with by a petitioner, but in their discretion can refuse it in any instance: *Perkins v. Ledbetter*, 68 Miss. 327; s. c. 8 So. 507. See also, *Perry v. City Council &c.*, 7 Utah 143; s. c. 25 Pac. 739; *In re Bickerstaff*, 70 Cal. 35; s. c. 11 Pac. 393. And certiorari lies to review proceedings of the council in granting a license upon an application by an insufficient number of petitioners: *Dexter v. Town Council &c.*, 17 R. I. 222; s. c. 21 Atl. 347. An ordinance prohibiting dram-shops, and imposing a license of \$500 a year on the sale of intoxicating liquor by measure, is not void as an unreasonable exercise of a power to suppress dram-shops and to levy a license tax on liquor sellers: *City of Elk Point v. Vaughn*, 1 Dak. 113; s. c. 46 N. W. 577. But a license fee of \$500 imposed on a druggist in a small town was declared unreasonable: *City of Lyons v. Cooper*, 39 Kan. 324; s. c. 18 Pac. 296. In a jury trial for violation of an ordinance imposing a license tax on liquor sellers, evidence of the population of the city and county and the annual sales of liquor and the profits thereof is properly rejected; the reason-

ableness of the ordinance being for the court: *City of Elk Point v. Vaughn*, supra. Under the power of a city “to tax, license and regulate” brewers, distillers, etc., it may require a license fee of \$500 for each brewery and for each distillery. Such is not a “tax” in the constitutional sense: *United States Distilling Co. v. Chicago*, 112 Ill. 19.

¹⁰⁴ *Veneman v. Jones*, 118 Ind. 41; s. c. 20 N. E. 644.

¹⁰⁵ *Village of Niagara Falls v. Salt*, 45 Hun (N. Y.) 41. A city ordinance prohibited the standing in certain places of “hacks, baggage-wagons and public conveyances.” It was held that an omnibus employed by a hotel to convey its guests to and fro free of charge was not a “public conveyance,” within the ordinance: *City of Oswego v. Collins*, 38 Hun (N. Y.) 171. An ordinance providing that cabs shall stand on certain parts of certain streets, and that any violation thereof shall be a misdemeanor, does not make a person standing a cab elsewhere than as provided guilty of a misdemeanor: *City of Helena v. Gray*, 7 Mont. 486; s. c. 17 Pac. 564. In an action for the violation of an ordinance prohibiting hackmen and porters from soliciting patronage at the depot or on the platform of any railroad in the city, it is no defense that the

§ 1344. **Regulation of markets.**—A market is a public place appointed by public authority where all sorts of things necessary to the subsistence or for the convenience of life are sold; or, in other words, it is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale.¹⁰⁶ In this country the authority to establish and regulate markets falls within the police power of the state, and the right to exercise such authority may be conferred by the state upon municipal corporations; and it is competent for these corporations, where the delegation of power is sufficient, to prohibit the sale of marketable articles outside of the regularly established markets.¹⁰⁷ There was some conflict of authority among the earlier cases as to whether a grant of the power to “establish and regulate markets” implies, when standing alone, authority to prohibit sales outside of the duly established markets; but the weight and current of the later cases show conclusively that the delegation of the first-mentioned power includes the other.¹⁰⁸

superintendent of a railroad had given defendant permission to stand beyond a certain line on the platform and solicit patronage: *City of Chillicothe v. Brown*, 38 Mo. App. 609. A rule of the board of police of Boston, providing that no person shall use “any hackney carriage unless he is licensed thereto by the board,” and that every vehicle “used for the conveyance of persons for hire from place to place within the city, except a horse-car, shall be deemed a hackney carriage,” applies to all vehicles used in the city for the conveyance of persons for hire, whether the vehicles stand in public places or in the stables of their owners: *Commonwealth v. Page*, 155 Mass. 227; s. c. 29 N. E. 512.

¹⁰⁶ *Breese, J., in Caldwell v. City of Alton*, 33 Ill. 416; *City of Jacksonville v. Ledwith*, 26 Fla. 163; s. c. 7 So. 885. See also, *City of Cincinnati v. Buckingham*, 10 Ohio 257; *McLin v. City of New Berne*, 70 N. C. 12; *City of Burlington v. Dankwardt*, 73 Iowa 170; s. c. 34 N. W. 801; *Prince v. Lewis*, 5 B. & C. 363; *Mosley v. Walker*, 7 B. & C. 40.

¹⁰⁷ *City of Bowling Green v. Carson*, 10 Bush (Ky.) 64; *First Mu-*

nicipality v. Cutting, 4 La. An. 335; *Ex parte Byrd*, 84 Ala. 17; s. c. 4 So. 397; 5 Am. St. 328. Ordinance prohibiting keeping of private market within six squares of public market not in contravention of the fourteenth amendment of the federal constitution: *Natal v. Louisiana*, 139 U. S. 621; s. c. 11 S. Ct. 631; *Morano v. Mayor*, 2 La. 217; *City of New Orleans v. Stafford*, 27 La. An. 417; *Bush v. Seabury*, 8 Johns. (N. Y.) 419; *Village of Buffalo v. Webster*, 10 Wend. (N. Y.) 99; *Nightingale's Case*, 11 Pick. (Mass.) 168; *Commonwealth v. Rice*, 9 Met. (Mass.) 253. Power to make by-laws for managing and ordering its prudential affairs, held sufficient to authorize appropriation of money for a market-house: *Spaulding v. City of Lowell*, 23 Pick. (Mass.) 71.

¹⁰⁸ *City of Jacksonville v. Ledwith*, 26 Fla. 163; s. c. 7 So. 885; 23 Am. St. 558, and note on page 581 (citing *Ex parte Byrd*, 84 Ala. 17; s. c. 5 Am. St. 328; *Cronin v. People*, 82 N. Y. 318; s. c. 37 Am. R. 564; *Ex parte Canto*, 21 Tex. App. 61; s. c. 17 S. W. 155; 57 Am. R. 609); *People v. Keir*, 78 Mich. 98; s. c. 43 N. W. 1039; *Gossigi v. City*

§ 1345. **Disorderly houses.**—A city having power to “define and prevent disorderly conduct,” and to “punish disorderly persons as defined by law,” may provide for the punishment of keepers of and residents in houses of ill fame;¹⁰⁹ but under its power to suppress bawdy-houses, etc., to suppress indecent and disorderly conduct, to punish lewd behavior in public places, and to make ordinances to promote morals, etc., it can not make one “whose known character is that of a prostitute” guilty, without more, of an offense.¹¹⁰ Nor do a char-

of New Orleans, 41 La. An. 522; s. c. 6 So. 534; State v. Gisch, 31 La. An. 544; State v. Pendergrass, 106 N. C. 664; s. c. 10 S. E. 1002; City of St. Louis v. Weber, 44 Mo. 547; Newson v. City of Galveston, 76 Tex. 559; s. c. 13 S. W. 368; Morano v. Mayor, 2 La. 217; Town Council v. Smart, 11 Rich. (S. C.) 551; Ash v. People, 11 Mich. 347; s. c. 83 Am. D. 740. Contra, Bethune v. Hughes, 28 Ga. 560 (see Badkins v. Robinson, 53 Ga. 613); City of St. Paul v. Laidler, 2 Minn. 190; s. c. 72 Am. D. 89; City of St. Paul v. Traeger, 25 Minn. 248; Caldwell v. City of Alton, 33 Ill. 417; s. c. 85 Am. D. 282; City of Bloomington v. Wahl, 46 Ill. 489; City of Burlington v. Dankwardt, 73 Iowa 170; s. c. 34 N. W. 801. Location of market may be changed from time to time if deemed expedient: Wartman v. City of Philadelphia, 33 Pa. St. 202; Gall v. City of Cincinnati, 18 Ohio St. 563; City of New Orleans v. Stafford, 27 La. An. 417. But not capriciously so as to injure public rights: Taggart v. Detroit, 71 Mich. 92; s. c. 38 N. W. 714. Can not be located so as to obstruct a street or person's place of business: Wartman v. City of Philadelphia, 33 Pa. St. 202; Mayor &c. v. Jacques, 30 Ga. 506. Power to establish and regulate includes power to license by reasonable license fees: City of Jacksonville v. Ledwith, 26 Fla. 163; s. c. 7 So. 885; 23 Am. St. 558; City of Davenport v. Kelley, 7 Iowa 102; Gale v. Village of Kalamazoo, 23 Mich. 344; Slaughterhouse Cases,

16 Wall. 36; Butchers' Union &c. Co. v. Crescent City &c. Co., 111 U. S. 746; s. c. 4 S. Ct. 652; Villivaso v. Barthet, 39 La. An. 247; s. c. 1 So. 599. But not to tax: State v. Bean, 91 N. C. 554. Reasonableness of regulations: City of Bloomington v. Wahl, 46 Ill. 489; Snell v. Corporation &c., 30 U. C. Q. B. 81; Le Claire v. City of Davenport, 13 Iowa 210; Kelly v. Corporation &c. of Toronto, 23 U. C. Q. B. 425; Strike v. Collins, 54 L. T. (N. S.) 152; Hughes v. Recorder's Court, 75 Mich. 574; s. c. 42 N. W. 984; Commonwealth v. Wilkins, 121 Mass. 356. In Ash v. People, 11 Mich. 347, 352, an ordinance prohibiting persons from keeping a meat market or stand outside of the market except on payment of an annual license fee of \$5 was sustained as a reasonable market regulation. But a license fee of \$10 for the privilege of selling fresh meat on the streets of a town having no established market was held unreasonable and in restraint of trade in Chaddock v. Day, 75 Mich. 527; s. c. 42 N. W. 977. See also, State v. Garibaldi, 44 La. An. 809; s. c. 11 So. 36.

¹⁰⁹ “The keeper of a house of ill fame is a disorderly person, and his conduct tends to disturb the peace of the community where the brothel is located, and it did not need legislation to declare him such.” People v. Miller, 38 Hun (N. Y.) 82.

¹¹⁰ Buell v. State, 45 Ark. 336; followed in Paralee v. Camden, 49 Ark. 165; s. c. 4 S. W. 654, where it was

ter giving power to punish prostitutes, and a general law providing for the suppression of bawdy-houses and the punishment of keepers thereof, authorize an ordinance making it an offense to resort to a house of ill fame for lewdness.¹¹¹

§ 1346. **Discrimination against non-residents.**—An ordinance practically prohibiting peddling and selling from house to house by sample or otherwise, by requiring a high license to be first obtained which excepts from its operation residents of the city, is not a valid exercise of the police power but a discriminating trade regulation and is void.¹¹² And an ordinance imposing a greater fee on a non-resident for a license than on a resident within the city is unreasonable and void as in restraint of trade.¹¹³

§ 1347. **Ordinances relating to licenses and fees.**—It is not essential that the license should be in writing,¹¹⁴ but it is material to its validity that a fixed and definite license fee should be named therein, which all persons engaged in like business shall pay, and that it should state the time of the duration and validity of the license to be is-

held that the mere presence within the town limits of one who had previously lived there as a prostitute could not be made a crime.

¹¹¹ *Ogden City v. McLaughlin*, 5 Utah 387; s. c. 16 Pac. 721. Complaint for keeping house of assignation need not allege all the circumstances contained in the ordinance. Same precision as in indictments not required: *State v. Baker*, 43 La. An. 1168; s. c. 10 So. 405. Punishment for visiting disorderly house pronounced excessive beyond reason: *In re Ah You*, 88 Cal. 99; s. c. 25 Pac. 974. A city may confine houses of prostitution within certain limits, although the effect is to depreciate the value of property: *L'Hote v. City of New Orleans*, 51 La. An. 93; s. c. 24 So. 608.

¹¹² *Sayre Borough v. Phillips*, 148 Pa. St. 482; s. c. 24 Atl. 76. It was held in Illinois that a village ordinance which imposed a license fee upon non-resident pedlers only was unreasonable, contrary to the laws and constitution of the state, being an unwarrantable discrimination be-

tween residents and non-residents, contrary to public policy as tending to create monopolies, and so void: *Village of Braceville v. Doherty*, 30 Ill. App. 645. See also, *Brooks v. Mangan*, 86 Mich. 576; s. c. 49 N. W. 633.

¹¹³ *State v. City of Orange*, 50 N. J. L. 389; s. c. 13 Atl. 240. See also, *Commonwealth v. Stodder*, 2 Cush. (Mass.) 562; *Graffy v. City of Rushville*, 107 Ind. 502; s. c. 8 N. E. 609; *Daniel v. Trustees &c.*, 78 Ky. 542. A city order requiring all pedlers and drummers to pay a license tax is not void as discriminating against the products of other states, although as a matter of fact few of the residents of the city or state care to sell under it, so that in practice most of the revenue under it is derived from outsiders: *Ex parte Hanson*, 28 Fed. 127.

¹¹⁴ *City of Boston v. Schaffer*, 9 Pick. (Mass.) 415. And when it is in writing a fac-simile signature is sufficient: *Swarth v. People*, 109 Ill. 621.

sued.¹¹⁵ The power to issue a license can not be delegated by the council,¹¹⁶ but the council may prescribe the mode of applying for a license, as, for instance, by a petition accompanied by a certificate of a certain number of citizens as to the character of the applicant.¹¹⁷ However, it is said that "the rule may be considered universal that no judicial discretion may be conferred upon the officer issuing the license."¹¹⁸ Although the power to license and regulate occupations is conferred solely for police purposes, and municipal corporations have no power to use it as a means of increasing their revenues, they may require a reasonable fee to be paid for a license. The amount they have a right to demand depends chiefly upon the extent and expense of the municipal supervision made necessary by the business in the city or town where it is licensed. A fee sufficient to cover the expense of issuing the license and to pay the expenses which may be incurred in the enforcement of such police inspections or superintendence as may be lawfully exercised over the business may be required.¹¹⁹ If the fee required is not plainly unreasonable the courts ought not to interfere with the discretion of the municipal authorities in fixing it; and unless the contrary appears on the face of the ordinance requiring it, they should presume it to be reasonable.¹²⁰

¹¹⁵ *Bills v. City of Goshen*, 117 Ind. 221; 20 N. E. 115; *Horr & Bemis Munic. Police Ordinances*, § 13.

¹¹⁶ *In re Bickerstaff*, 70 Cal. 35, 39; s. c. 11 Pac. 393; *Darling v. City of St. Paul*, 19 Minn. 389. Otherwise if there be express authority for such delegation: *City of Brooklyn v. Breslin*, 57 N. Y. 591.

¹¹⁷ *In re Bickerstaff*, *supra*. See also, *Powers v. Mayor &c.*, 54 Ala. 214; *Commonwealth v. Stockley*, 12 Phila. (Pa.) 316. Cf. *In re Quong Woo*, 13 Fed. 229.

¹¹⁸ *Horr & Bemis Munic. Police Ordinances*, § 263; *Elwood v. Bullock*, 6 Q. B. 383. In *Town of State Center v. Barenstein*, 66 Iowa 249; s. c. 23 N. W. 652, an ordinance requiring that pedlers "shall pay not less than one nor more than twenty-five dollars for a fixed time, in the discretion of the mayor," was held invalid because the mayor might fix so short a time as to be equivalent to a refusal to license at

all. But an ordinance authorizing the mayor to fix a fee within a specified sum was sustained in *Town of Decorah v. Dustan*, 38 Iowa 96. See also, *Bradley v. City of Rochester*, 7 N. Y. S. 237. A city ordinance prohibiting the sale of liquor without a license, and restricting the business to certain districts of the city "to be designated by the mayor," was held constitutional, except as to the attempted restriction, which section might properly be stricken out by amendment: *State v. Kantler*, 33 Minn. 69; s. c. 21 N. W. 856.

¹¹⁹ *City of Fayetteville v. Carter*, 52 Ark. 301; s. c. 12 S. W. 573; 6 L. R. A. 509, and note.

¹²⁰ *City of Fayetteville v. Carter*, 52 Ark. 301; s. c. 12 S. W. 573; 6 L. R. A. 509; *City of Burlington v. Putnam Ins. Co.*, 31 Iowa 102, 106; *Denver City R. Co. v. City of Denver*, 2 Colo. App. 34; s. c. 30 Pac. 1048; *Van Hook v. City of Selma*, 70 Ala. 361; *Van Baalen v. People*, 40 Mich. 258; *Laundry License Cases*, 22 Fed.

§ 1348. **Miscellaneous.**—A city council may designate the number of hours that shall constitute a day's labor on public works, but it can not make a violation a misdemeanor.¹²¹ An ordinance prohibiting public speaking in any of the public grounds except on permission of the mayor does not violate the fourteenth amendment.¹²² An ordinance imposing a penalty for offering for sale untagged and uninspected meats is valid.¹²³ Where the right to regulate is given by statute the city has a right to require drummers to wear a badge of a certain character prescribed.¹²⁴ A board of health may prohibit the maintenance of a privy vault within twenty-five feet of any door or window of a residence,¹²⁵ and a city has power to determine what kind of privy vaults shall be used, under a statute giving power to pass ordinances to preserve the health, regulate privies, etc.¹²⁶ It may require an owner of dogs to register their names and description and pay a reasonable tax therefor.¹²⁷ It is not within the police power to require pawnbrokers and second-hand dealers to keep lists of and report goods handled by them.¹²⁸ An ordinance providing that an application for license to keep a dram shop shall be signed by a majority of the property owners according to frontage on both sides of the street in the block is not repealed by a subsequent ordinance providing that the president of the board of trustees may grant licenses to keep dram shops "as they may deem proper."¹²⁹ An ordinance which is, in part, void and is separate does not destroy the entire ordinance;¹³⁰ that which is separable and is void as ultra vires, may be disregarded and the remainder of the ordinance enforced.¹³¹ An ordinance prohibiting the running of street cars without vestibules during winter is not valid

701; *Johnson v. Philadelphia*, 60 Pa. St. 445; *Ex parte Chin Yan*, 60 Cal. 78; *Ex parte Gregory*, 20 Tex. App. 210; *Town of State Center v. Barenstein*, 66 Iowa 249; s. c. 23 N. W. 652; *Fisher v. Harrisburg*, 2 Grant (Pa.) 291; *City of St. Louis v. Weber*, 44 Mo. 547; *Corrigan v. Gage*, 68 Mo. 541; *State v. Ironton Gas Co.*, 37 Ohio St. 45; *Clason v. City of Milwaukee*, 30 Wis. 316; *Poyer v. Village of Desplaines*, 22 Ill. App. 576.

¹²¹ *State v. O'Neil*, 49 La. An. 1171; s. c. 22 So. 352.

¹²² *Davis v. Massachusetts*, 167 U. S. 43; s. c. 17 S. Ct. 731.

¹²³ *City of New Orleans v. Lozes*, 51 La. An. 1172; s. c. 25 So. 979.

¹²⁴ *Hot Springs v. Curry*, 64 Ark. 152; s. c. 41 S. W. 55.

¹²⁵ *Cartwright v. Board of Health &c.*, 56 N. Y. S. 731; s. c. 39 App. Div. (N. Y.) 69.

¹²⁶ *Sprigg v. Garrett Park*, 89 Md. 406; s. c. 43 Atl. 813.

¹²⁷ *City of Iola v. Sugg*, 8 Kan. App. 529; s. c. 56 Pac. 541.

¹²⁸ *State v. Itzkovitch*, 49 La. An. 366; s. c. 21 So. 544.

¹²⁹ *People v. Harrison*, 185 Ill. 307; s. c. 56 N. E. 1120.

¹³⁰ *Doran v. City of Camden*, 64 N. J. L. 666; s. c. 46 Atl. 724.

¹³¹ *Stirling v. City of Camden*, 65 N. J. L. 190; s. c. 46 Atl. 781.

however reasonable it may be.¹³² Where power is vested in the mayor and council to secure the protection of persons and property they may construct a canal to carry off the waters of a natural stream which was subject to overflow and caused injury.¹³³ An ordinance providing that whoever shall be guilty of any boisterous or disorderly conduct shall be fined not less than five nor more than twenty dollars is a legitimate exercise of police power.¹³⁴ The constitutional provision that no municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by the statute for the same offense, is not violated by an ordinance fixing a less penalty for disorderly conduct than is fixed by statute for breach of the peace, riot, rout, unlawful assembly or affray. The offenses are different.¹³⁵ The city council has power to confer upon the board of health the right to abate a house infected with small-pox, as a nuisance dangerous to the health of the public.¹³⁶ The question of the reasonableness of an ordinance is for the court.¹³⁷ In the absence of power given in the charter a city of the second-class in Nebraska has no authority to regulate the charges of an electric light company.¹³⁸

¹³² *City of Yonkers v. Yonkers R. Co.*, 64 N. Y. S. 955; s. c. 51 App. Div. (N. Y.) 271.

¹³³ *Wilson v. City of Boise City (Idaho)*, 55 Pac. 887.

¹³⁴ *City of Mt. Sterling v. Holly*, 22 Ky. L. 358; s. c. 57 S. W. 491.

¹³⁵ *City of Mt. Sterling v. Holly*, *supra*.

¹³⁶ *Waters v. Townsend*, 65 Ark. 613; s. c. 47 S. W. 1054.

¹³⁷ *State v. Boardman*, 93 Maine 73; s. c. 44 Atl. 118.

¹³⁸ *Wabaska Electric Co. v. City of Wymore*, 60 Neb. 199; s. c. 82 N. W. 626. Texas penal code 1879, not repealed by act of 1889, p. 84, and act 1893, p. 38, in relation to butchers' reports: *Braun v. State*, 40 Tex. Cr. App. 236; s. c. 49 S. W. 620. Revised Ord. St. Louis, art. 17188, § 981, construed: *St. Louis v. Babcock*, 156 Mo. 154; s. c. 56 S. W. 731.

CHAPTER XXXI.

MUNICIPAL COURTS AND RECORDS.

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(a) MUNICIPAL COURTS.

§ 1349. **Introductory.**—The fundamental principle of the common law, derived doubtless from the ancient doctrine of the divine right of kings, was that every power, including the judicial, was a prerogative of the throne. Thus upon an examination of English history we find that it was the king who granted corporation charters to cities, which charters frequently contained grants or franchises of holding municipal courts.¹ Stephen (for instance) says:—"These charters from the earliest times contained grants of courts of various degrees of importance. The mayor and aldermen were, in some cases, made

¹ Kyd Corporations, §§ 70, 182, 272; 1 Bac. Abr.; 4 Inst. 78, 224; Cro. 327; Wood, Inst. 205, 111; 2 Bl. Com. Jac. 313; Haddock's Case, T. Raym. 37; 3 Bl. Com. 30, 80; 4 Bl. Com. 435.

magistrates *ex officio*, and authorized to hold courts of quarter sessions; and these grants were accompanied or not, as the case might be, by a clause called the 'non intromittant clause,' which ousted the jurisdiction of the county magistrates. In some cases towns were made counties of themselves."² In England such a franchise having once been granted it was considered a public right, and consequently could never be lost by non-user no matter how long continued.³ In America we shall find that the same power which confers the right frequently abolishes it.

§ 1350. The same subject continued—Scope of subject.—Municipal courts in our country are known by a variety of names, such as mayor's, recorder's, corporation, hustings, inferior and police courts, and while their jurisdiction is to a large degree similar in the various states, there seems a tendency in some states to increase their authority to such an extent that it passes beyond what might be ordinarily considered their technical boundaries; thus, for example, it was held in Alabama that the acts of that state gave "the judge of the city court of Selma all the powers and jurisdiction which are now, or may hereafter be, lawfully exercised by the judges of the circuit court and chancellors of the state."⁴ It will be the purpose of this chapter, in treating the subject of municipal courts, to conform that subject as far as possible to courts in their narrower and more technical signification, although from what has just been said some latitude may be at times essential.

§ 1351. Creation—Abolition—Increase of power.—As in England towns owed their corporate existence and powers to the will of the king, so in our country the legislature, representing the sovereign state, or the constitution, expressing the sovereign will of the people, is the only source of municipal corporate rights; to statute law and decisions thereupon we must therefore refer in order to discover the principles governing the creation and jurisdiction of municipal courts; and the law seems to be well settled that, while such courts exist almost solely for the benefit of cities and the enforcement of their local authority, still the legislature, acting in accordance with the state constitution, alone can call them into existence and define

² Stephen Hist. of Crim. Law, p. 116.

³ *Rex v. Mayor &c.*, 4 D. P. C. 562; *Rex v. Mayor &c.*, 1 D. & R. 148; *Rex v. Steward &c.*, 5 Barn. & Ald. 691.

⁴ *Bledsoe v. Gary*, 95 Ala. 70; s. c. 10 So. 502. See also, *Hercules Iron Works v. Elgin &c. R. Co.*, 141 Ill. 491; s. c. 30 N. E. 1050; *Glove &c. Mills v. Belbrough*, 19 N. Y. S. 176.

their powers.⁵ It also seems to be very clear both upon reason and authority that there can be no implication of the right to hold a municipal court, and that the creative power can in no sense be delegated by the legislature to the municipality. Thus it was held in a comparatively recent case in the supreme court of California that the legislature and governor, being the law-making power, alone could establish a municipal court and define its jurisdiction, and that consequently a municipal charter adopted by approval could not establish a municipal court, even though the legislature subsequently sanctioned the same by its resolution of approval.⁶ As the legislature alone can establish courts for municipal purposes, so also by its act only can their existence and power be terminated;⁷ and such termination divests the officers of such court of all their authority.⁸ And there may be an implied as well as an express abolition of a municipal court.⁹

§ 1352. The same subject continued.—The legislature may also pass acts increasing the number of municipal courts and magistrates and may enlarge their powers, and may confer a greater jurisdiction upon some courts than upon others; but it would seem that unless municipal courts are to lose their technical characteristics as such, their jurisdiction must be confined within certain defined limits.¹⁰

⁵ *People v. Wilson*, 15 Ill. 388; *State v. Young*, 3 Kan. 445; *People v. Curley*, 5 Colo. 412; *Graham v. State*, 1 Ark. 171; *In re Cahill*, 110 Pa. St. 167; s. c. 20 Atl. 414; *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146; *City of Mankato v. Arnold*, 36 Minn. 62; s. c. 30 N. W. 305; *Perkins v. Corbin*, 45 Ala. 103; *Mayor &c. v. Dearing*, 15 La. An. 208; *Missouri v. Lewis*, 101 U. S. 22.

⁶ *People v. Toal*, 85 Cal. 333; s. c. 23 Pac. 203. See also, *Ex parte Reilly*, 85 Cal. 632; s. c. 24 Pac. 807; *In re Cloherty*, 2 Wash. 137; s. c. 27 Pac. 1064; *Barter v. Commonwealth*, 3 P. & W. (Pa.) 253; *Weeks v. Forman*, 16 N. J. L. 237; *Thomas v. Incorporated Village of Ashland*, 12 Ohio St. 124. But see dissenting opinion of Beatty, C. J., in case of *People v. Toal*, supra, who said, referring to the charter creating a municipal court: "Such charters are laws; the legislature must approve

the charter; therefore, what the charter establishes the legislature establishes. The charter is a law; therefore the jurisdiction conferred by it is conferred by law." Pp. 342, 343.

⁷ *Tesh v. Commonwealth*, 4 Dana (Ky.) 522; *Boyd v. Chambers*, 78 Ky. 140; *Vason v. City of Augusta*, 38 Ga. 542.

⁸ *Perkins v. Corbin*, 45 Ala. 103; *Mayor &c. v. Dechert*, 32 Md. 369.

⁹ *People v. Henshaw*, 76 Cal. 436; s. c. 18 Pac. 413. In Maryland the legislature can not confer judicial powers: *Mayor &c. v. Dechert*, 32 Md. 369. But see *Vason v. City of Augusta*, 38 Ga. 542; and *Alexander v. Bennett*, 60 N. Y. 204, which decides that where state constitutions continue the powers and jurisdiction of certain inferior courts, no subsequent legislature can take away such jurisdiction.

¹⁰ *State v. Helfrid*, 2 Nott & McCord (S. C.) 233; *In re Cahill*, 110

But on the other hand, it was held in Virginia that the legislature may enlarge the powers of a corporation court, giving it jurisdiction greater even than a circuit court.¹¹

§ 1353. **Jurisdiction—Criminal, civil and special.**—It has already been stated that there seems a tendency to enlarge the powers of municipal courts, and cases have been cited illustrative of this; nevertheless it is submitted that upon examination of these cases it will be found that the courts therein mentioned are not strictly municipal courts within the technical meaning of that term, if by that term we understand courts exercising jurisdiction co-extensive only with corporate limits. And upon careful inquiry we will find that a municipal court per se is one exercising a jurisdiction within certain defined and more or less narrow confines; and that while in the various states its exact boundaries may shift to a certain extent, the underlying principle of jurisdiction is to a large degree uniform. Such courts are from their very nature of inferior jurisdiction, and are confined in their adjudication to such matters as arise within the particular corporate territory for which they are created. Very frequently they are not courts of record. Nor do their judges fall within the constitutional meaning of such.¹² Owing to the fact that the most ordinary exercise of their power is in the enforcement of municipal ordinances passed for the preservation of peace and order in cities, criminal or quasi-criminal jurisdiction is peculiarly their province; but inasmuch as a rule their method of procedure is summary, it would seem that criminal offenses, as applicable to them, are confined to such as are not felonies or crimes against the general law, but simply petty offenses, amounting in some cases to misdemeanors punishable by fine or by fine and a limited imprisonment.¹³

Pa. St. 167; s. c. 20 Atl. 414; *State v. Crane*, 84 Maine 271; s. c. 24 Atl. 853; *Landers v. Staten Island R. Co.*, 53 N. Y. 450.

¹¹ *Chahoon v. Commonwealth*, 21 Gratt. (Va.) 822. See also, *Bledsoe v. Gray*, 95 Ala. 70; s. c. 10 So. 502. But it was held in *Hickman v. O'Neil*, 10 Cal. 292, that the power conferred by a legislature upon a municipal court to send its process beyond its territorial limits, did not enlarge its jurisdiction, but only the method of enforcing its powers. See § 1358, post, "Jurisdictional limitation."

¹² *Richmond Mayoralty Case*, 19 Gratt. (Va.) 673; *Egleston v. City Council*, 1 Mill Const. (S. C.) 45; *Grand Rapids &c. R. Co. v. Gray*, 38 Mich. 461; *In re Stratman*, 39 Cal. 517; *Nugent v. State*, 18 Ala. 521.

¹³ *Ex parte Slattery*, 3 Ark. 484; *Myers v. People*, 26 Ill. 173; *Commonwealth v. Pindar*, 11 Met. (Mass.) 539; *Rector v. State*, 6 Ark. 187; *Durr v. Howard*, 6 Ark. 461; *Borough of St. Peter v. Bauer*, 19 Minn. 327; *State v. Pender*, 66 N. C. 313; *Commonwealth v. Roark*, 8 Cush. (Mass.) 210; *Goodrich v. Brown*, 30 Iowa 291; *People v. Wong*

§ 1354. **The same subject continued.**—Under certain circumstances and in certain states the legislature has conferred also a limited civil jurisdiction upon these courts. Thus in New Jersey the recorder of the town of New Brunswick is authorized under a certain act to try civil suits within the jurisdiction of a justice of the peace, and it was decided that the civil jurisdiction of a justice of the peace may also be conferred upon the mayor of a city.¹⁴ On the other hand it was held in North Carolina that the legislature could not constitutionally confer the judicial powers of a justice of the peace in civil cases upon a mayor.¹⁵ But it would seem, as stated, that a limited civil jurisdiction is frequently conferred upon these courts, and that there is a growing tendency to enlarge the same.¹⁶ It was held in Georgia that where a statute declared certain offenses crimes against the state, a city can not make the same offenses against the city triable summarily in a municipal court; that this would be unconstitutional.¹⁷ But in New Jersey it was held that the same offense may be one against the state and against the municipality; hence both may punish constitutionally.¹⁸ In the various states certain special powers and jurisdiction have been conferred, but it will generally be found that these are in keeping with the local character of the municipal court.¹⁹

Wang, 92 Cal. 277; s. c. 28 Pac. 270; *People v. Ah Ung* (Cal.), 28 Pac. 272; *Brown's Case*, 152 Mass. 1; s. c. 24 N. E. 857; *People v. Hulett*, 15 N. Y. S. 630; *People v. Brown*, 80 Mich. 615; s. c. 45 N. W. 371; *People v. Gooseman*, 80 Mich. 611; s. c. 45 N. W. 369; *State v. Cram*, 84 Maine 271; s. c. 24 Atl. 853; *City Council v. Pepper*, 1 Rich. L. (S. C.) 364; *City Council v. King*, 4 McCord (S. C.) 487; *Lewis v. State*, 21 Ark. 209.

¹⁴ *Hutchings v. Scott*, 9 N. J. L. 218.

¹⁵ *Town of Edenton v. Wool*, 65 N. C. 379.

¹⁶ *Hercules Iron Works v. Elgin & C. R. Co.*, 141 Ill. 491; s. c. 30 N. E. 1050; *Globe & C. Mills v. Bledbrough*, 19 N. Y. S. 176; *Bledsoe v. Gary*, 95 Ala. 70; s. c. 10 So. 502; *Pressel v. Bice*, 142 Pa. St. 263; s. c. 21 Atl. 813; *Callahan v. Mayor*, 66 N. Y. 656; *City of Cincinnati v. Gwynne*, 10 Ohio 192; *Brown*

v. Jerome, 102 Ill. 371; *Stimson Statute Law*, 120, 122. Questions of title to real estate apparently not cognizable before a municipal court: *Warwick v. Mayo*, 15 Gratt. (Va.) 528; *Bailey v. Winn*, 101 Mo. 649; s. c. 12 S. W. 1045.

¹⁷ *Jenkins v. Mayor & C.*, 35 Ga. 145. See language of Lumpkin, C. J., who says:—"The line is not very accurately drawn where municipal power ends and state authority begins;" P. 147. See also, *Mayor & C. v. Hussy*, 21 Ga. 80; *People v. Nyland*, 41 Cal. 129.

¹⁸ *Howe v. Treasurer & C.*, 37 N. J. L. 145; *State v. Lee*, 29 Minn. 445; s. c. 13 N. W. 913.

¹⁹ *City of Fayette v. Shafroth*, 25 Mo. 445; *Willis v. City of Boonville*, 28 Mo. 543; *Myers v. People*, 26 Ill. 173; *Malone v. Murphy*, 2 Kan. 250; *Rice v. State*, 3 Kan. 141; *Elder v. Dwight Mfg. Co.*, 4 Gray (Mass.) 201; *State v. Ricker*, 32 N. H. 179

§ 1355. **Summary powers.**—By far the largest number of decisions in the matter of municipal courts principally turn upon the question of their power to act summarily in the enforcement of their criminal or quasi-criminal jurisdiction, and yet upon the proper and constitutional exercise of this right mainly depend the efficiency and usefulness of these courts. Whenever such a method of procedure is put in action it must necessarily be in a certain sense and to a certain degree in derogation of the fundamental principles of Magna Charta, the essential provisions of which form the substance of our national and state constitutions and are justly prized as the bulwark of American liberty, namely, the right of every citizen accused of crime to presentment duly predicated upon a careful weighing of evidence by unbiased fellow-citizens, and after presentment a prosecution before an impartial jury of his peers. And yet it will readily be seen that such a cumbersome method will not be effectual in the bringing to justice of those who commit petty municipal offenses, and that, as has been said more than once by the courts, such a requirement would defeat the very object for which municipal courts were created and greatly hinder the efficiency of their procedure. It was said in a late case that the provision of the constitution guaranteeing jury trial was designed to embrace such prosecutions “as at the time of its adoption, by the course of law, were triable by a jury. There was at that time and always had existed a class of criminal cases which were proceeded against summarily and without the intervention of a jury. * * * The power to dispose of them summarily was undoubted.”²⁰

(where it was held that a police court of a town had by statute jurisdiction of cases of complaints committed anywhere in the county where warrant of arrest was issued in the town returnable before that court); *Ex parte Halstead*, 89 Cal. 471; s. c. 26 Pac. 961; *Carroll v. Langan*, 63 Hun (N. Y.) 380. Upon jurisdiction generally, see *Robinson v. Benton Co.*, 49 Ark. 49; s. c. 4 S. W. 195; *Davis v. Woolnough*, 9 Iowa 104; *Nesbit v. Matthews*, 16 N. Y. S. 202; *Hercules Iron Works v. Elgin & C. R. Co.*, 141 Ill. 491; s. c. 30 N. E. 1050; *Cross v. Hecker*, 75 Md. 574; s. c. 24 Atl. 99.

²⁰ *United States v. Green*, 8 Mackey 230, 238, 239. See also, *Callan v. Wilson*, 127 U. S. 540; s. c. 8 S.

Ct. 1301; *State v. Glenn*, 54 Md. 572; *State v. Mayor*, 12 Rich. (S. C.) 480; *City of New Orleans v. Costello*, 14 La. An. 37; *Hill v. Mayor & C.*, 72 Ga. 314 (where the court said:—“It is well settled that such is the law, the constitutional law; for if no man could be fined or imprisoned for violation of a city police ordinance except by a jury trial or indictment, away would go all power in our municipal authorities to preserve peace and good order within their corporate limits”); *State v. Gutierrez*, 15 La. An. 190; *People v. Justices*, 74 N. Y. 406; *Byers v. Commonwealth*, 42 Pa. St. 89; *McGear v. Woodruff*, 33 N. J. L. 213; *Ex parte Schmidt*, 24 S. C. 363; *State v. Powell*, 97 N. C. 417; s. c. 1 S. E.

§ 1356. **The same subject continued.**—While the decisions are by no means uniform in the various states, and while in some cases it has been seemingly denied that in any instance could a municipal court exercise summary powers,²¹ the better and more uniform rule appears to be, that courts created for corporate communities must frequently act in a summary way. Upon an examination of the authorities the following principles seem clearly to underlie and form the rationale, so to speak, of this method of procedure:—The exercise of the power is confined to cases which properly fall within police surveillance; it has to do with the prosecution and punishment of infringements of local ordinances and by-laws, which, while they may possess a quasi-criminal character, are in reality only petty offenses against the peace and order of the special locality wherein they are committed; are punishable by fine, or, if by imprisonment also, the latter is of only a temporary character and generally not in the same place nor surrounded by the same penal circumstances as in the case of grievous public crimes; in a word, such offenses are not “criminal” and “infamous” in the meaning of those words as found in the various constitutions. But it is also well settled that in no sense can the summary jurisdiction of these courts be evoked where the offense committed is one to which at common law, or at the adoption of the state constitution, attached the rights of presentment, indictment and trial by jury; in all such cases these rights are inviolate. But it is equally clear that the legislature may declare new offenses which were nonexistent at common law and at the adoption of the constitution, and prescribe the method of trial of such offenses, authorizing trial of them in a summary way; and such a proceeding is not a suit at common law, but a criminal statutory proceeding.²²

482; *Tims v. State*, 26 Ala. 165; *Murphey v. People*, 2 Cow. (N. Y.) 815; *In re Powers*, 25 Vt. 261; *Lowe v. Commissioners*, R. M. Charlt. (Ga.) 302; *In re Pennsylvania Hall*, 5 Pa. St. 204; *McGarty v. Deming*, 51 Conn. 422.

²¹ *Burns v. Town of Le Grange*, 17 Tex. 415; *In re Scully & O'Leary* (Ill.), 11 Chicago Leg. N. 27; *State v. Moss*, 2 Jones (N. C.) 66; *Smith v. City of San Antonio*, 17 Tex. 643; *City of Dubuque v. Rebman*, 1 Iowa 444; *Plimpton v. Town of Summer-*

set, 33 Vt. 283; *Town Council &c. v. Ohlandt*, 24 S. C. 158.

²² *Van Swarton v. Commonwealth*, 24 Pa. St. 131; *Markle v. Town Council &c.*, 14 Ohio 586; *Mayor &c. v. Meuer*, 35 La. An. 1192; *Williams v. City Council &c.*, 4 Ga. 509; *Slaughter v. People*, 2 Doug. (Mich.) 334; *Floyd v. Commissioners*, 14 Ga. 354; *Shafer v. Mumma*, 17 Md. 331; *In re Rolfs*, 30 Kan. 758; s. c. 1 Pac. 523; *Howe v. Treasurer &c.*, 37 N. J. L. 145; *State v. Colin*, 27 Vt. 318; *Triggally v. Mayor &c.*, 6 Coldw. (Tenn.) 382; *Work v. State*, 2 Ohio St. 296.

§ 1357. **The same subject continued.—Felonies and misdemeanors.**—It was held in Wisconsin that in no case of felony could the right of trial by jury in a criminal case be waived, and that in cases of misdemeanor the current of authority was the same way,²³ and in Arkansas that all offenses below the grade of felony can constitutionally be vested by the general assembly in a corporation court.²⁴ These cases are, however, in line with the current of decisions, for they clearly refer in “felonies” and “misdemeanors” to crimes against the state; and it is very evident that whenever the infringement of town ordinances rises to the gravity of such, a jury trial is the inalienable right of the accused, nor can any legislative act deprive him thereof.²⁵ It may be added that it has been held that restrictions upon the right of these courts, acting in a summary way, are not governed by nor are they within the purview of the constitution of the United States, but only of the state constitutions. The former has to do with restrictions upon federal power, and is not intended in any manner to prohibit the legislatures of the different states from conferring such jurisdiction, summary or otherwise, as they may deem proper, upon municipal courts, so long as they keep within the specific provisions of the constitutions of their respective states.²⁶

§ 1358. **Jurisdictional limitation.**—Like the corporate cities for whose uses and purposes they are created, municipal courts owe their authority and existence to statutory enactment, although, as has already been stated, cities sometimes enjoyed at common law what was known as the franchise of holding a court; therefore they are from their very nature of only a limited jurisdiction territorially.²⁷ And in every instance it seems well settled that the statutes defining their

²³ State v. Lockwood, 43 Wis. 403.

²⁴ Ex parte Slattery, 3 Ark. 484.

²⁵ United States v. Green, 8 Mack. 230; Cooley Const. Lim. 319, 410; Proffat Jury Trials, § 113; Neales v. State, 10 Mo. 498; State v. Mansfield, 41 Mo. 470; Commonwealth v. Shaw, 1 Pittsburgh (Pa.) 492; Moundville v. Fountain, 27 W. Va. 182; State v. City of Topeka, 36 Kan. 76; s. c. 12 Pac. 310. In this case it was held that the provision in the Bill of Rights, that “in all prosecutions the accused shall be allowed . . . to have . . . a speedy trial by an impartial jury,” applied to criminal prosecutions for viola-

tions of laws of the state, and not to that of city ordinances appertaining to local affairs of the city.

²⁶ State v. Wells, 46 Iowa 662; Boring v. Williams, 17 Ala. 510. But see City of Portland v. City of Bangor, 65 Maine 120, where a contrary doctrine is expressed, overruling Nott’s Case, 11 Maine 208, and Inhabitants &c. v. Inhabitants &c., 42 Maine 403.

²⁷ State v. Treasurer &c., 43 N. J. L. 139; Bonner v. McPhail, 31 Barb. (N. Y.) 106; Stanhart v. Sitley (N. J.), 19 Atl. 464; Grand Rapids &c. R. Co. v. Gray, 38 Mich. 461; In re City of Buffalo, 18 N. Y. S. 771.

jurisdiction must be strictly construed, and that jurisdiction is substantially confined within the limits of those powers expressly given by statute; thus, for example, it was held that where a statute gave a municipal court jurisdiction over an individual or corporation, where there is a demand "for money only," such court has no jurisdiction to give not only a judgment for the money claimed, but also to determine that defendant was not entitled thereto as a trustee.²⁸ Yet while this is clearly the law, any powers which can naturally or necessarily be inferred from those expressly given have been frequently held to be within their jurisdiction; for example, it was decided in Maine that although the Declaration of Rights of that state declares that no person shall be tried for a capital offense or infamous crime except on presentment by a grand jury, nevertheless where one is charged with assault and battery, confessedly an infamous crime, judgment thereof was within the jurisdiction of a trial justice of the city of Portland, owing to the possible smallness of the punishment arising from the circumstances.²⁹

§ 1359. The same subject continued—Constitutional limitations.—It may be safely asserted that the influence of Magna Charta will never pass away, and inasmuch as its provisions have been embodied substantially in the constitutions of the various states of the Union, we naturally find that there is also this further limit to the jurisdiction of municipal courts, namely, that they can exercise no powers in anywise at variance with the provisions of that highest of all state laws, the Bill of Rights. Thus the supreme court of Michigan said in reference to the police court of Grand Rapids:—"The statute which attempts to give this court jurisdiction over misdemeanors in general can not exercise that power for want of indispensa-

²⁸ *Hunt v. Genet*, 14 Daly (N. Y.) 225. See also, *Gray v. State*, 2 Harr. (Del.) 76; *Zylstra v. Corporation of Charleston*, 1 Bay (S. C.) 382; *Rohland v. St. Louis & C. R. Co.*, 89 Mo. 180; s. c. 1 S. W. 147; *People v. Stott*, 90 Mich. 343; s. c. 51 N. W. 509; *White v. Levy*, 93 Ala. 484; s. c. 8 So. 563; *In re Ah You*, 82 Cal. 339; s. c. 22 Pac. 929.

²⁹ *State v. Cram*, 84 Maine 271; s. c. 24 Atl. 853. The common-law test of the magnitude of the offense was deemed to have been changed by the statute, under which a mere nominal fine might be imposed: *Town of*

Henderson v. Davis, 106 N. C. 88; s. c. 11 S. E. 573; *People v. Gooseman*, 80 Mich. 611; s. c. 45 N. W. 369; *People v. Brown*, 80 Mich. 615; s. c. 45 N. W. 371; *Georgia State B. & L. Ass'n v. Owens*, 88 Ga. 224; s. c. 14 S. E. 210; *McCrea v. Jacobs*, 19 Abb. N. C. (N. Y.) 188; *City Council & C. v. Ashley Phosphate Co.*, 34 S. C. 541; s. c. 11 S. E. 386; *Wheeler v. Bowery Sav. Bank*, 20 Abb. N. C. (N. Y.) 243; *In re Knoop's Estate*, 11 N. Y. S. 773; *Price v. Grant*, 7 N. Y. S. 904; *Ex parte Burnett*, 30 Ala. 461.

ble means to carry it out. Those powers can not be given to it without changing its entire character. * * * It is certain no court can be so constituted as to deprive either the public or criminals of their substantial rights. As we had occasion to suggest before, the judicial system of the state is not within legislative discretion except to a limited extent. * * * This police act has got beyond any range which the constitution recognizes."³⁰

§ 1360. **Qualifications of officers—Judges and jurors.**—A casual examination of cases upon this point would lead one to suppose that there was scarcely any uniformity, and that not only were the different states in conflict upon the eligibility of residents and taxpayers of municipalities to sit as judges, jurors or witnesses in their local courts, but that the appellate court of the same state leaned now to one and now to a contrary opinion; but a little closer scrutiny dissolves the difficulty and reconciles the apparent want of harmony. The rule seems to be that when the city itself is a party, and an interested party in the proceeding, or when the city is being sued in its corporate capacity, or is liable thereby to pecuniary loss or gain, then in such proceeding a resident taxpayer is not competent to sit as a juror; and presumably the same disqualification extends to a judge.³¹ But when the suit is only for the enforcement of a city ordinance by prosecution, the penalty being a fine or limited imprisonment, then a resident taxpayer and citizen is competent to sit either as juror or a judge.³² One may also be disqualified from acting as a judge in a

³⁰ *People v. Mangold*, 71 Mich. 335; 99; *Mayor &c. v. State*, 15 Md. 376; s. c. 39 N. W. 6; *Montross v. State*, 1 Dillon Munic. Corp. (4th ed.), 61 Miss. 429. But see *Ex parte Peacock*, 25 Fla. 478; s. c. 6 So. 473; § 427, and cases cited.

³¹ *Fulweiler v. City of St. Louis*, 61 Mo. 479; *Dively v. City of Cedar Falls*, 21 Iowa 565; *Davenport &c. Co. v. City of Davenport*, 13 Iowa 229; *Johnson v. Mayor &c.*, 46 Ga. 80; *Mayor &c. v. Lyon*, 69 Ga. 577; *City of Boston v. Baldwin*, 139 Mass. 315; s. c. 1 N. E. 417; *Kundinger v. City of Saginaw*, 59 Mich. 355; s. c. 26 N. W. 634; *Diveny v. City of Elmira*, 51 N. Y. 506. This case held that the charter could remove disqualification.

³² *Commonwealth v. Ryan*, 5 Mass. 90; *State v. Wells*, 46 Iowa 662; *Mayor &c. v. Long*, 31 Mo. 369; *Mayor &c. v. Minor*, 73 Ga. 484; *City Council v. Pepper*, 1 Rich. (S. C.)

municipal court by reason of the fact that he holds another office of public trust, such as governor, lieutenant-governor, councilor or representative.³³ Nor can a mayor who is elected for one year act as a justice of the peace when the latter officer's tenure is by virtue of the state constitution of four years' duration.³⁴ The constitution and the legislature may also directly or impliedly disqualify a citizen under certain circumstances from occupying a position as judge in a municipal court.³⁵ But on the contrary the constitution may clearly empower a mayor to act judicially as well as to fulfil his executive functions.³⁶

§ 1361. **Appeals.**—Sufficient has already been said to show that municipal courts derive their authority and jurisdiction from enactment of the legislature or by virtue of some clause in the state constitution alone, and that their powers are only those which are expressly given thereby; but it would seem from one class of cases that the right of appeal from their adjudications was one which need not be expressly provided for, but which, unless clearly and unequivocally taken away, would necessarily exist.³⁷ At common law the right of appeal existed, and so in the absence of a provision therefor the right would seem to exist.³⁸ Of course where the right is expressly conferred by statute it is needless to say that it exists.³⁹ And it was held in Alabama that, while the legislature could confer summary jurisdiction upon justices of the peace, still that the act must provide for an appeal or it would be unconstitutional.⁴⁰ Sometimes the statute conferring the jurisdiction either limits the right of appeal or altogether denies it, but generally in criminal prosecutions it would seem that the right of appeal *vel non* is determined according to the amount

364; *City Council v. King*, 4 McCord (S. C.) 487; *Thomas v. Town of Mt. Vernon*, 9 Ohio 290. But see in direct conflict with the view expressed in the text, *City of Omaha v. Olmstead*, 5 Neb. 446; *Kemper v. City of Louisville*, 14 Bush (Ky.) 87.

³³ *Commonwealth v. Hawkes*, 123 Mass. 525; *Howard v. Shoemaker*, 35 Ind. 111. Cf. *Respublica v. Dallas*, 3 Yeates (Pa.) 300.

³⁴ *People v. Maynard*, 14 Ill. 419; *Beesman v. City of Peoria*, 16 Ill. 484.

³⁵ *Lafon v. Dufrocq*, 9 La. An. 350; *Wheeling v. Black*, 25 W. Va. 266.

³⁶ *Waldo v. Wallace*, 12 Ind. 569;

Gulick v. New, 14 Ind. 93. See also, *Commonwealth v. Emory*, 11 Cush. (Mass.) 406.

³⁷ *In re Heath*, 3 Hill (N. Y.) 42, 52; *City of Dubuque v. Rebman*, 1 Iowa 444; *Conboy v. Iowa City*, 2 Iowa 90.

³⁸ *Town of Camden v. Bloch*, 65 Ala. 236; *Town Council &c. v. Ohlandt*, 24 S. C. 158; *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146; *Starr v. Trustees*, 6 Wend. (N. Y.) 564.

³⁹ *Moundsville v. Fountain*, 27 W. Va. 182; *City of Muscatine v. Steck*, 7 Iowa 505.

⁴⁰ *Tims v. State*, 26 Ala. 165.

of the fine.⁴¹ It was held, however, in Michigan that an appeal would not lie from the police court of Detroit to the circuit court of Wayne county because the right was not expressly given.⁴² Sometimes the acts of an inferior municipal court may be purely administrative and not in any true sense judicial; from such acts neither appeal nor certiorari will lie.⁴³

§ 1362. **Method of procedure.**—In courts of inferior jurisdiction, such as municipal courts, the object of whose existence is the speedy and inexpensive enforcement of local laws, we would naturally not expect to find the same formal requisites of pleading and procedure as are more or less attendant upon the trials of more serious offenses. Thus, when the legislature gives justices of the peace jurisdiction for the recovery of a penalty, no formal complaint is requisite.⁴⁴ And a complaint before a municipal tribunal for violation of a city ordinance is sufficient if it clearly refers to the ordinance. It need not be strictly framed nor set out the ordinance in totidem verbis.⁴⁵ But

⁴¹ *Tierney v. Dodge*, 9 Minn. 166; *Willis v. City of Boonville*, 28 Mo. 543; *McGarty v. Deeming*, 51 Conn. 422; *In re Canal St.*, 12 N. Y. 406; *New York &c. R. Co. v. Marvin*, 11 N. Y. 276. *Elliott v. Palmer*, 10 Pa. Co. Ct. 427, held that the right of appeal from a justice of the peace was determined by the amount of judgment and not that of the claim, while in *Koetke v. Ringer*, 46 Minn. 259; s. c. 48 N. W. 917, an exactly contrary doctrine was held. See also, *Norton v. Petrië*, 59 Conn. 200; s. c. 20 Atl. 199; *State v. Folwell*, 53 N. J. L. 176; s. c. 20 Atl. 1079 (a person can appeal from a justice's court from a judgment in a matter over which the justice had no jurisdiction, or he may have certiorari).

⁴² *People v. Police Justices*, 7 Mich. 456. See also, *People v. Jackson*, 8 Mich. 110. Inasmuch as municipal courts owe their very existence to statutory or constitutional enactment, it is a consistent doctrine which makes the right of appeal depend upon whether or not the legislature has expressly or clearly conferred the same. See also, *Henry v. Lansdowne*, 42 Mo. App. 431; *Steven*

v. Nebraska &c. Ins. Co., 29 Neb. 187; s. c. 45 N. W. 284; *Ballard v. Gay*, 108 N. C. 544; s. c. 13 S. E. 207; *Purcell v. Booth*, 6 Dak. 17; s. c. 50 N. W. 196; *Mayer v. American Ins. Co.*, 15 Daly (N. Y.) 215; *Richards v. Brice*, 15 Daly (N. Y.) 144.

⁴³ *Farley v. Board &c.*, 126 Ind. 468; s. c. 26 N. E. 174; *People v. Mayor*, 2 Hill (N. Y.) 9. But certiorari lies to the judges of the court of common pleas on an appeal to them from the commissioners of highways: *Lawton v. Commissioners*, 2 Caines (N. Y.) 179. See also, *Dixon v. City of Cincinnati*, 14 Ohio 240; *Cunningham v. Squires*, 2 W. Va. 422, 425; *State v. Folwell*, 53 N. J. L. 176; s. c. 20 Atl. 1079.

⁴⁴ *Ewbanks v. President &c.*, 36 Ill. 177.

⁴⁵ *Keeler v. Milledge*, 24 N. J. L. 142; *Fink v. City of Milwaukee*, 17 Wis. 26; *Ex parte Lane*, 76 Cal. 587; s. c. 18 Pac. 677; *State v. Baker*, 44 La. An. 79; s. c. 10 So. 405; *State v. Carpenter*, 60 Conn. 97; s. c. 22 Atl. 497; *Commonwealth v. Cutter*, 156 Mass. 52; s. c. 29 N. E. 1146; *City of Miles City v. Kern*, 12 Mont. 119; s. c. 29 Pac. 720. Complaint must at

every fact necessary to confer jurisdiction must clearly and affirmatively appear.⁴⁶ In a recent case in Wisconsin it was held that although a municipal court (which in this case was a court of record), required by law to be held in a certain city, did not lose its jurisdiction because its record failed to state the place to which an adjournment thereof was made, yet that a justice of the peace of the same place was required to state his place of adjournment, and if not, that his jurisdiction would be lost.⁴⁷

§ 1363. The same subject continued.—Suits in municipal courts for violations of city ordinances and laws are variously brought in different states. In some states suits are instituted in the name of the city,⁴⁸ or they may be brought in the name of the state,⁴⁹ or again in the name of the "people of the state."⁵⁰ Where one not an officer in the local tribunal acts under color of office (thus in such courts one may decide as a *de facto* judge), his decisions will be sustained.⁵¹ And it was held in Massachusetts that the proper way to oust a *de facto* officer was by information on behalf of the commonwealth.⁵²

least refer to ordinance: *State v. Dunbar*, 43 La. An. 836; s. c. 9 So. 492; *City of Durango v. Remsberg*, 16 Colo. 327; s. c. 26 Pac. 820; *Commonwealth v. Odenweller*, 156 Mass. 234; s. c. 30 N. E. 1022; *City Council &c. v. Ashley Phosphate Co.*, 34 S. C. 541; s. c. 13 S. E. 845; *Town of Moundsville v. Velton*, 35 W. Va. 217; s. c. 13 S. E. 373.

⁴⁶ *Lowe v. Commissioners*, R. M. Charl. (Ga.) 302; *City of Muscatine v. Steck*, 7 Iowa 505; *Truchelut v. City Council*, 1 Nott & McCord (S. C.) 227; *People v. Wong Wang*, 92 Cal. 277; s. c. 28 Pac. 270; *People v. Ah Ung* (Cal.), 28 Pac. 272; *Thorn-ton v. Smith*, 1 Wash. (Va.) 81.

⁴⁷ *State v. Wright*, 80 Wis. 648; s. c. 50 N. W. 894.

⁴⁸ *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146; *Ex parte Hollwedell*, 74 Mo. 395; *City of Davenport v. Bird*, 34 Iowa 524.

⁴⁹ *State v. Powell*, 97 N. C. 417; s. c. 1 S. E. 482.

⁵⁰ *Brownville v. Cook*, 4 Neb. 101;

Pillsbury v. Brown, 47 Cal. 477; *God-dard, Petitioner*, 16 Pick. (Mass.) 504.

⁵¹ *Town of Lewiston v. Proctor*, 23 Ill. 483; *State v. Carroll*, 38 Conn. 449.

⁵² *Commonwealth v. Hawkes*, 123 Mass. 525 (quo warranto). See also, *Fowler v. Bebee*, 9 Mass. 231; *Commonwealth v. Fowler*, 10 Mass. 290; *Sheehan's Case*, 122 Mass. 445; *Answer of Justices*, 122 Mass. 600; *Tyler v. State*, 63 Vt. 300; s. c. 21 Atl. 611; *Rose v. City of St. Charles*, 49 Mo. 509; *Smith v. City of San Antonio*, 17 Tex. 643. Where a party excepts to a mayor's jurisdiction but does not demand a jury trial, this does not prevent the proceeding of such mayor in imposing a fine without a jury trial from being set aside, because the party is entitled to a jury trial: *Wheeling v. Black*, 25 W. Va. 266. Municipal courts take judicial notice of municipal ordinances.

(b) MUNICIPAL RECORDS.

§ 1364. **Recording of ordinances.**—Whether municipal ordinances shall or shall not be recorded is dependent upon statute; when a statute upon the subject is directory, it is not necessary to their validity that they be recorded.⁵³ But if the statute is mandatory in its terms recording is of course necessary.⁵⁴ And wherever the statute prescribes legal formalities to be observed, these must be strictly followed.⁵⁵ Thus in a recent case in Illinois it was held that where a statute commands that a city ordinance shall be published in a newspaper published in the city, then upon a production of the record, in order to prove the ordinance, all of the required facts must also be clearly shown.⁵⁶ But every intendment of law is made in favor of the regularity of corporate and municipal acts and proceedings.⁵⁷

§ 1365. **Evidential character—Originals.**—Where records are kept of municipal acts and proceedings, the law is clearly defined that the same are receivable in evidence in proof of the facts therein recited; and it would seem to be a rule that when so produced they establish themselves, because they are made by accredited agents, are of a public nature and notoriety, and are usually made under the sanction of

⁵³ *Central Irrigation District v. De Lappe*, 79 Cal. 351; s. c. 21 Pac. 825; *Trustees &c. v. Erie*, 31 Pa. St. 515; *Amey v. Mayor &c.*, 24 How. 364; *Town of Tipton v. Norman*, 72 Mo. 380; *Barton v. Pittsburgh*, 4 Brewst. (Pa.) 373; *Whalin v. City of Maccomb*, 76 Ill. 49; *Upington v. Oviatt*, 24 Ohio St. 232; *Wiggin v. Mayor*, 9 Paige (N. Y.) 16; *Stevenson v. Bay City*, 26 Mich. 44; *Stricker v. Kelly*, 7 Hill (N. Y.) 9; *Coleman v. Commonwealth*, 25 Gratt. (Va.) 865. It was held in this case that whenever a written record of transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep the same, and when kept that it becomes a public record belonging to the office and not to the officer.

⁵⁴ *Schwartz v. City of Oshkosh*, 55 Wis. 490; s. c. 13 N. W. 450; *State v. Town of Union*, 32 N. J. L. 343;

Marshall v. Commonwealth, 59 Pa. St. 455.

⁵⁵ *Elmendorf v. Mayor &c.*, 25 Wend. (N. Y.) 693; *City of Delphi v. Evans*, 36 Ind. 90; *In re Buffalo*, 78 N. Y. 362; *Steckert v. City of East Saginaw*, 22 Mich. 104; *Town of Olin v. Meyers*, 55 Iowa 209; s. c. 7 N. W. 509; *Rich v. City of Chicago*, 59 Ill. 286; *McCormick v. Bay*, 23 Mich. 457; *Spangler v. Jacoby*, 14 Ill. 297.

⁵⁶ *Hutchisson v. City of Mt. Vernon*, 40 Ill. App. 19. Cf. *People v. Wilson*, 62 Hun (N. Y.) 618 (mem.); s. c. 16 N. Y. S. 583; *Walker v. City of Aurora*, 140 Ill. 402; s. c. 29 N. E. 741.

⁵⁷ *President &c. v. Dandridge*, 12 Wheat. 64. See language of Mr. Justice Story at p. 69; *City of Lexington v. Headly*, 5 Bush (Ky.) 508; *City of Solomon v. Hughes*, 24 Kan. 211; *City of Greeley v. Hamman*, 17 Colo. 30; s. c. 28 Pac. 460. See also, and compare *Adams v. Mack*, 3 N. H. 493, where the court said:—"It is

an oath of office.⁵⁸ It may and should be added in this connection that such records when produced in evidence should be properly identified.⁵⁹ It was held in Massachusetts that the book of assessments for taxes, made and kept by the assessors in the performance of their official duty in accordance with the requirements of statute, is competent evidence of the facts therein stated in all cases relating to the assessment or collection of a tax; but how far the same would be admissible for any other purpose, and in controversies between persons not claiming rights under it, is a question upon which the authorities are somewhat obscure.⁶⁰ It would appear that records are always evidence on behalf of or against the city touching the matters which they contain and to which they relate.⁶¹

§ 1366. The same subject continued—Copies.—In like manner copies of such records, when duly certified and authenticated by the proper officer, that is, the one by whom the originals are made, have

very clear that the doings of towns must be proved by their records," but that these need not be strictly judged.

⁵⁸ 1 Greenl. Evidence (15th ed.), §§ 483, 484; 2 Am. & Eng. Encyc. of Law, 467; *City of Boston v. Inhabitants &c.*, 4 Cush. (Mass.) 538; *Toledo R. Co. v. Toledo Electric R. Co.*, 6 Ohio C. C. 362; *South School Dist. v. Blakeslee*, 13 Conn. 227; *Denning v. Roome*, 6 Wend. (N. Y.) 651; *Wood v. President &c.*, 9 Cow. (N. Y.) 194; *State v. Van Winkle*, 25 N. J. L. 73; *McFarland v. Triton Ins. Co.*, 4 Denio (N. Y.) 392; *President &c. v. McKean*, 11 Johns. (N. Y.) 98; *Adams v. Mack*, 3 N. H. 493; *Stebbins v. Merritt*, 10 Cush. (Mass.) 27 (records of a manufacturing corporation kept by an unsworn clerk are evidence of its proceedings, if verified by oath, when offered in evidence). See also, *Hutchinson v. Pratt*, 11 Vt. 402; *Cass v. Bellows*, 31 N. H. 501; *President &c. v. O'Mailey*, 18 Ill. 407; *Coleman v. Commonwealth*, 25 Gratt. (Va.) 865; *Owings v. Speed*, 5 Wheat. 420; *Commonwealth v. Heffron*, 102 Mass. 148; *Ronkendorff v. Taylor*, 4 Pet. 349; *People v. Murray*, 57 Mich. 396; s. c. 24 N. W. 118; *City of St. Louis v.*

Foster, 52 Mo. 513; *Town of Tipton v. Norman*, 72 Mo. 380; *People v. Maxon*, 139 Ill. 306; s. c. 28 N. E. 1074; *Knight v. Kansas City &c. R. Co.*, 70 Mo. 231; *Kennedy v. Newman*, 1 Sandf. (N. Y.) 187; *Bailey v. State*, 30 Neb. 855; s. c. 47 N. W. 208; *Larkin v. Burlington &c. R. Co.*, 85 Iowa 492; s. c. 52 N. W. 480; *City of Greeley v. Hamman*, 17 Colo. 30; s. c. 28 Pac. 460.

⁵⁹ *Beaumont v. Wilkes-Barre City*, 142 Pa. St. 198; s. c. 21 Atl. 888; *City of Greeley v. Hamman*, 17 Colo. 30; s. c. 28 Pac. 460; *City of Ottumwa v. Schaub*, 52 Iowa 515; s. c. 3 N. W. 529. Identified by a policeman of town: *Rutherford v. Swink*, 90 Tenn. 152; s. c. 16 S. W. 76; *President &c. v. Hamlin*, 14 Mass. 178.

⁶⁰ *Commonwealth v. Heffron*, 102 Mass. 148. See also, *Buffalo &c. Co. v. Knight Templar &c. Ass'n*, 126 N. Y. 450; s. c. 27 N. E. 942.

⁶¹ *City of Greeley v. Hamman*, 17 Colo. 30; s. c. 28 Pac. 460; *City of Ottumwa v. Schaub*, 52 Iowa 515; s. c. 3 N. W. 529; *Village of Wapella v. Davis*, 39 Ill. App. 592; *City of Delphi v. Lowery*, 74 Ind. 520. Cf. *Mayor &c. v. Wright*, 2 Port. (Ala.) 230 (books of corporation not evidence in its favor).

equal weight with the originals and are receivable in evidence without further proof, forming thus an exception to the general rule of evidence excluding secondary when the best is procurable.⁶² But before the copy of a record can be received in evidence it would seem to be proper to show that its contents are of a character required to be recorded;⁶³ and where the law does not require a record to be kept it has been held that a copy of such a record is inadmissible in evidence.⁶⁴ In Kansas it was held that where a city furnished no book for recording its ordinances, and the registrar kept proceedings of the city council on slips of paper and gave third parties what purported to be an ordinance of the city, under his hand and the seal of the city, attested by the mayor, *upon which the parties had acted*, that such a copy was admissible in evidence and also the slips of paper.⁶⁵

§ 1367. Proof of records—By originals.—In the absence of any provision in the act of incorporation providing for the proof of ordinances, the general common law rules will apply.⁶⁶ And inasmuch as only municipal courts take judicial notice of city ordinances, in other courts they must be proven just as any other facts.⁶⁷ It was held in Tennessee, in a recent decision, that when charter and statute are both silent as to the method of proof of municipal ordinances, this must be by production of the originals or the books in which they are contained.⁶⁸ Where the law or the charter of a city requires the clerk

⁶²Greenleaf Evidence (15th ed.), §§ 91, 484; Commonwealth v. Chase, 6 Cush. (Mass.) 248 (where the court said:—"The clerk of a city or town is the proper certifying officer of all votes, ordinances or by-laws of said city or town, and copies thereof duly attested by the clerk are competent evidence to go to the jury, without any special verification of the genuineness of said signature"); Oakes v. Hill, 14 Pick. (Mass.) 442; United States v. Percheman, 7 Pet. 51; Denning v. Roome, 6 Wend. (N. Y.) 651; People v. Adams, 9 Wend. (N. Y.) 333; People v. Murray, 57 Mich. 396; s. c. 24 N. W. 118; O'Mally v. McGuin, 53 Wis. 353; s. c. 10 N. W. 515; Wood v. President &c., 9 Cow. (N. Y.) 194; President &c. v. McKean, 11 Johns. (N. Y.) 98; Village of Wapella v. Davis, 39 Ill. App. 592. Ordinance in the last case provided that any number of copies thereof should be

considered original: Johnson v. Martin, 68 Miss. 330; s. c. 8 So. 847. Where the municipal records were those of another state: Walker v. City of Aurora, 140 Ill. 402; s. c. 29 N. E. 741; Troy v. A. & N. R. Co., 11 Kan. 519.

⁶³Haile v. Palmer, 5 Mo. 403.

⁶⁴Brown v. Hicks, 1 Ark. 232.

⁶⁵Troy v. A. & N. R. Co., 11 Kan. 519. See also, State v. Van Winkle, 25 N. J. L. 73, and Gearhart v. Dixon, 1 Pa. St. 224.

⁶⁶Chicago &c. R. Co. v. Engle, 76 Ill. 317; City Council v. Durr, 1 McCord (S. C.) 333; Fitch v. Pinckard, 5 Ill. 69.

⁶⁷City of McPherson v. Nichols, 48 Kan. 430; s. c. 29 Pac. 679. See also, City Council &c. v. Ashley Phosphate Co., 34 S. C. 541; s. c. 13 S. E. 845.

⁶⁸Rutherford v. Swink, 90 Tenn. 152; s. c. 16 S. W. 76.

thereof to keep a journal of the acts and proceedings of the city council, this, or a copy of the same, is the proper evidence of the official doings of that body.⁶⁹ Where no record of an ordinance is kept, the original ordinance or a duly certified copy thereof must be produced for the purpose of proving the same.⁷⁰ But the fact that a statute allows a municipal record to be proven by a sworn copy does not, of course, exclude the original.⁷¹

§ 1368. The same subject continued—By certified copies.—

Municipal records are duly and properly proved by a copy of the original minutes or records, certified by the clerk or other officer in whose custody they are kept.⁷² And it was held in Illinois that even an ordinance of a city of another state was provable by a properly sworn copy thereof without further attestation.⁷³ But as a rule an attestation by the proper officer is a *sine qua non* to the receivability of such a copy in evidence. Thus in Massachusetts it was held that an attestation made by the secretary of a banking corporation was insufficient to make it admissible in evidence without being sworn to, as he was not the proper certifying officer.⁷⁴ It has already been stated that copies of municipal records so adduced and attested are equally receivable with the originals in evidence, but with this qualification, that they are only *prima facie* evidence of the existence, contents and enactments of ordinances; upon being produced the burden of proof shifts to the opposing side to disprove them.⁷⁵ And when the regu-

⁶⁹ *City of Lowell v. Wheelock*, 11 Cush. (Mass.) 391; *Harris v. Whitcomb*, 4 Gray (Mass.) 433; *City of Louisville v. McKegney*, 7 Bush (Ky.) 651; *Jordan v. School Dist.*, 38 Maine 164; *Morrison v. City of Lawrence*, 98 Mass. 219.

⁷⁰ *Pugh v. City of Little Rock*, 35 Ark. 75; *Louisville &c. R. Co. v. Shires*, 108 Ill. 617; *Block v. President &c.*, 36 Ill. 301.

⁷¹ *Green v. City of Indianapolis*, 25 Ind. 490.

⁷² *People v. Minck*, 21 N. Y. 539; *Denning v. Roome*, 6 Wend. (N. Y.) 651; *Hickok v. Town of Shelburne*, 41 Vt. 409; *Commonwealth v. Chase*, 6 Cush. (Mass.) 248; *Dudley v. Grayson*, 6 T. B. Mon. (Ky.) 259; *Bryan v. Wear*, 4 Mo. 106. The handwriting of the attesting officer proves itself: *Best Principles of Evidence*

(Chamb. ed.), 454, 455, 456, and cases there cited.

⁷³ *Louisville &c. R. Co. v. Shires*, 108 Ill. 617. See also, *Johnson v. Martin*, 68 Miss. 330; s. c. 8 So. 847.

⁷⁴ *President &c. v. Hamlin*, 14 Mass. 178. See also, *City of Ottumwa v. Schaub*, 52 Iowa 515; s. c. 3 N. W. 529.

⁷⁵ *Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 370; s. c. 19 S. W. 1053; *Terre Haute &c. R. Co. v. Voelker*, 31 Ill. App. 314; *Holly v. Bennett*, 46 Minn. 386; s. c. 49 N. W. 189; *Barr v. Village of Auburn*, 89 Ill. 361; *Lindsay v. City of Chicago*, 115 Ill. 120; *Prell v. McDonald*, 7 Kan. 426; *City of Independence v. Trouvalle*, 15 Kan. 70; *State v. King*, 37 Iowa 462; *Commonwealth v. Chase*, 6 Cush. (Mass.) 248 (see language of Dewey, J., p. 249). See

larity of the enactment of an ordinance is called in question, the original journal and record of the official proceedings must be produced.⁷⁶

§ 1369. **Parol evidence.**—The well established rule of evidence that a written instrument can not be varied or contradicted by parol testimony is equally applicable to municipal records.⁷⁷ It has been held that when the record of a city's proceedings fails to show certain facts which it ought to show, and which should properly be of record, parol testimony can not be resorted to to establish the same.⁷⁸ The court said, in a case decided in Indiana: "Acts of corporate bodies are sometimes omitted to be of record; generally, in such cases, if there is no prohibition in the charter, they may be proved by parol."⁷⁹ And that law seems the best to the author, applying the ordinary rules of evidence with reference to "latent ambiguities," under which head omissions might be considered as falling, which makes parol evidence admissible in all cases to show such omissions (unless expressly prohibited by statute, charter or ordinance itself), as contradistinguished from its inadmissibility for the purpose of variation or contradiction.⁸⁰ Thus, for example, it was very recently decided in Michigan that it was competent to prove by parol in aid of the record that an

also, as to method of "pleading" an ordinance, *City Council &c. v. Ashley* (Phosphate Co., 34 S. C. 541; s. c. 13 S. E. 845.

⁷⁶ *Barnes v. Common Council*, 89 Ala. 602; s. c. 7 So. 437.

⁷⁷ *Manning v. Inhabitants &c.*, 6 Pick. (Mass.) 6; *Wild v. Deig*, 43 Ind. 455; *Hoag v. Durfey*, 1 Aik. (Vt.) 286; *Ball v. Fagg*, 67 Mo. 481. Parol testimony inadmissible to contradict date of ordinance and approval by mayor attested by clerk: *Galbraith v. Littlech*, 73 Ill. 209; *Pittsburg v. Cluley*, 74 Pa. St. 262; *City of Aurora v. Fox*, 78 Ind. 1; *Stevens v. Eden &c. Soc.*, 12 Vt. 688; *Leavitt v. Eastman*, 77 Maine 117; *City of Logansport v. Crockett*, 64 Ind. 319; *Town of Cabot v. Britt*, 36 Vt. 349; *Halleck v. Inhabitants &c.*, 117 Mass. 469. Record is evidence: *City of Lexington v. Headly*, 5 Bush (Ky.) 508; *City of Covington v. Ludlow*, 1 Met. (Ky.) 295. When a city council acts as a court

parol testimony is inadmissible to prove its proceedings; its record must be produced: *Parsons v. Trustees &c.*, 44 Ga. 529.

⁷⁸ *Tyler v. Henry*, 2 Pick. (Mass.) 397; *Baker v. Scofield*, 58 Ga. 182. See also, *Dillon Munic. Corp.* (4th ed.), § 299.

⁷⁹ *City of Indianapolis v. Imberry*, 17 Ind. 175, 179. See also, *Darlington v. Commonwealth*, 41 Pa. St. 68.

⁸⁰ *Ross v. City of Madison*, 1 Ind. 281; *Third School Dist. v. Atherton*, 12 Met. (Mass.) 105; *Langsdale v. Bonton*, 12 Ind. 467; *Bigelow v. Inhabitants &c.*, 25 N. J. L. 297; *Gearhart v. Dixon*, 1 Pa. St. 224; *Bridgford v. City of Tuscumbia*, 4 Woods 611. See also, *City of Delphi v. Evans*, 36 Ind. 90, which decides that when a charter requires acts to be recorded, then such acts can not be proved by parol unless they have been lost after having been recorded.

annual meeting was adjourned to the time of the subsequent meeting, when minutes in the record book of a school district, purporting to be of its annual meeting, were not signed by any one, and did not show any adjournment, but the minutes of a subsequent meeting, written upon the flyleaf of the same book, and signed by the director, showed that the latter meeting was held in pursuance of an adjournment.⁸¹

§ 1370. **The same subject continued.**—It clearly follows from what has already been said with reference to the evidential character of official records, and from the fact that when properly attested even a copy thereof imports absolute verity, that wherever there has been any record kept, either as matter of fact or in pursuance of some requirement of the law, parol testimony can not be introduced to show their existence.⁸² But on the other hand it was held in a case in Louisiana, that while official journals of a legislature required to be kept by the constitution import absolute verity, and parol and extrinsic proof is inadmissible to contradict facts recited in them, still such proof is admissible to show that they are not the genuine records.⁸³ So records that have been destroyed by fire, or that are of an ancient character and can not be found, or that have been lost, are provable by parol or extrinsic testimony.⁸⁴

§ 1371. **Amendments.**—A very interesting and instructive case, decided in the supreme court of errors of Connecticut, held that the strict and technical rules applicable to the correction of judicial records should not be enforced touching amendments made in the records of municipal proceedings, and that where no serious detriment would ensue to any one interested, a clerk has power to amend the records of a town six months after the occurrence of a matter therein appearing, and that not upon his knowledge of the facts, but upon information derived from third persons. But in his dissenting opinion, filed in this case, which opinion, it is submitted, is the correct and only

⁸¹ *School Dist. v. Clark*, 90 Mich. 435; s. c. 51 N. W. 529.

⁸² *Stewart v. Clinton*, 79 Mo. 603; *Lumbard v. Aldrich*, 8 N. H. 31; *Haven v. Asylum*, 13 N. H. 532; *City of Delphi v. Evans*, 36 Ind. 90.

⁸³ *State v. Mason*, 43 La. An. 590; s. c. 9 So. 776. See also, *Dyer v. Brogan*, 70 Cal. 136; s. c. 11 Pac. 589; *People v. Fairfield*, 90 Cal. 186; s. c. 27 Pac. 199.

⁸⁴ *Surget v. Newman*, 43 La. An.

873; s. c. 8 So. 561; *Dodge v. Gallatin*, 130 N. Y. 117; s. c. 29 N. E. 107; *Ex parte Calhoun*, 87 Ga. 359; s. c. 13 S. E. 694. In this case extrinsic testimony was disallowed to prove public records lost or destroyed, but it is noticeable that the pleadings did not set out anything at all as the specific contents of such records to be proven. Upon this side issue the case probably turned.

tenable view of the question, the chief justice said: "I am persuaded that a material alteration can not be made in any record by the mere ex parte act of the clerk, unless made under the sanction * * * of his official oath, an oath which, if I mistake not, requires him to make a true record, not of what he has heard, and therefore believes, but of what he knows officially."⁸⁵ And, generally speaking, when a clerk has personal knowledge of an error, and honestly desires to make a record conform to the truth, he may, by virtue of his office, amend the same for that purpose.⁸⁶ But when such amended records are introduced in evidence the truth of the facts alleged must be clearly proven.⁸⁷

§ 1372. The same subject continued.—In Missouri it was held that while amendments in the records of the proceedings of a town must be made by those who were in office when the proceedings were had, still it is not essential to the validity of such that they be in office at the time of making the amendment.⁸⁸ In Massachusetts, on the other hand, one who was formerly a town clerk can not, after he has ceased to be such, amend a record made by him while he was clerk.⁸⁹ Where a clerk has failed properly to record the proceedings of a city council, the same council, at a subsequent meeting, may cause a nunc pro tunc entry of their proceedings to be made, but a different council can not do this.⁹⁰ But amended town records will not bind

⁸⁵ *Boston Tpk. Co. v. Town of Pomfret*, 20 Conn. 590, 602. See also, *Samis v. King*, 40 Conn. 298; *Farrell v. King*, 41 Conn. 448; *City of Logansport v. Crockett*, 64 Ind. 319. An examination of this case of *Boston Tpk. Co. v. Town of Pomfret*, supra, will show, it is believed, that the vital difference between the decision and dissenting opinion lies in the fact that the amendment was made, not upon the clerk's own knowledge, but upon information derived outside. All the judges agreed that amendments made by a clerk were proper.

⁸⁶ *Welles v. Battelle*, 11 Mass. 477; *Mott v. Reynolds*, 27 Vt. 206; *Gibson v. Bailey*, 9 N. H. 168; *Low v. Pettengill*, 12 N. H. 337; *Bishop v. Cone*, 3 N. H. 513; *Proprietors &c. v. Page*, 6 N. H. 182; *Hoag v. Durfey*, 1 Aik. (Vt.) 286; *Samis v. King*, 40

Conn. 298. An honest correction of town records does not vitiate by-laws: *President &c. v. O'Mailey*, 18 Ill. 407.

⁸⁷ *Pierce v. Richardson*, 37 N. H. 306; *Cass v. Bellows*, 31 N. H. 501; *Low v. Pettengill*, 12 N. H. 337; *Boston Tpk. Co. v. Town of Pomfret*, 20 Conn. 589; *New Haven &c. R. Co. v. Town of Chatham*, 42 Conn. 465.

⁸⁸ *Kiley v. Cranor*, 51 Mo. 541; *Stadler v. Roth*, 59 Mo. 400. See also, *Gibson v. Bailey*, 9 N. H. 168.

⁸⁹ *Hartwell v. Inhabitants &c.*, 13 Pick. (Mass.) 229; *Third School Dist. v. Atherton*, 12 Met. (Mass.) 105.

⁹⁰ *City of Logansport v. Crockett*, 64 Ind. 319; *City of Covington v. Ludlow*, 1 Met. (Ky.) 295; *Bathurst v. Course*, 3 La. An. 260.

the inhabitants of a town.⁹¹ And municipal records can not be varied so as to interfere with rights thereby acquired.⁹²

§ 1373. Right of abstract makers to take transcripts of public records.—Upon the question whether a person engaged in the abstract-of-title business has the right to inspect the records and make abstracts of title to be used by him in his own business and for his own profit the decisions are conflicting. It is not a common-law right, and if it exists must be founded upon statutory law.⁹³ Where the statute provided that the officers having the custody of records should furnish proper and reasonable facilities for their inspection, for the purpose of making transcripts therefrom, to all persons having occasion to make an examination of them for any lawful purpose, provided, however, that such person should not use pen and ink in making the transcripts, it was held that one engaged in the abstract-of-title business was a person within the meaning of the statute.⁹⁴ And a like construction was placed upon a statute requiring a clerk to "open to the examination of any person all books," etc., "required to be kept in his office, and permit any person so examining to take notes and copies of such books, records or papers."⁹⁵ A provision that all deeds, etc., should be recorded in books to be furnished by the clerk, "to which books every person shall have access at proper seasons, and may search the same, paying the fees allowed by law," was interpreted to permit an attorney to examine the records free of charge.⁹⁶

§ 1374. The same subject continued.—On the other hand, under a statute which provided that "all books kept by any public officer shall be subject to the inspection of all the citizens," and prescribed a table of fees for inspection and abstracts, no person was entitled to examine or inspect the records except in the clerk's presence and under his observation.⁹⁷ And where "all books and papers required to be kept by the county officers shall be open to the inspection and examination of any person," the right of inspection can be exercised only by persons who have an interest in the record or by some one for them,

⁹¹ *Chamberlain v. Inhabitants &c.*, 13 Maine 466.

⁹² *New Haven &c. R. Co. v. Town of Chatham*, 42 Conn. 465.

⁹³ *Belt v. Prince George &c. Abstract Co.*, 73 Md. 289; s. c. 20 Atl. 982; 34 Am. & Eng. Corp. Cas. 440.

⁹⁴ *Burton v. Tuite*, 78 Mich. 363; s. c. 44 N. W. 282; overruling *Weber v. Townley*, 43 Mich. 534; s. c. 5 N. W. 971.

⁹⁵ *Hanson v. Eichstaedt*, 69 Wis. 538; s. c. 35 N. W. 30; 20 Am. & Eng. Corp. Cas. 137.

⁹⁶ *Lum v. McCarty*, 39 N. J. L. 287; overruling *Flemming v. Clerk &c.*, 30 N. J. L. 280. The court makes a distinction between searches and transcripts, holding that for the latter the clerk is entitled to compensation.

⁹⁷ *Buck v. Collins*, 51 Ga. 391.

and not by those who desire abstracts for private business and profit.⁹⁸ So, also, the court of appeals of Maryland decided that an abstract company chartered by the legislature had no right to make copies of the public records, and that they must be obtained through the clerk and upon the payment of the fees prescribed by law.⁹⁹

§ 1375. **Remedial rights.**—While it was held by the supreme court of Maine that as between a school district and a stranger who had illegally usurped the office of clerk and had possession of the records replevin could be brought therefor, upon the theory that the possession of records by a clerk was the possession of the district,¹⁰⁰ it was decided in Michigan that replevin is not a proper remedy to obtain possession of state papers filed in a public office; that the custody of such papers belongs to the officer in charge; and further, that it would violate public policy to allow a sheriff or constable under color of legal process to intermeddle with public files. Mandamus was declared to be the only safe method of compelling a delivery of such records by the custodian thereof;¹⁰¹ and this adjudication appears to the writer more in consonance with sound legal principles. Mandamus is also the appropriate remedy for a duly elected officer to compel delivery to him by his predecessor of books belonging to the office.¹⁰² And where a statute declares that certain official books shall be open to inspection by any one who has the need or rightful occasion so to do, mandamus is the proper remedy to compel the custodian to allow

⁹⁸ *Cormack v. Wolcott*, 37 Kan. 391; s. c. 15 Pac. 245; 17 Am. & Eng. Corp. Cas. 309. In *Brewer v. Watson*, 71 Ala. 299, and *Bean v. People*, 7 Colo. 200; s. c. 2 Pac. 909, the same construction was given to statutes of like import.

⁹⁹ *Belt v. Prince George's &c. Abstract Co.*, 73 Md. 289; s. c. 20 Atl. 982; 34 Am. & Eng. Corp. Cas. 440, where it was provided by statute that the clerks of the courts should have the custody of the books and papers, etc., which they were required to keep, preserve and deliver to their successors in office in good order, and should give a copy of any paper or record to the person applying for it upon receipt of the usual fee.

¹⁰⁰ *School Dist. v. Lord*, 44 Maine

374. See also, *Inhabitants &c. v. Stearns*, 21 Pick. (Mass.) 148. The court said in this case, which was one of trover for the possession of converted parish records, "that mandamus would doubtless be a more appropriate and effectual remedy to compel delivery of records to the legal officer;" citing *Commonwealth v. Athearn*, 3 Mass. 285; *Carr v. McCampbell*, 61 Ind. 97.

¹⁰¹ *People v. State Treasurer*, 24 Mich. 468.

¹⁰² *Proprietors &c. v. Stack*, 7 Cush. (Mass.) 226; *Kimball v. Lamprey*, 19 N. H. 215; *Taylor v. Henry*, 2 Pick. (Mass.) 397; *Inhabitants &c. v. Stearns*, 21 Pick. (Mass.) 148; *Bates v. Overseers*, 14 Gray (Mass.) 163; *Perkins v. Weston*, 3 Cush. (Mass.) 549.

such inspection.¹⁰³ But mandamus will not lie to compel an inspection of documents in the hands of a corporate officer on behalf of a private citizen merely out of curiosity and when there is no necessity for such inspection.¹⁰⁴ A mandamus may also issue to compel a clerk to amend records of proceedings of a common council which the charter requires him to keep.¹⁰⁵

¹⁰³ *Steckman v. Brooks*, 17 Colo. 248; s. c. 29 Pac. 746. *People v. Cornell*, 35 How. Pr. (N. Y.) 31.

¹⁰⁴ *People v. Walker*, 9 Mich. 328; ¹⁰⁵ *Samis v. King*, 40 Conn. 298.

CHAPTER XXXII.

FIREMEN AND POLICEMEN.

SECTION	SECTION
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§ 1375a. **Organization of fire department.**—The organization of fire departments for municipalities large enough to make such a force an imperative necessity is usually provided for by general or special laws or by the municipal charter. In Boston, for instance, it is organized by the city council under a special act. It consists of three commissioners appointed by the mayor and aldermen, who are authorized to appoint and fix the compensation of all officers and members of the department and make suitable rules and regulations for their government and discipline.¹

¹ See Johns Hopkins University Studies, vol. 5 (1887), p. 120. In New York City the mayor appoints by and with the consent of the aldermen: Consolidation Act, § 106. By the present charter of St. Louis the fire department is under the control and supervision of a "chief of the fire department" appointed by the mayor: Johns Hopkins University Studies, vol. 5 (1887), p. 166. It was held in an elaborate opinion by the supreme court of Indiana that an act creating a board of metropolitan police and fire department in cities having a certain population, providing for the election of the first commissioners by the legislature, and giving them exclusive control of the police and fire departments, was void as invading the province of local self-government. "The conclusion we unhesitatingly reach is that the right of self-government in towns and cities of this state is vested in the people of the

§ 1376. **Liability of corporation for removal of fireman.**—The appointment and control of the fire department of Baltimore was by city ordinance vested in commissioners, and all firemen when appointed were by express provision entitled to retain their respective positions for such time as they evinced willingness and capacity to discharge their duties, and were not subject to removal on account of any religious, political or other sentiments entertained by them so long as those opinions did not interfere with the faithful discharge of their duty. The plaintiff was discharged on the ground of unwillingness and incapacity and sued for salary accruing subsequent to his discharge, alleging in his pleadings that the decision of the commissioners was not an honest exercise of judgment and discretion, but a contrivance to effect his removal on account of his political opinions, etc. But the court held that the commissioners were the sole judges of the plaintiff's efficiency and their determination was conclusive upon all other tribunals.²

§ 1377. **Certiorari to review dismissal of fireman.**—In reviewing by certiorari the dismissal of an engineer of a fire department for negligence, the supreme court will not weigh the evidence; but if a legitimate inference that the officer was negligent can be deduced from the testimony, the finding of the board of fire commissioners will be affirmed.³ Relator, a fireman, was charged with absence from duty without leave, and notice to appear for trial before the commissioner was served on him personally. The charges specified minutely relator's breach of duty, and were supported by the testimony of relator's superior. It was held, the facts being presumably within the knowledge of the superior, and being unexplained by cross-examination, that the commissioner's judgment of removal should be affirmed.⁴

respective municipalities, and that the general assembly has no right to appoint the officers to manage and administer municipal affairs; that the right of the general assembly ends with the enactment of laws prescribing the manner of selection and the duties of the officers:" *State v. Denny*, 118 Ind. 449, 469; s. c. 21 N. E. 274. See also, *State v. Blend*, 121 Ind. 514; s. c. 23 N. E. 511; *City of Evansville v. State*, 118 Ind. 426; s. c. 21 N. E. 267; *People v. Albertson*, 55 N. Y. 50; *People v. Common Council &c.*, 28 Mich. 228; *People v. Hurlbut*, 24 Mich. 44; *People v. McKinney*, 52 N. Y. 374; *People v. Bull*,

46 N. Y. 57; *People v. Shepard*, 36 N. Y. 285. Cf. *Mayor v. Board of Police*, 15 Md. 376; *People v. Draper*, 15 N. Y. 532 (distinguished in *People v. Albertson*, 55 N. Y. 50); *State v. Seymour*, 35 N. J. L. 47; 1 *Dillon Munic. Corp.* (4th ed.), § 60; *Farrell v. City of Bridgeport*, 45 Conn. 191; *Burch v. Hardwicke*, 30 Gratt. (Va.) 24.

² *Mayor &c. v. O'Neill*, 63 Md. 336. See also, *Riley v. City of Kansas*, 31 Mo. App. 439.

³ *State v. City of Jersey City*, 54 N. J. L. 310; s. c. 23 Atl. 666.

⁴ *People v. Ennis* (Sup.), 19 N. Y. S. 946. Where a fireman, who has

§ 1378. **Policemen unknown to the common law.**—The modern policeman is a creature of statute.⁵ The ancient conservator of the peace was the watch and constable, much after the Dogberry pattern, and all citizens were bound to take their turn in keeping watch. The provisions of the law or charter relating to the police departments, especially of large cities, are generally very comprehensive. Sometimes the mayor is the responsible head, and in other instances the department is managed by a board of police appointed by the governor of the state, with power to establish and organize the police and prescribe regulations.⁶

been dismissed on a charge of disrespect to one of the fire commissioners, sues the commissioners, alleging that his dismissal was in wilful violation of their duties, under an ordinance allowing the dismissal of employes for inefficiency, or failure to perform their duties to the satisfaction of the commissioners, but not for any political or other sentiments entertained by them, evidence as to plaintiff's conduct on previous occasions, or as to his efficiency and general reputation, has no bearing on the question of his guilt or innocence on the occasion mentioned in the charge, nor upon the fairness of the commissioners' judgment, and is irrelevant: *O'Neill v. Register*, 75 Md. 425; s. c. 23 Atl. 960. Where the charter requires the cause of removal or suspension by a mayor to be stated in the order, a communication by the mayor to the council merely appointing a person in the place of an incumbent does not constitute a removal: *Selby v. City of Portland*, 14 Or. 243; s. c. 12 Pac. 377. One who, in the municipal resolution appointing him, is called a detailed fireman, is none the less a fireman who can be removed only in the mode prescribed by the city charter: *People v. Commissioners &c.*, 103 N. Y. 370; s. c. 8 N. E. 730.

⁵ *Commonwealth v. Dugan*, 12 Met.

(Mass.) 233; *Doering v. State*, 49 Ind. 56; *Buttrick v. City of Lowell*, 1 Allen (Mass.) 172; *Commonwealth v. Hastings*, 9 Met. (Mass.) 259; *Mitchell v. City of Rockland*, 52 Maine 118. The state has the right to prescribe the manner of selecting the constabulary, including the police force of a city: *People v. Draper*, 15 N. Y. 532; *People v. Shepard*, 36 N. Y. 285; *People v. Mahaney*, 13 Mich. 481; *State v. Covington*, 29 Ohio St. 102; *Police Com'rs v. City of Louisville*, 3 Bush (Ky.) 597; *State v. Hunter*, 38 Kan. 578; s. c. 17 Pac. 177; *Mayor &c. v. State*, 15 Md. 376; *State v. Seavey*, 22 Neb. 454; s. c. 35 N. W. 228. See also, *Commonwealth v. Plaisted*, 148 Mass. 375; s. c. 19 N. E. 224.

⁶ See *Johns Hopkins University Studies*, vol. 5 (1887), Index, tit. Police. In *City of Evansville v. State*, 118 Ind. 426; s. c. 21 N. E. 267, it was held that the legislature could not constitutionally appoint a board of police commissioners with exclusive power over the police department of a city. See also, *State v. Denny*, 118 Ind. 449; s. c. 21 N. E. 274. It was held in *State v. Sims*, 16 S. C. 486, that under charter authority to make all such rules and regulations as may be necessary to good order and public peace the power to appoint policemen is implied.

§ 1379. **Qualification of officers—Non-partizan boards.**—A Massachusetts statute creating a board of police for the city of Boston, to be appointed by the governor and council from “the two principal political parties,” was held to violate no constitutional provision. “The legislature has the right,” said the court, “to fix the qualifications of the members of the board, and we see no objection to the provision that they shall be appointed from the two principal political parties. It is designed to secure, in the action of the board, impartiality and freedom from political bias.”⁷ But in Indiana such a political test of eligibility to an *elective* office, thus disqualifying a large number of citizens who belong to no particular party, was held to contravene the constitutional provision prohibiting the granting of special privileges and immunities.⁸

§ 1380. **Police fund—Legislative control of.**—A California statute fixed the compensation of police officers of the city and county of San Francisco at a certain sum per month, and directed the treasurer of the city and county to “retain from the pay of each police officer the sum of \$2 per month, to be paid into a fund to be known as the ‘Police Life and Health Insurance Fund,’” of which \$1,000 was to be paid to the personal representative of any member of the police force upon his death. It was held that as the police officer never received the amount so retained, nor had any power of disposition over the same, he had no property rights in such fund, which was in effect created by the state, until the happening of the contingency upon which the statute provided that part of it should be paid to him or his representative, and until that time the fund was entirely at the disposal of the state.⁹

⁷ Commonwealth v. Plaisted, 148 Mass. 375; s. c. 19 N. E. 224. “It can probably be regarded only as directory to the governor,” continued the court, “and not as an element in the tenure of the office; in either view, it violates no provision of the constitution, and it is for the legislature to determine whether such a qualification is wise.” See also, to the same effect, State v. Seavey, 22 Neb. 454; s. c. 35 N. W. 228; State v. Bennett, 22 Neb. 470; s. c. 35 N. W. 235.

⁸ City of Evansville v. State, 118 Ind. 426; s. c. 21 N. E. 267; State v. Denny, 118 Ind. 449; s. c. 21 N. E. 274; State v. Blend, 121 Ind. 514; s. c. 23 N. E. 511.

⁹ Pennie v. Reis, 132 U. S. 464; s. c. 10 S. Ct. 149. Laws of New York of 1885, ch. 364, § 2, amending consolidation act, § 307, provide that any member of the police force of New York city who shall have served twenty years or more, on his own application in writing, shall, by resolution adopted by a majority vote of the full board, be relieved and placed on the roll of the police pension fund, etc. It was held that the mere filing of such application by a member of the force did not dissolve his connection with it, but that until the resolution was adopted the applicant remained a policeman, subject to dismissal by the board for

§ 1381. **Suspension pending trial on charges of misconduct.**—A board of police commissioners was authorized by law to suspend any member of the police force after trial and due hearing and upon proper cause and charges and not otherwise. Charges of disrespect and misconduct towards certain members of the board were preferred against the chief of police. The board sat with closed doors and in secret session, and passed resolutions providing for the taking of an appeal to the court of last resort from the decision of an inferior tribunal relating to the nature and limitation of their jurisdiction over the chief of police, and postponed the hearing of the charges until after a determination should be had in the appellate court. They also resolved that in the meanwhile the defendant be wholly suspended from office. Upon the defendant's application for a writ of prohibition the action of the board was sustained. The court said: "The suspension of an officer pending his trial for misconduct so as to tie his hands for the time being seems to be universally accepted as fair, salutary and often necessary incident of the situation. The retention at such a time, with all of the advantages and opportunities afforded by official position, may enable and encourage him not only to proceed in the rebellious practices complained of, but also to seriously embarrass his triers in their approaches to the ends of justice. In the absence of express limitation to the contrary, we are of opinion that in cases where guiltiness of the offense charged will involve a dismissal from office, there is, on general principles, no arbitrary and improper exercise of a supervisory authority in a suspension of the accused pending his trial in due and proper form."¹⁰

improper conduct: *People v. French*, 108 N. Y. 105; s. c. 15 N. E. 188. Under laws of 1885, ch. 364, § 307, amending the consolidation act (Acts 1882, ch. 410), providing that a person who has served twenty years on the police force of the city, or under the former metropolitan police, may be retired on half salary, it is not necessary that the service should have been continuous, but if it aggregates twenty years it is sufficient. The board of police may, in their discretion, retire an officer under the statute mentioned, but they are not bound to do so: *People v. French*, 46 Hun (N. Y.) 232. Mandamus will not lie to compel the board of police commissioners of the

city of New York to place the widow of a deceased police officer on the police pension roll; laws of 1887 providing that the board "shall have power in its discretion" to grant such pensions: *People v. Martin*, 131 N. Y. 196; s. c. 30 N. E. 60.

¹⁰ *State v. Police Com'rs*, 16 Mo. App. 48, 50. The objection that the suspension was for an unreasonable time, inasmuch as the decision of the appellate court was not likely to be rendered during the term of the defendant's office, was overcome by the presumption of official fidelity to duty, etc.; but the court intimated that if it should subsequently appear that the delay was practically unjust and oppressive, there would be oc-

§ 1382. **The tribunal to hear charges.**—It is frequently provided by municipal charters or general laws of the state applicable to municipal corporations that policemen shall not be removed except for cause and after a hearing by some appropriate municipal officer or board.¹¹ Where, as in New Jersey, the language of the statute is, after a hearing “by the appropriate municipal board,” and the charter of a city vests the power of removal in the city council, the council can not authorize a police board created by ordinance to hear charges against policemen nor to suspend them for cause.¹² In Maine under a statute providing that the city marshal should be subject, “after hearing, to removal at any time by the mayor by and with the consent of the aldermen for inefficiency or other cause,” it was held that the hearing must be by the mayor and aldermen and not by the aldermen alone.¹³ Under the New York statute providing that policemen of the New York and Brooklyn bridge are removable only after written charges preferred, and a public examination thereon, in such manner as the rules and regulations of the trustees may prescribe, but no removal can be had after such hearing unless by a majority vote of all the trustees, a rule that the hearing shall be had before the president of the board, who, in case he recommends the dismissal of the person charged with the offense, shall report the evidence to the board, is valid.¹⁴

casion to apply appropriate compulsory methods to hasten the proceedings of the commissioners. See also, *Mayor &c. v. Fahm*, 60 Ga. 109.

¹¹ Mass. acts of 1890, ch. 319, providing for removal by the mayor for cause deemed by him sufficient, after due hearing; N. Y. laws of 1887, ch. 192, as to policemen of the New York and Brooklyn bridge; N. J. act of March 25, 1885, § 5; Maine acts of 1877, ch. 346, as amended by acts of 1878, ch. 16; N. Y. laws of 1870, ch. 77, as amended by laws of 1873, ch. 495, as to the police of Albany, that no one shall be dismissed without written charges and due notice and trial.

¹² *Carey v. Board of Police &c.*, 53 N. J. L. 311; s. c. 21 Atl. 492.

¹³ *Andrews v. King*, 77 Maine 224. Under Mass. acts of 1890, ch. 319, which provides that members of the police force shall “hold office during

good behavior, and until removed by the mayor for cause deemed by him sufficient, after due hearing,” the mayor has power to hear all cases on the removal of police officers in the first instance, though the police regulations provide that the investigation of all charges shall be before the committee on police, and the evidence shall, with the report of the committee, be submitted to the mayor: *McAuliffe v. Mayor &c.*, 155 Mass. 216; s. c. 29 N. E. 517. It was also held in the same case (*mandamus* to reinstate a discharged policeman) that statements by the mayor that he did not care about the evidence, and that he knew what the petitioner had been doing, were immaterial, where the judge found that there had been a due hearing.

¹⁴ *People v. Board &c.*, 7 N. Y. S. 806; s. c. 28 N. Y. St. 397.

§ 1383. **The hearing.**—While under the statutes noticed in the preceding section the officer is entitled to a fair hearing and investigation, he can not insist on all the formalities necessary in criminal trials.¹⁵ Thus it has been held that an investigation by the police commissioners of New York city into charges of neglect of duty on the part of a patrolman need not be governed by the rules governing trials in courts of law. The evidence may be taken before one commissioner and then submitted to others, even though the commissioner before whom it was taken ceases to be a member of the board at the time it was acted on.¹⁶ But the fact that the mayor and aldermen might have removed a policeman without trial does not warrant irregularities in a hearing granted or in the order of removal.¹⁷

§ 1384. **Counsel and witnesses.**—The right to be heard carries with it the right to summon and examine witnesses¹⁸ and to employ counsel.¹⁹ It is not an improper denial of the defendant's right to ex-

¹⁵ *State v. Board &c.*, 49 N. J. L. 170; s. c. 6 Atl. 659. The mayor's refusal to grant specifications on final hearing in proceedings to remove a policeman was not error, where the complaint was tolerably full, and there was evidence that at the first hearing the policeman said:—"I admit I am guilty. What's the penalty?" and at another interview said if he was going to be removed he would like to know it, so that he could resign: *McAuliffe v. Mayor &c.*, 155 Mass. 216; s. c. 29 N. E. 517.

¹⁶ *People v. Board &c.*, 98 N. Y. 332.

¹⁷ *Asbell v. Mayor &c.*, 80 Ga. 503; s. c. 5 S. E. 500, an application for certiorari, where it appeared that petitioner was tried before six aldermen for certain offenses as a policeman, and a vote on his dismissal from the force was evenly divided, the chairman voting, and afterwards the vote of the chairman was ignored as illegal, thus condemning the petitioner. It was decided that the writ should be granted, though the city charter expressly authorized the mayor and aldermen to remove such officer for good and sufficient cause, without trying him, there be-

ing nothing in the charter, or, as far as appeared, in the ordinances, depriving the presiding officer of the right to vote. - - - In the summary proceedings of the board of police commissioners dismissing from service a patrolman it must appear that they found him guilty, but no formal record of conviction need be kept. In such a case a blank used by the board, on which the name of the accused, his plea, the finding of the board and the sentence were entered, and the paper then handed to the clerk for filing, is a sufficient record to support the conviction: *State v. Mayor &c.*, 53 N. J. L. 544; s. c. 22 Atl. 123.

¹⁸ *People v. French*, 51 Hun (N. Y.) 427; s. c. 3 N. Y. S. 841.

¹⁹ *People v. Board &c.*, 11 N. Y. S. 841; s. c. 34 N. Y. St. 193; following *People v. Hannan*, 10 N. Y. S. 71; s. c. 56 Hun (N. Y.) 469; 31 N. Y. St. 602. In the latter case it appeared that the charter of the city of Troy provides that no member of the police force shall be removed "without having written charges preferred against him and the same having been publicly heard and examined, after due notice thereof and upon

amine witnesses where he merely inquires if he shall call certain witnesses, and is told by the commissioners, on stating what he expects to prove by them, that they will do him no good, the witnesses not being present.²⁰ And the proceedings of the police commissioners in dismissing a policeman were not reversed because the accused was not allowed to show that the other person was drunk and that he was trying to arrest him, when the evidence of others proved that it was a mere quarrel.²¹ But an order of dismissal was reversed where a witness called in defendant's behalf was rejected before he had given any testimony, merely on a showing that he had been discharged from the postoffice department because of absence from duty without leave, which was due to intoxication.²²

§ 1385. Examining the accused as a witness.—In a trial before police commissioners of a policeman for neglect of duty, the commissioners may question the accused about the circumstances of the case before the testimony of the prosecution is received,²³ and if the defendant made no objection to being sworn and examined he can not subsequently have the decision reversed on the ground of being compelled to testify against himself.²⁴ An objection by the accused that the commissioners ought to make out a case against him before he should be compelled to testify is directed to the order of the examina-

due proof." A rule of the board of police commissioners of the city provides that no officer shall be removed except upon substantiation of the written charges preferred against him after a fair trial, in which full opportunity shall be given him for his own defense as prescribed by law. Another rule provides that "no counsel are needed for the investigation of any charges, but may be allowed." Constitution of New York, art. 1, § 6, provides that in any trial in any court whatever, the accused shall be allowed to appear and defend in person and with counsel. It was held that the police commissioners could not deprive a policeman of the right to appear and defend with counsel on his trial for official misconduct.

²⁰ *People v. French*, 6 N. Y. S. 213; s. c. 25 N. Y. St. 536.

²¹ *People v. Martin*, 8 N. Y. S. 516; s. c. 29 N. Y. St. 369.

²² *People v. French*, 51 Hun (N. Y.) 427; s. c. 3 N. Y. S. 841.

²³ *People v. McClave*, 123 N. Y. 512; s. c. 25 N. E. 1047; affirming s. c. 10 N. Y. S. 764; 32 N. Y. St. 824.

²⁴ *People v. French*, 8 N. Y. S. 456; s. c. 29 N. Y. St. 305. In *People v. Robb*, 9 N. Y. S. 831; s. c. 56 Hun (N. Y.) 649; 31 N. Y. St. 640, the record stated the testimony of the relator as follows:—"John J. Quinn [relator], being duly sworn, testified as follows:—Question. Are you guilty or not guilty? Answer. I am guilty of going in the box for the simple purpose of drinking my coffee. . . . Q. But you were there, sitting down? A. No, sir; I deny sitting down." It was held that it did not appear that relator was wrongfully compelled to be sworn as a witness against himself.

tion, and does not raise the question that the accused is compelled to criminate himself, in violation of the constitution.²⁵

§ 1386. Neglect and absence from duty.—Neglect or absence from duty is a frequent ground for the dismissal of policemen. The numerous cases upon the point turn, however, mainly upon the fact and are not generally instructive. Where the evidence against a policeman charged with neglect of duty was that he was in a store apparently drunk and asleep during his tour of patrol; that being asked, on coming out, what he was doing in there, he replied, "Nothing," but afterwards said some one was sick in there, which the storekeeper contradicted; and his own testimony was that he felt a dizziness, but did not know what ailed him, and went in the store, but that he had not been drinking, the decision of the commissioners dismissing him was not disturbed.²⁶ A policeman went into a private residence at night and remained nearly three-quarters of an hour, and on coming out was preceded by a young man, who, after looking up and down the street, said, "All right; come." The officer testified that he went in on account of sickness, and that he made an entry of the absence in his book while there. After it was shown that there was no light in the place where he stated that he wrote the entry, he denied that he had testified that it was made in that place. It was held that a finding that he was guilty of leaving his post was warranted.²⁷ In New York it is provided by statute that any member of the police force of New York city who shall be absent from duty without leave for five days shall, at the expiration thereof, cease to be a member of the force.²⁸ This act was held, however, not to apply in a case where a patrolman was arrested and confined under criminal process, but who reported for duty upon his release; and his absence being enforced, he was considered entitled to his wages during the time of his arrest.²⁹ Again, under a rule of the department making "absence without leave" a cause of dismissal, a patrolman should not be removed who was absent from roll-call on account of serious illness.³⁰ But when the rule of the department called for a certificate of sickness from the police surgeon, a policeman who made no effort to procure one was considered properly dismissed.³¹ The court declined

²⁵ *People v. McClave*, 123 N. Y. 512; s. c. 25 N. E. 1047.

²⁶ *People v. French*, 8 N. Y. S. 456, 459; s. c. 29 N. Y. St. 305.

²⁷ *People v. Bell*, 3 N. Y. S. 314; s. c. 50 Hun (N. Y.) 606.

²⁸ N. Y. laws of 1878, ch. 755, § 5.

²⁹ *People v. Board &c.*, 114 N. Y. 245; s. c. 21 N. E. 421.

³⁰ *People v. Board &c.*, 55 Hun (N. Y.) 445; s. c. 8 N. Y. S. 640.

³¹ *People v. McClave*, 13 N. Y. S. 340; s. c. 59 Hun (N. Y.) 623.

to interfere with the decision of commissioners dismissing a police officer where the preponderance of testimony showed that while on duty he was found off his post, lying on the grass with two other officers, in violation of the rules of the department.³² Uncontradicted evidence that a policeman failed to arrest one who committed an assault in his presence warrants a finding of neglect of duty, and the failure to make the arrest is not excused by the fact that he was not on duty at the time.³³

§ 1387. Violating regulations.—It is no excuse that a policeman charged with violating one of the rules of the department merely committed a mistake of judgment.³⁴ Thus one of the police regulations of the city of Brooklyn provided that, “in case of fire, burglary, riot, or other emergency, the sergeant, roundsman or patrolman who discovers the same shall immediately send information to the officer in command at the station, and in the meantime take such action as the case may require.” A policeman, hearing some one screaming, went to the place, and found a woman who stated that an acquaintance of his, naming the person, had broken into her room, and that to escape an assault she had jumped from the second-story window. The policeman called two other officers, made an investigation, and concluded that no crime had been committed. He advised the woman to get out a warrant for her assailant’s arrest, but did not report the affair to the officer in charge at the station, and it was held to be a violation of the regulations.³⁵ Again, proof that a policeman ordered cigars from a manufacturer, to be delivered to a number of persons in small quantities; that the cigars were charged to him, and that he was in the business of canvassing for the sale of cigars, shows *prima facie* a violation of a rule of the police department which provides that “each member of the police force shall devote his entire time and attention to the business of the department, and he is expressly prohibited from following any other calling or being engaged in any other business. Although certain hours are allotted to members of the force for the performance of duty on ordinary occasions,

³² *People v. Crimmins*, 1 N. Y. S. 656, 657; s. c. 49 Hun (N. Y.) 607.

³³ *People v. Bell*, 8 N. Y. S. 748; s. c. 55 Hun (N. Y.) 610. Under laws of N. Y. of 1887, ch. 262, which provides that the board of commissioners of public parks shall have power to remove officers from the police force of the park department for immoral or unbecoming conduct,

the board may remove an officer who, while on duty in a park, indecently and wilfully exposes his person in the presence of female visitors: *People v. Robb*, 16 N. Y. S. 124; s. c. 40 N. Y. St. 760.

³⁴ *People v. McClave*, 10 N. Y. S. 561; s. c. 32 N. Y. St. 824.

³⁵ *People v. Bell*, 3 N. Y. S. 812.

they must at all times be prepared to act immediately on notice that their services are required.”³⁶ But on a charge against a policeman for violating a rule of the department, in that he “drew his pistol on a citizen, and fired a shot, not in self-defense,” where he explained that he did not draw his pistol on or fire at or see the injured man until after firing the shot; that he fired the pistol in the air to attract other officers to assist him in watching suspicious characters, it was held a case was not made out sufficient to justify his dismissal.³⁷ And a statute empowering the park commissioners of New York city to punish or dismiss members of the park police force on conviction of certain offenses, and to withhold the pay of any member of such force “for or on account of absence for any cause, without leave, lost or sick time, sickness or other disability, physical or mental,” does not authorize the removal of a member of such force on the ground that he is subject to insane delusions.³⁸

§ 1388. Evidence of intoxication.—It seems to be especially difficult for policemen to rebut evidence of intoxication. In a recent case where the defendant was discharged on that ground, the sergeant in charge testified that he could not answer intelligently, and “staggered some,” and was unfit for duty. Another sergeant testified that from the appearance of the defendant, his thick speech, manner of walking and the smell from his breath, he concluded that he was drunk. The police surgeon testified that he was under the influence of liquor to the extent of requiring some few hours’ sleep to work it off. The defendant declared that he had only drank a preparation for malaria. The physician who supplied the preparation testified that, properly taken, it would not produce a dazed condition, but too much would make relator a little stupid. Five witnesses, two of whom had not particularly noticed the defendant, testified that they did not consider him drunk. But the court held that his dismissal must be sustained.³⁹ In another case a park policeman was charged with

³⁶ *People v. Bell*, 4 N. Y. S. 869. A rule prohibiting members of a police force from soliciting money for political purposes, and becoming members of a political committee, is open to no constitutional or statutory objection, and is reasonable: *McAuliffe v. Mayor &c.*, 155 Mass. 216; s. c. 29 N. E. 517.

³⁷ *People v. McLean*, 8 N. Y. S. 511.

³⁸ *People v. Robb*, 55 Hun (N. Y.)

425; s. c. 8 N. Y. S. 502. Cf. *People v. MacLean*, 13 N. Y. S. 685.

³⁹ *People v. French*, 13 N. Y. S. 337. It appeared that the defendant, while not on duty, entered a house about 1 p. m., attempted to go up stairs, and drew a revolver, which was taken from him, and he was ejected. The proprietor of the house testified that the defendant was grossly intoxicated, and relator ad-

being off his post, and sitting down and having a can of beer in the gate box at one of the entrances to the park. His explanation that he went into the box to drink his coffee was met by the testimony of the sergeant that there was no coffee in the box, and no arrangement by which to heat coffee; and there was also testimony that upon the approach of the sergeant the defendant attempted to hide himself by getting on the floor. The court considered the testimony sufficient to sustain a finding that the charge was true.⁴⁰ Testimony of witnesses that in their judgment the defendant was intoxicated is unobjectionable where the opinion is limited to what the witnesses saw.⁴¹

§ 1389. Conduct unbecoming an officer.—In addition to the specific acts for which policemen may be discharged the regulations of the department often provide for their removal upon conviction of conduct unbecoming an officer. This is a broad rule and covers nearly all cases not otherwise provided for. Thus where it appears that a policeman used language to a brother officer calculated to provoke an assault, and afterwards assaulted him with a club and revolver, he is guilty of “conduct unbecoming an officer” within the rule of the police department of Brooklyn, and a judgment dismissing him will not be disturbed.⁴² In a case in New York on the trial of a policeman charged with conduct unbecoming an officer in arresting a saloon-keeper for a violation of the excise laws, and agreeing with him to make the charge that of exposure for sale instead of for an actual sale, for the consideration of twenty-five dollars, the saloon-keeper testified that defendant first arrested his bartender and then arrested the witness at his own suggestion, and discharged

mitted that he did not know what house he was in, on account of the drinks he had taken because he was very chilly, having been on duty the night before, when the weather was inclement. About four hours after entering the house he could not remember what had become of his revolver, though the inspector testified that he was then apparently sober. A dismissal from the force was sustained: *People v. French*, 4 N. Y. S. 222. See also, *People v. French*, 5 N. Y. S. 55.

⁴⁰ *People v. Robb*, 9 N. Y. S. 831. In *People v. McClave*, 10 N. Y. S. 441, a dismissal for intoxication was not sustained. A physician who at-

tended defendant at the time in question testified that he saw he had been drinking a little too much, and his breath smelt strongly of alcohol. But the defendant testified that he told the physician that he had taken brandy and oil, and the testimony of several other witnesses was to the effect that he had taken brandy and oil for cramps. And there was no evidence that he was in the habit of drinking liquor. In *People v. MacLean*, 17 N. Y. S. 475, an order of dismissal was also reversed.

⁴¹ *People v. MacLean*, 13 N. Y. S. 677.

⁴² *People v. Bell*, 3 N. Y. S. 314.

the bartender; that witness was taken to the station and discharged; that he gave defendant ten dollars because it was a big favor he had done, taking witness instead of the bartender; and that no contract was made for the payment of the money. The arrest was made at half-past one in the morning, when it was apparent the law was being violated by having the saloon open. The officer denied receiving the money. But it was held that the action of the commissioners in discharging defendant would be affirmed.⁴³ But while this rule is broad in covering cases not otherwise provided for, it is not to be vaguely applied. There must be conviction of some specific acts manifestly unbecoming an officer, and not a general finding. Thus where one is charged with "conduct immoral and unbecoming an officer," with a specific accusation of acts constituting a felony, the board can not, after finding him not guilty of the acts specified, find him guilty of "conduct unbecoming an officer," and remove him therefor.⁴⁴

§ 1390. The same subject continued.—The commission of the crime of burglary is "conduct unbecoming an officer" which justifies a removal. It is no objection in such cases that the conduct specified constitutes an indictable offense, and the police commissioners in New York were held to possess ample jurisdiction to try the charge without waiting for a prosecution and conviction in a criminal court.⁴⁵

§ 1391. Severity of punishment.—The decision of the police commissioners, inflicting a punishment which they are authorized by law to inflict on finding an officer guilty of the charges against him, is not reviewable because of its severity, as that is in the discretion of

⁴³ *People v. McClave*, 9 N. Y. S. 263. (N. Y.) 224; s. c. 11 N. Y. S. 841;

⁴⁴ *Wellman v. Board &c.*, 84 Mich. s. c. affirmed 126 N. Y. 623; 27 N. E. 410.

⁴⁵ *People v. French*, 32 Hun (N. Y.) 112 (overruling *People v. Board &c.*, 20 Hun (N. Y.) 333); *People v. French*, 60 How. Pr. (N. Y.) 377 (policeman was properly tried and dismissed for accepting bribes); *People v. Board &c.*, 11 Hun (N. Y.) 403 (dismissal for enticing a girl into house of assignation); *People v. Board &c.*, 9 Hun (N. Y.) 222 (for assault and battery). See also, *People v. Board &c.*, 8 Wkly. Dig. (N. Y.) 466; *People v. Board &c.*, 77 N. Y. 153; *People v. Jourdan*, 15 Wkly. Dig. (N. Y.) 278.

People v. Board &c., 58 Hun

the commissioners.⁴⁶ Accordingly, the dismissal of a policeman for neglect of duty, by the police commissioners, will not be interfered with on certiorari, though the punishment is apparently greater than the offense warrants, where the officer admits the charge against him.⁴⁷ Where a policeman leaves his post and falls asleep, his dereliction gives the police commissioners jurisdiction for purposes of discipline, and the supreme court can not review their action in regard to the punishment inflicted.⁴⁸ The commissioners are the judges as to whether the dismissal from the force is the proper penalty for a violation of the rules of the department.⁴⁹ Long, faithful service and extenuating circumstances are addressed only to the discretion of the commissioners in mitigation of punishment, and can not be considered by the court as ground for reversal.⁵⁰ And even punishment by dismissal from the police force for lying down while on patrol duty is not excessive, where the record of the accused officer shows numerous previous derelictions of duty.⁵¹

§ 1392. Review of proceedings by certiorari.—Where the police commissioners accept the voluntary resignation of a police officer, no proceedings having been instituted by them for his removal, their action can not be inquired into on certiorari.⁵² It was held that where a policeman had been a member of the force for four years it could not be objected, on certiorari to review the action of the police commissioners in dismissing him for misconduct in office, that, on account of non-compliance with the civil service law, he was an officer only de facto and could not be restored, though the proceedings against him were irregular.⁵³ In New York, where the evidence concerning the misconduct of a policeman is conflicting, and there is sufficient evi-

⁴⁶ *People v. Bell*, 8 N. Y. S. 748.

⁴⁷ *People v. French*, 5 N. Y. S. 57.

⁴⁸ *People v. French*, 7 N. Y. S. 442.

⁴⁹ *People v. McClave*, 10 N. Y. S. 561.

⁵⁰ *People v. French*, 6 N. Y. S. 213, sustaining the action of the police commissioners of New York City in dismissing a policeman for intoxication, though it appeared that he had served faithfully for eighteen years, and that the liquor was taken as a medicine. *Contra*, *People v. French*, 1 N. Y. S. 878, where an officer was dismissed for an altercation with a brother officer in the public streets, the preponderance of

proof showing that he was less to blame in the matter than the other, who was only fined thirty days' pay. He had once been commended for good conduct in making an important arrest under dangerous circumstances; and it was decided that, as the punishment was too harsh and unequal, the decision should be reversed and the cause remanded for further action.

⁵¹ *People v. MacLean*, 14 N. Y. S. 77.

⁵² *People v. Martin*, 10 N. Y. S. 511.

⁵³ *People v. Hannan*, 10 N. Y. S. 71; s. c. 56 Hun (N. Y.) 469.

dence, if credited, to establish his alleged offense, the order of the commissioners discharging him will not be reversed; as under the New York code the same rule governs the review of such a question on certiorari as would determine a motion to set aside the verdict of a jury as against evidence.⁵⁴

§ 1393. Recovery of salary after restoration upon certiorari.—It was held in New York that when a policeman had been duly appointed and entered upon the performance of his duties and he was removed by the police commissioners, and upon certiorari the order of removal was reversed and he was restored to his office, he could recover his salary which accrued between the time of the order of removal and the restoration, and without any abatement on account of earnings realized from his former trade resumed during the interim.⁵⁵ But where another officer is regularly inducted into and occupies as an officer *de facto* the place of the officer removed, the latter can not sustain an action for his salary until the right to the office is judicially determined by a competent tribunal in a direct proceeding for that purpose.⁵⁶

⁵⁴ *People v. French*, 6 N. Y. S. 394. See also, *People v. Hayden*, 16 N. Y. S. 98; *People v. French*, 7 N. Y. S. 460; *People v. Robb*, 5 N. Y. S. 869; *People v. French*, 9 N. Y. S. 262; *People v. Robb*, 8 N. Y. S. 418, 456; *People v. McClave*, 8 N. Y. S. 515. On certiorari to review the action of the mayor and council of a city in dismissing a member of the police force, the validity of the appointment of his successor can not be considered. But it was held in New Jersey that the legality of the relator's own appointment may be inquired into, for the act of New Jersey of March 25, 1885, § 1 (Supp. Rev., p. 514), forbidding the dismissal of members of the police force except for cause and after trial, applies only to persons lawfully in possession of the office: *State v. Mayor &c.*, 53 N. J. L. 362, 368; s. c. 21 Atl. 568, 570. An officer serving under the appointment and authority of the board of police commissioners can not, on certiorari to proceedings for his removal, ques-

tion the constitutionality of the act constituting the board: *State v. Board &c.*, 49 N. J. L. 170; s. c. 6 Atl. 659. The term "officer," as used in a charter relating to removals, was held to include police officers: *City of Jacksonville v. Allen*, 25 Ill. App. 54.

⁵⁵ *Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536; s. c. 7 N. E. 787, on the ground that the salary is an incident to the office and does not depend upon contract.

⁵⁶ *Selby v. City of Portland*, 14 Or. 243; s. c. 12 Pac. 377. See also, *Dorsey v. Smyth*, 28 Cal. 21; *Douglass v. State*, 31 Ind. 429; *City of Philadelphia v. Rink* (Pa.), 2 Atl. 505; *People v. Potter*, 63 Cal. 127; *Meagher v. Storey Co.*, 5 Nev. 244; *City of Philadelphia v. Given*, 60 Pa. St. 136; *Mayor &c. v. Woodward*, 12 Heisk. (Tenn.) 499; *Mayor &c. v. Hays*, 25 Ga. 590; *Dolan v. Mayor &c.*, 68 N. Y. 274; *Bryan v. Cattell*, 15 Iowa 538. Where a city ordinance provides that a policeman for absence without leave shall forfeit

§ 1394. **City marshals.**—The powers and duties of a city marshal are in relation to municipal affairs similar to those of the sheriff of the county. He is the chief executive officer clothed with authority to apprehend offenders against the municipal laws.⁵⁷

his pay except in cases of sickness properly certified by a physician, he must have produced such certificate to recover his pay: *City of Wilkes-Barre v. Meyers*, 113 Pa. St. 395; s. c. 6 Atl. 110.

⁵⁷*Attorney-General v. Connors*, 27 Fla. 329; s. c. 9 So. 7. Where the mayor directed the marshal to post notices requiring the owners of dogs

to keep them muzzled, and directed that all dogs found running at large without muzzles should be killed, such direction was held, in the absence of an ordinance authorizing such regulation, to give the marshal no authority to kill dogs found running at large in violation of the notice: *Stebbins v. Mayer*, 38 Kan. 573; s. c. 16 Pac. 745.

CHAPTER XXXIII.

WATER AND LIGHTS.

SECTION	SECTION
1395. Power of municipality as to water supply.	1408. Liability of water-works companies.
1396. Contracts for water supply.	1409. The same subject continued.
1397. Limitations upon power to contract.	1410. Water-rates.
1398. Contracts further illustrated.	1411. The same subject continued.
1399. The same subject continued—Monopolies.	1412. Collection of water-rents.
1400. Construction of contracts.	1413. Power of municipality to contract for lights.
1401. The same subject continued.	1414. The same subject continued.
1402. No exclusive right.	1415. Authorized contracts illustrated.
1403. Rent of hydrants.	1416. Unauthorized contracts.
1404. Water-works companies under New Jersey statutes.	1417. Contract for gas lighting construed.
1405. Infringement of riparian rights.	1418. The same subject continued.
1406. The right to waters of a stream.	1419. Construction of statutory and charter provisions.
1407. Connecting pipes.	1420. The same subject continued.

§ 1395. **Power of municipality as to water supply.**—Under authority to contract for a water supply for ten years, a town can not, as a condition to its grant of authority to a company to lay pipes, require the company to furnish water for twenty years, and bind itself to take the water at a specified rate for that time.¹ A water company which has laid its pipes in the village where organized, and has made a contract to supply another town with water, has the power to lay its water-main through the streets of an intermediate village for the purpose of carrying on its contract, under the statute of New York,

¹ *State v. Town of Harrison*, 46 N. J. L. 79. It was intimated in the argument that since the town had power to make such a contract for ten years the resolution [for the twenty years' contract] might be upheld for that term and set aside as to the excess. But the court said the case came within the rule that although when objectionable parts of ordinances are severable from the rest they will be disregarded, when the void parts are essential and connected with the remainder of the ordinance the whole is void: Citing *State v. Mayor &c.*, 38 N. J. L. 110; *State v. Inhabitants &c.*, 45 N. J. L. 318; *State v. Board &c.*, 39 N. J. L. 632.

which authorizes any such corporation to lay its pipes in any street of an adjoining town or village to the town or village where it was organized, and another statute which confers that right upon such corporations contracting to supply other towns and villages with water.² A city permitted a corporation chartered for the purpose of supplying the city with water to construct works at great expense, under an agreement with the city that the privilege should be exclusive. It was held that the city could not permit competition, on the ground that its agreement was *ultra vires*, as tending to create a monopoly; that if it were *ultra vires* the city had exhausted its power in the premises.³ While a corporation having a franchise to furnish a city with water may condemn private property, there must exist a real necessity for the condemnation. It is not enough that the acquisition of certain land would be a convenience, and would enhance the value of the property of the corporation and secure a better supply of water.⁴

§ 1396. Contracts for water supply.—A statute entitled “An act to enable cities to supply the inhabitants thereof with pure and wholesome water” has been held to authorize a city to contract for a supply of water for public and private use.⁵ And a statute providing water commissioners for the city and authorizing them to contract

² *Village of Tarrytown v. Pocon-tico Water-works Co.*, 1 N. Y. S. 394.

³ *Atlantic City Water-works Co. v. Atlantic City*, 39 N. J. Eq. 367.

⁴ *Spring Valley Water-works v. San Mateo Water-works*, 64 Cal. 123; s. c. 28 Pac. 447; quoting from the language of the court in *Prather v. Jeffersonville &c. R. Co.*, 52 Ind. 16, as follows:—“For public uses the government has the right to exercise its power of eminent domain and take private property, giving just compensation; but for public convenience it has not. A public convenience is not such a necessity as authorizes the exercise of the right of eminent domain. The taking of private property for public use is in derogation of private right and in hostility to the ordinary control of the citizen over his estate, and statutes authorizing its con-

demnation are not to be extended by inference or implication.” See also, *Le Coul v. Police Jury*, 20 La. An. 308; *Jefferson &c. R. Co. v. Hazeur*, 7 La. An. 182; *Fenwick v. East London R. Co.*, L. R. 20 Eq. 544, a railway condemnation case where the master of the rolls said:—“I think the case is concluded by the authorities (I should have thought it would have been by good sense without authority), that you can not damage your neighbor’s property merely for the purpose of saving yourself a little money where it is unnecessary for the construction of the railway.”

⁵ *Hackensack Water Co. v. Mayor &c.*, 51 N. J. L. 220; s. c. 17 Atl. 307. The city was already in possession of its own water plant and only needed a supply of water, not to build, buy or acquire works or franchises for the construction.

for water with the commissioners of another city did not deprive the first of its power to contract with other bodies for the use of water under the general powers of the city.⁶ A city passed two ordinances under which it contracted with a company organized under a general statute for the construction and operation of water-works, to pay a specified sum for water for public purposes for an indefinite period. An information was filed in the name of the attorney-general to set aside the proceedings for fraud. Before determination of that suit the ordinances were repealed. The company completed their works, but took no steps to enforce the contract for some time. When the company brought an action against the city upon the contract, prosecutor, a taxpayer in the city, applied for a certiorari, which was allowed. It was held that neither the city nor the taxpayer was estopped from contesting the authority of the city to take the proceedings in question, and that the writ was properly allowed if applied for within a reasonable time after it had become apparent that by the proceedings a burden might be imposed on taxpayers.⁷ Where the charter requires the submission of the question of granting a franchise to erect water-works to the qualified voters, and such submission is made, the franchise is valid although the council after the submission made certain modifications in the details, such changes being within the discretionary power of the council.⁸

§ 1397. Limitations upon power to contract.—A city council has no power to contract for water supply, the expense exceeding the limit of expenditure provided by law, and not provided for in the appropriation ordinance for the current year, where a statute has made it criminal for city councils to incur obligations in excess of the appropriation and limit of expenditure provided by law. And a statute conferring on cities the power to consent to the association of persons for supplying water and laying pipes in the streets would not change the matter.⁹ And a contract for water supply invalid under that statute was not cured by other statutes which authorize

⁶ *Hackensack Water Co. v. Mayor &c.*, 51 N. J. L. 220; s. c. 17 Atl. 307.

⁷ *State v. Atlantic City*, 49 N. J. L. 558; s. c. 9 Atl. 759.

⁸ Under *S. & H. Dig. Arkansas*, a city of the second class may be laid off into an improvement district for the maintenance of water-works: *Crane v. Siloam Springs*, 67 Ark. 30; s. c. 55 S. W. 955. In *S. C. a* city can acquire water-works and

light plant only as provided in *Const.*, art. 8, § 5: *Stehmeyer v. City Council*, 53 S. C. 259; s. c. 31 S. E. 322; *Johnson v. City of Rockhill*, 57 S. C. 371; s. c. 35 S. E. 568. As to an election in the matter of water-works, see *Brown v. Carl*, 111 Iowa 608; s. c. 82 N. W. 1033.

⁹ *Atlantic City Water-works Co. v. Read*, 50 N. J. L. 665; s. c. 15 Atl. 10.

cities not already supplied with water to contract for such supply for a term not exceeding ten years.¹⁰ And where a contract for a water supply is invalid as ultra vires, the public are not estopped from setting up such invalidity because the contracting company has acted under the contract in constructing its works, etc., not knowing the illegality of the contract, or using no diligence to ascertain whether the council exceeded its powers.¹¹

§ 1398. Contracts further illustrated.—As a city of the second class in Kansas has the power to contract for water to be furnished to itself and its inhabitants, a contract for that purpose remains binding on it after it has become a city of the first class as expressly provided by the statute; and hence it has power to levy a tax to pay such contract obligation.¹² In the absence of express statutory authority, a municipal corporation can not make a permanent and exclusive contract with a water company to build water works and supply it with water. Such authority can not be implied from the general power conferred by its charter to contract for the needs of the municipality.¹³ An ordinance for a supply of water to a municipality for a term of years by a water company of which a majority of the councilmen were directors was held to be void where a statute of the state prohibited any member, officer or agent of any corporation from being interested in any contract for the sale or furnishing of any supplies or materials to it. And it was not ratified by payments for water made by councils none of whose members was a member of the water company.¹⁴

¹⁰ *Atlantic City Water-works Co. v. Read*, 50 N. J. L. 665; s. c. 15 Atl. 10.

¹¹ *Atlantic City Water-works Co. v. Read*, supra.

¹² *Manley v. Emlen*, 46 Kan. 655; s. c. 27 Pac. 844.

¹³ *Greenville Water-works Co. v. City of Greenville* (Miss.), 7 So. 409.

¹⁴ *Borough of Milford v. Milford Water Co.*, 124 Pa. St. 610; s. c. 17 Atl. 185; 23 W. N. C. (Pa.) 413. "It is almost needless to say," said the court, "that a contract so prohibited by law is utterly void, and there is no power that can breathe life into such a dead thing. . . . There was no ratification of the contract because there was no contract to

ratify. The water company never contracted with the borough. They contracted with themselves to supply the latter with water; to that agreement the borough was not a party in a legal sense. It is true the borough might, after its council had become purged of the members of the water company, have passed an ordinance similar [to the one in question] and thus have entered into a new contract. But no such ordinance was passed, and neither councils nor the officers of the municipality can contract in any other way. It is one of the safeguards of municipal corporations that they can only be bound by a contract authorized by an ordinance duly passed. The act of 1860 [prohibit-

§ 1399. **The same subject continued—Monopolies.**—A contract between a city and a water-works company provided that if the company should fail at any time to furnish an adequate supply of water for all fire, sanitary and other public purposes, no rent should be paid by the city during the time of such failure. A subsequent paragraph provided that the company “guaranteed at all times to furnish, if required, * * * a sufficient force or pressure to throw” a certain amount of water a specified distance. It was held that the company’s failure to comply with the latter requirement did not entitle the city to suspend payment of rent, but its remedy was by action for breach of guaranty.¹⁵ A contract by which a city gives a water company the exclusive right to furnish the city with water for public purposes for twenty-five years, at a certain amount per year, is illegal, as creating a monopoly.¹⁶ A water-works company had a contract for a supply of water to a Michigan village. Subsequently this village by a change of charter became a city, and subsequently under authority from the legislature established water-works of its own. It then endeavored to get rid of the old company, which was still supplying its customers, on various grounds. It was urged for one thing that when the village became a city that ended the contract. To this the court held that as the charter as a city made the city the successor both to rights and to obligations of the village, this in law continued the body politic as the same legal body. There was no legislation necessary to adjust the new relations of the water company and the city.¹⁷ It was further held that a water company authorized by its charter to lay pipes and distribute water in a city had a right of access to the streets or alleys for that purpose, which right must be exercised in harmony with the public convenience; and it was the duty of the city to regulate its exercise by ordinance in such a way as

ing members to be interested in contracts] is another and valuable safeguard thrown around municipalities. It was passed to protect the people from the frauds of their own servants and agents. It may be there was no actual fraud or intended in the present case, but we will not allow it to be an entering wedge to destroy the act of 1860. Of what possible use would that act be if its violations are condoned and its prohibited, criminally-condemned contracts allowed to be enforced under the guise of an implied ratification? It is too plain for argument that the

payment by councils for some years for water actually furnished created no contract to accept and pay for it in the future.”

¹⁵ *Wilson v. City of Charlotte*, 108 N. C. 121; s. c. 12 S. E. 846.

¹⁶ *Altgelt v. City of San Antonio* (Tex.), 17 S. W. 75; following *City of Brenham v. Brenham Water Co.*, 67 Tex. 545; s. c. 4 S. W. 143.

¹⁷ *City of Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606; s. c. 33 N. W. 749. See also, *St. Louis Gas Light Co. v. City of St. Louis*, 46 Mo. 121.

to prevent injury to other interests while not interfering with the reasonable exercise of such right.¹⁸

§.1400. Construction of contracts.—A Missouri statute provides that “any city, town or village, the plat of which has been filed in the recorder’s office of the county in which the same is situate, may, together with the territory which is or may be attached thereto, be organized in a single school district, and when so organized shall be a body politic.” It has been held that when schools formerly under control of a city are organized under this law, the property in the school buildings does not cease to be in the city, and hence a water company which contracts to furnish water free of charge for “all public buildings and offices of the city” is bound to supply the school buildings; especially so when the contract was made before the schools were so organized.¹⁹ The rule that a court in construing a doubtful provision of a contract will follow the interpretation placed upon it by the parties does not apply to contracts made by a municipal corporation in matters affecting the public interest.²⁰

§ 1401. The same subject continued.—A contract for a supply of water was made in these terms: The payment of an agreed annual rental by the city to the water company contracted with was made dependent upon the latter supplying water for thirty years, unless the city sooner purchased the works, the water to be taken from wells and springs, sufficient to supply all the inhabitants of the city with wholesome water for domestic and fire purposes. Payment of the

¹⁸ *City of Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606; s. c. 33 N. W. 749.

¹⁹ *National Water-works Co. v. School District*, 48 Fed. 523.

²⁰ *National Water-works Co. v. School District*, *supra*. The court said:—“It may be said that the construction given to a doubtful provision by the parties to a contract, and affecting their interest only, often influences courts in their judgment, upon the reasonable presumption that the parties to a judgment [contract?] are in a condition to best know what was meant or intended by it, and moreover likely to guard their interest. The force of such reasoning is broken when we come to apply it to municipal corporations. They must of necessity

have their affairs conducted by persons selected according to law, who often have but a general public interest in the matter intrusted to them, are frequently changed and not always the best calculated to construe contracts made by their predecessors. This is illustrated to some extent in the case before the court, in which school directors of one board contracted to pay and the same or another set of directors refused payment. A court asked to construe the provisions of a contract under such or similar circumstances may well hold itself free to do so without being influenced by the views entertained or even acted on by the corporators, especially in a case involving public interests.”

rental was not to begin until the completion of the works in practical compliance with the contract, nor until accepted by the common council of the city. In an action for breach of contract in failing to accept the works when the contractor had completed them, it was argued on demurrer that there was not stated a cause of action, in that the declaration had not alleged that the company had provided the supply of water contracted for, the contention of the city being that the provision in the contract as to a sufficiency of water was a condition precedent to their being obliged to accept the works. The supreme court of Michigan held that it was a condition subsequent to acceptance, and the covenant a continuing one, protecting the city from payment of rent in case the water was not supplied according to its terms, overruled the demurrer and ordered the case to proceed.²¹

§ 1402. No exclusive right.—It has been held in Pennsylvania that a water company had no exclusive right to lay its pipes in the streets, or to supply water to the inhabitants, by reason of the statute which provides that “the right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one; and no other company shall be incorporated for that purpose until the said corporation shall have from its earnings realized, and divided among its stockholders, during five years, a dividend equal to eight per cent. per annum upon its capital stock,” as against an individual who had introduced water into a borough with its consent before the water company acquired its charter.²²

²¹ *Adrian Water-works v. City of Adrian*, 64 Mich. 584; s. c. 31 N. W. 529. The court said:—“Defendant insists that it is made a condition precedent to payment for this water or to acceptance of the works that the water shall be taken from the wells and springs and that it shall be sufficient in quantity, before defendant is obliged to accept the works, to supply all the inhabitants of the city for thirty years with wholesome water for domestic and fire purposes, and that the performance of this condition must be alleged in the declaration. . . . The several clauses of the contract must be construed together and the intent of the parties arrived at from

the whole instrument. It provides in positive and unmistakable terms when the contract shall be completed in § 7. It would be an unreasonable and strained construction of the contract to hold that the company must, in advance of its requirement for use for twenty or thirty years, have a supply of water sufficient to supply all the inhabitants the city will contain twenty or thirty years hence.”

²² *Freeport Water-works Co. v. Prager*, 129 Pa. St. 605; s. c. 18 Atl. 560. Paxson, C. J., said:—“The evident object of the [statute] was to encourage the formation of water companies to supply the inhabitants of small towns with water, and to

§ 1403. **Rent of hydrants.**—The fact that an ordinance granting a person the right to supply water to a city and its inhabitants, and agreeing that the city should pay a certain annual rent for hydrants, was passed irregularly, and procured by such person's bribing members of the council, will not affect the right of a water company that purchased such person's franchise without notice of the irregularity and fraud, and expended money in the construction of water-works, to recover the agreed rent for hydrants actually furnished to and used by the city.²³ And where a water company, under an agreement with a city, furnishes to a city and its inhabitants water, and to the city the use of certain hydrants, and the water appears and is believed to be good, and is received by the city and its inhabitants without objection for about a year, the city when it is sued for the rent of the hydrants can not then set up, as a full, complete and absolute defense to the action, that the water furnished by the company was not good.²⁴

§ 1404. **Water-works companies under New Jersey statutes.**—The New Jersey statute entitled "An act for the construction, maintenance and operation of water-works for the purpose of supplying cities, towns and villages of this state with water" authorizes the formation of more than one company in a city, town or village for the purposes designated.²⁵ The statute of New Jersey which authorizes the forma-

that end prohibited the formation of rival companies until they should have become profitable; but it was never intended that said companies should interfere with rights vested prior to their formation, nor to place municipal corporations at their mercy for a supply of water. In this view, the law is wholesome and can do no harm. In the view contended for, it might become an engine of oppression." See also, *Lehigh Water Co.'s Appeal*, 102 Pa. St. 515.

²³ *Burlington Water-works Co. v. City of Burlington*, 43 Kan. 725; s. c. 23 Pac. 1068. The following is from the opinion of the court:—"After a city through its officers and another have united in carrying on and consummating a fraud and conspiracy whereby they have induced

an innocent third person to expend large sums of money for the benefit of the city and its inhabitants, and upon an agreement that such city would pay for a certain named portion of such benefit to be received by it, may the city then, after it has received the contemplated benefit and as against such innocent third person, repudiate the agreement and refuse to pay for any portion of such benefit because of the original fraud and conspiracy entered into and consummated by itself or its officers and the other original party? We would think not."

²⁴ *Burlington Water-works Co. v. City of Burlington*, 43 Kan. 725; s. c. 23 Pac. 1068.

²⁵ *State v. Consumers' Water Co.*, 51 N. J. L. 420; s. c. 17 Atl. 824. The prosecutor rested its claim of

tion of water companies to supply municipalities with water has been held not to be void as special legislation, though it applies solely to municipalities having populations ranging between five hundred and fifteen thousand, since the legislature might reasonably conclude that a difference in the size of the various municipalities within the state would necessitate a difference in the method of supplying them with water.²⁶ A water company lawfully formed under the New Jersey statute authorizing the formation of corporations to supply water to cities, towns and villages acquires, at its incorporation, by force of the statute, a right to lay its pipes in the public highways, and the only control which the local authorities may exercise over it in laying its pipes is such as may be necessary to prevent it doing anything which will unnecessarily obstruct or otherwise interfere with public travel.²⁷

§ 1405. Infringement of riparian rights.—It has been held in New York that where a water company was organized under the statute of that state which provides for supplying water to villages and which authorizes the acquisition of riparian rights for that purpose, and water commissioners of a village acting with it, after acquiring land above and below the land of another on the river intended as the source of supply, and expending large amounts in the construction of

an exclusive franchise on three grounds, two of which were as follows:—First, the words of the act in providing “that any number of persons not less than seven . . . may form a company for the purpose of constructing, maintaining and operating water-works in any city, town or village, . . . for the purpose of supplying such city, town or village and the inhabitants thereof with water;” secondly, the fact that the consent of the municipal authorities was by the statute made necessary for the creation of the company. The court said:—“The first reason, because the act speaks of the formation of a company and not of companies in any city, town or village, has no substance. Similar language is used in our general corporation act, general railroad law and general canal law, but it has never been suggested or

supposed that they conferred exclusive franchises. Under the railroad and canal laws, also, the locality in which each company is to operate must be as precisely defined as under the statute which we are now considering. Nor has the second ground any firmer support. It is as reasonable to assume that the local authorities were invested with the right of giving or withholding consent in order that they might act upon an attempt to form a second or third company as to suppose that such right had reference to the first company itself. The public interests of the municipality might be involved in the later applications as greatly as in the earliest one.”

²⁶ *State v. Moore*, 54 N. J. L. 121; s. c. 22 Atl. 993.

²⁷ *Atlantic City Water-works Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427; s. c. 15 Atl. 581.

reservoirs and dams for its purposes, began condemnation proceedings against this other party to acquire his water rights and proposed to erect a dam and reservoir on his land, they should be enjoined from so doing, it appearing that these rights were necessary to the other party, and to allow them to divert the water at that point would greatly injure him.²⁸ It has also been held in the same state that water companies organized under that statute can not, in exercising the authority given them to have, hold and occupy any of the waters of the state, with the provision that they can not in so doing infringe on any private right, are entitled to divert from the streams upon which they have acquired land for a reservoir the surplus water above what is required by lower riparian owners for the uses to which they have been accustomed to devote it, but they can not divert the water required by them for such uses.²⁹ A borough in Pennsylvania has a right to take as much water from a flowing stream as is necessary for the uses of its inhabitants, proper compensation being made for injury resulting therefrom to riparian proprietors above or below, under the authority given in the borough act "to provide a supply of water for the use of its inhabitants, to make all needful regulations for the protection of the pipes."³⁰

§ 1406. **The right to waters of a stream.**—It has been held in Pennsylvania that a private corporation, vested with the right of eminent domain for the purpose of supplying a city with water, does not, by the mere purchase of land on which is a spring, acquire the right to divert the water of the spring from its natural channel, in order to supply the city with water, without making compensation or tendering security, since its purchase of the land gives it merely the rights of a riparian owner.³¹ It has also been held in Vermont that

²⁸ *Pocontico Water-works Co. v. Bird*, 4 N. Y. S. 317.

²⁹ *Crownen v. Wellsville Water Co.*, 3 N. Y. S. 177.

³⁰ *Appeal of Haupt*, 125 Pa. St. 211; s. c. 23 W. N. C. (Pa.) 545; 17 Atl. 436, in which case it was held that a borough which had constructed a reservoir on a tract of land purchased by it through which a creek flowed, and conveyed the water several miles to the borough for the use of its inhabitants, had rights more than those of a riparian owner, having the power to condemn, as stated in the text, and was

entitled to an injunction to restrain another borough from taking water from the same stream for the use of the latter, the supply of water being limited.

³¹ *Lord v. Meadville Water Co.*, 135 Pa. St. 122; s. c. 19 Atl. 1007; 26 W. N. C. (Pa.) 110. "It was conceded upon the argument that the company had the power to divert it under its power of eminent domain. But it has never exercised such right. To do so involves compensation to those who are or may be injured by such diversion. Compensation was not made nor security

a water company authorized by its charter to take water from a stream, by purchase or otherwise, to supply a town with water "for the extinguishment of fires, and for domestic, sanitary and other purposes," had no right as against the mill-owners on the stream below its dam to take more water than is ordinarily needed for the purposes enumerated, in order to use the surplus for its own benefit in supplying power to manufactories, though this larger supply might be necessary to protect the town in case of a general conflagration.³² It has been held that a water company was not restricted, under a Maine statute which authorized it to "take, detain and use the water of Oyster river pond and all streams tributary thereto," to such a taking as would not interfere with the natural flow of the stream below the pond, nor to a detention of the waters in reservoirs outside of the pond, but was authorized to detain such waters in the pond itself.³³ And a notice by such water company, pursuant to the

tendered. While a city or borough or company having the right of eminent domain may take a spring or stream of water to supply a municipality, it can only do so by making compensation to those who are deprived of the use of the water as provided by the constitution. A taking without compensation is a trespass, as much so as the taking of land by a railroad company to construct its road without making compensation or filing a bond with security as provided by law. Where the power to take exists it must be exercised according to law. If it is not, the corporation so taking becomes a trespasser and may be proceeded against as such. It is a mistake to assume that the purchase of this acre of land gave the company an absolute right to the spring of water. The water did not pass by the deed beyond its reasonable use by the vendee as a riparian owner."

³² *In re Barre Water Co.*, 62 Vt. 27; s. c. 20 Atl. 109.

³³ *Ingraham v. Camden &c. Water Co.*, 82 Maine 335; s. c. 19 Atl. 861. "It is contended for the complainants," said the court, "that inas-

much as the act allows an appropriation of the waters of the pond and its tributaries above the pond and makes no mention of the brook below the pond, the implication is that the natural flow of the brook is not to be prevented, and that the corporation are to take only such surplus water as can be diverted without injury to a beneficial use of the flow of the brook as heretofore customarily enjoyed. And it is contended that the intention of the act was not that the corporation would retain the waters wholly within the limits of the pond, but that they would carry its surplus in a state of high water off into reservoirs to be established in other places. We think it a strained construction of the act to say that the defendants must divert the waters of the pond in such a manner and to such an extent and at such times that there will be no interference with any rights of proprietors on the brook below. The act authorizes the corporation to detain the waters of the pond—not merely a portion—but all of them. No words qualify the amount to be taken. The grant is absolute."

terms of its charter, that it would take from a pond as much water as might be required by it, not exceeding seven hundred and fifty thousand gallons in twenty-four hours, was held sufficiently definite as to the quantity taken to estimate the damage to lower proprietors, as it would be presumed that the company consumed the entire amount specified.³⁴

§ 1407. Connecting pipes.—A water company having a contract with a city by which it has the right to maintain water-works, and to lay down pipes and mains in and along all the streets and alleys of the city, for the purpose of supplying water for domestic and other purposes, where those taking water for private use were required to construct and keep in repair at their own expense the pipes and fixtures on their premises connecting with the pipes in the streets, has no power to prevent a plumber from laying connecting pipes on private premises at the instance of the owners thereof, nor to require a bond for the payment of any damages caused by the negligence of the plumber in his work.³⁵ Neither can a city in such a case delegate to the water company the power to require a license from plumbers employed by citizens to lay such connecting pipes.³⁶

³⁴ *Ingraham v. Camden &c. Water Co.*, 82 Maine 335; s. c. 19 Atl. 861.

³⁵ *Franke v. Paducah Water Supply Co.*, 88 Ky. 467; s. c. 11 S. W. 432, 718. The court, remarking that the contract ordinance conferred no power on the company to prescribe the qualification of a plumber, etc., proceeded as follows:—"If such a power had been conferred it would be in plain violation of the fundamental law of the city. A delegation of power to one corporation or to one man in a city to determine who shall exercise a particular trade, and to provide penalties for misconduct or neglect in the discharge of his duties, is also in plain violation of the organic law. The effect of this legislation on the part of the appellee [the company] is to destroy the trade and profession of the appellant and to compel the citizen either to employ the company or some one named by it, and none other, to enter on his

premises and perform labor for his private use that the company is under no obligation whatever to perform. That the connection should be properly made can not be questioned, and by one competent to make it, but the right of determining who is qualified is not with the company. That the council of the city may require a license of all plumbers for the protection of the people from fraud and imposition may be conceded; but when such power is conferred upon a corporation it is such a delegation of legislative control as can not be sanctioned. In this case the exercise of appellant's vocation in the city where he lives is destroyed, and the right of its citizens placed in the hands of the corporation to be disposed of as the corporation may see proper."

³⁶ *Franke v. Paducah Water Supply Co.*, *supra*.

§ 1408. **Liability of water-works companies.**—The Iowa supreme court has held that the statute of that state which authorizes cities to contract for the building and operation of water-works by individuals or companies confers no power to contract with such individual or company to indemnify a citizen or taxpayer for damages which he may sustain by reason of a failure to furnish water as provided in the contract, so as to enable the citizen to maintain an action in his own name.³⁷ And he can not maintain such a suit even though a specified fund has been raised by the city by taxation to pay for a sufficient supply of water for use in case of fires, and the plaintiff has contributed to such fund.³⁸ It was also held in this case that the ordinance providing that the water company should be liable for all injuries to personal property caused by its negligence in the construction or operation of said works, and, should the city be sued therefor, upon notification it should be the duty of the company to defend or settle such suit, referred only to injuries for which the city would be liable if caused by its negligence, and hence no action would lie against the water company for the burning of property by reason of the insufficient supply of water, as none would lie against the city in such case.³⁹

§ 1409. **The same subject continued.**—In an action for the value of property destroyed by fire as alleged by reason of a water company's not furnishing a sufficiency of water under its contract with a city, it was held by the court of appeals of Kentucky that where a water company makes a contract with a city, the declared object of which was the protection of private property against fire, an action against the company for the destruction of property by fire, caused by the failure of the company to supply a sufficient amount of water to extinguish

³⁷ *Becker v. Keokuk Water-works*, 79 Iowa 419; s. c. 44 N. W. 694. The court said:—"Municipal corporations have and can exercise only such powers as are expressly granted to them by law, and such incidental ones as are necessary to make those powers available, and are essential to effectuate the purposes of the corporation; and those powers are strictly construed:" citing *Clark v. City of Des Moines*, 19 Iowa 199; *McPherson v. Foster*, 43 Iowa 48, 57.

³⁸ *Becker v. Keokuk Water-works*, supra.

³⁹ *Becker v. Keokuk Water-works*, supra. See also, *Vanhorn v. City of*

Des Moines, 63 Iowa 447; s. c. 19 N. W. 293, deciding that the city was not liable for the failure of the water-works company to furnish the water required by its contract to extinguish fires, even though the city had taken a contract from the company to protect it from liability which might arise from malfeasance or neglect on the part of the company; further, that the city could not assume a liability for negligence where none was imposed by law, and that the contract of indemnity must be regarded as having reference to existing grounds of liability and not as creating new ones.

it, could not be defeated on the ground that the plaintiff's damages were not the proximate result of the company's negligence;⁴⁰ also that the contract of this water company with a city having declared that it was made for the protection of private property against destruction by fire, and provided that the city might rescind it for failure of the company to furnish an adequate supply of water for five months, and that the rents should cease in case the water supply was cut off more than five days, it was held the only exemption from liability contained in the contract being for damages occasioned by a temporary suspension of the works, upon notice, for repairs or extension, the necessary inference must be that, in the absence of such excuse, and while the contract was in force, the company would be liable for its failure to furnish water sufficient to extinguish fires.⁴¹ And on a petition for rehearing the court held that the contract did not create between the city and the company the relation of principal and agent, and the doctrine of respondeat superior could not be invoked to relieve the company of liability to a citizen for loss by reason of its failure to keep up such supply.⁴²

§ 1410. **Water-rates.**—It has been held that the constitution of California, in its provisions as to water-rates, etc., did not make the board of supervisors part of the legislative department of the state, but that the power granted to them was to fix reasonable rates and just compensation.⁴³ Where such board of supervisors have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed these rates without reference either to the expense necessary to furnish the water or what is a fair and reasonable compensation therefor, so as to render it impossible to furnish the water without loss, and so low as to amount to a practical confiscation of the property invested in the business, a court of equity has jurisdiction to set aside such ordinance and direct the board to fix such rates as the constitution provided for.⁴⁴ In an action to set aside an ordinance regulating water-rates, it is not necessary that the mayor of the city should be made a party defendant.⁴⁵

§ 1411. **The same subject continued.**—It is not necessary that the board should give notice to parties furnishing water of an intention to

⁴⁰ *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340; s. c. 12 S. W. 554; 13 S. W. 249; 11 Ky. L. 738.

⁴¹ *Paducah Lumber Co. v. Paducah Water Supply Co.*, *supra*.

⁴² *Paducah Lumber Co. v. Paducah Water Supply Co.*, *supra*.

⁴³ *Spring Val. Water-works v. City &c. of San Francisco*, 82 Cal. 286; s. c. 22 Pac. 910.

⁴⁴ *Spring Val. Water-works v. City &c. of San Francisco*, *supra*.

⁴⁵ *Spring Val. Water-works v. City of San Francisco*, *supra*.

fix the rates, the notice not being provided for by the constitution; but it is the duty of the board to obtain all information necessary to act intelligently and fairly.⁴⁶ It is not an unreasonable regulation that the meter should be supplied by the party furnishing water.⁴⁷ An ordinance is not objectionable for uncertainty in that it gives every householder the option to require a meter, and to pay for the water used at water-rates which are different from house-rates, as the rates are fixed.⁴⁸ Under the constitution and statutes of California authorizing the board of supervisors to fix the rates at which water shall be sold, rented or distributed by a corporation furnishing water to the general public for profit, the board of supervisors of a county have no power to fix the rate for a corporation organized to furnish water to the stockholders only.⁴⁹ A city authorized by statute to furnish water to its inhabitants to be paid for by them, which has received from a householder payment in advance for water to be furnished, is liable in damages in an action at law for cutting off his supply, because his predecessor in title had not paid the water-rent for the preceding year.⁵⁰

§ 1412. Collection of water-rents.—A water company may provide by by-law that if water-rent is not paid the supply shall be cut off

⁴⁶ *Spring Val. Water-works v. City &c. of San Francisco*, 82 Cal. 286; s. c. 22 Pac. 910.

⁴⁷ *Spring Val. Water-works v. City &c. of San Francisco*, *supra*.

⁴⁸ *Spring Val. Water-works v. City &c. of San Francisco*, *supra*.

⁴⁹ *McFadden v. Board &c.*, 74 Cal. 571; s. c. 16 Pac. 397.

⁵⁰ *Merrimack River Sav. Bank v. City of Lowell*, 152 Mass. 556; s. c. 26 N. E. 97. It was argued that the city was merely performing a public service and that the rates paid for water by individuals were special taxes, and that there was no contract or obligation on the part of the city to furnish water after a payment beyond the public duty which it owed to all the inhabitants, and that the plaintiff's remedy, if any, was by a writ of mandamus. The court said:—"Special payments are made by individuals only when they are supplied with water at their request and then only for

what is furnished and for the time that it is furnished. While these may be called special assessments for the use by the individuals of particular privileges which are part of a general provision for all the people, it seems to be more consistent with the nature of the transaction to consider them as payments of the price of a commodity sold under a general authority to provide for the public, and to sell upon request in a reasonable way to the persons who constitute the public: *Tindley v. City of Salem*, 137 Mass. 171. In *Stock v. City of Boston*, 149 Mass. 410; s. c. 21 N. E. 871, it was assumed both by counsel and the court under a similar statute that the city of Boston, having complied with the request of an applicant to deliver water by pipes at his greenhouse, and presumably having been paid for it, was under a contract to continue to deliver."

until all arrears and expenses of shutting off are paid.⁵¹ Where the charter of a water company provides that the real estate to which water is supplied shall be bound for the water-rent, there would be a lien upon land in the hands of a purchaser, where such water-rent was due and unpaid by the grantor when he sold the same.⁵² It has been held in Missouri that in an action by a city for the value of water used through a secret pipe, not connected with a meter, what defendant said with reference to such pipe could be shown by any one who heard it; but evidence of a third person of what the defendants' employes told such third person that defendants had said to them was mere hearsay and should be excluded. It was competent for the inspector, in describing how he and his assistant discovered the secret pipe, to relate what directions he gave his assistant in the matter. And evidence in such an action of the cost of the water-works as a basis of water-rates was irrelevant and inadmissible.⁵³ The Omaha water-works ordinance provides that the company shall furnish water to citizens residing along the line of its mains at certain rates, and gives a tariff for dwelling-houses according to the number of rooms and other buildings of different kinds. Rents for other purposes are fixed by meter-rates, lowering inversely to the amount of water taken. It has been held that the company had the right to treat each building separately; and the United States, as owner of the Fort Omaha reservation—a tract of many acres, on which are dwellings for officers, hospitals, warehouses and barracks—was not entitled to be supplied as a single consumer.⁵⁴

§ 1413. **Power of municipality to contract for lights.**—An injunction should not be granted in an action brought by a private citizen to restrain the mayor and council of a city from entering into a contract to have the streets lighted by electricity, upon allegations that a prior contract had been made with a gaslight company, which was yet in force, and that, by making the second contract, the city would increase its indebtedness, where it is not shown that the gaslight company had the ability or desire to perform its contract, nor that the city or the plaintiff would sustain any substantial injury by the contemplated act.⁵⁵ A cash contract for current supplies, such as lamps and gasoline for lighting the streets, can be made by a municipal corporation through its appropriate officers or committees, as effectually as by

⁵¹ *Appeal of Brumm (Pa.)*, 12 Atl. 855.

⁵² *Appeal of Brumm (Pa.)*, 12 Atl. 855.

⁵³ *City of St. Louis v. Arnot*, 94 Mo. 275; s. c. 7 S. W. 15.

⁵⁴ *United States v. American Waterworks Co.*, 37 Fed. 747.

⁵⁵ *Searle v. Abraham*, 73 Iowa 507; s. c. 35 N. W. 612.

formal order or resolution entered on its minutes.⁵⁶ And such a contract, if not authorized or confirmed in the mode commonly practiced, may become obligatory by implied ratification, as by taking the fruits of the contract and enjoying them for a considerable time, without notice of objection.⁵⁷

§ 1414. The same subject continued.—It has been held that there was no power conferred upon a city in West Virginia by its charter or the general statutes in relation to municipal corporations in force in West Virginia in 1864 to delegate to a private corporation the exclusive privilege of using the streets and alleys of the city for laying gas-pipes and furnishing the city and its inhabitants with gas for thirty years.⁵⁸ It is within the legal discretion of a city council to

⁵⁶ *City of Conyers v. Kirk*, 78 Ga. 480; s. c. 3 S. E. 442.

⁵⁷ *City of Conyers v. Kirk*, 78 Ga. 480; s. c. 3 S. E. 442. "Against this view of ratification," said the court, "and all theory of implied contract, the counsel urged upon us . . . the suggestion that the constitution would protect the city against this claim by virtue of the limitation which it puts upon municipal corporations touching the power to create debts. The facts of this case taken most strongly in favor of the prevailing party, as they must be after verdict, do not show any purpose or intention to create a debt. The debt resulted from a breach of the contract and not from the making of it. Against paying a debt so originating there is no constitutional impediment. When a cash purchase is made there is no expectation that any debt will exist; and there was no such contemplation in this case. If we take the evidence as we do, most favorably for the plaintiffs, there was no intention that any debt should arise. It was contemplated that payment should be made as soon as the articles were delivered; and the reason indicated in the record why payment was not then in fact made was the extended absence of the city treasurer from

his office. So that this debt (and it is a debt now) became such not by virtue of making the contract but by virtue of breaking the contract; and surely there never can be and never will be any law against paying a debt which arises from default in making a cash payment at the time the debtor ought to have it—the cash sufficient for the purpose being then in the debtor's treasury." See also, *Mayor &c. v. McWilliams*, 67 Ga. 106.

⁵⁸ *Gas Co. v. Parkersburg*, 30 W. Va. 435; s. c. 4 S. E. 650. The court, in its opinion in *Wright v. Nagle*, 101 U. S. 791, 796, says:—"Exclusive rights to public franchises are not favored. If granted they will be protected, but they will never be presumed. Every statute which takes from a legislature its power will always be construed most strongly in favor of the state. These are elementary principles." In *Proprietors &c. v. Proprietors &c.*, 11 Peters 420, 544, it was directly determined by the supreme court of the United States that no franchise was exclusive unless so asserted to be by the unmistakable terms of the grant. See also, *Trent v. Cartersville Bridge Co.*, 11 Leigh (Va.) 521; *Richmond &c. R. Co. v. Louisa &c. R. Co.*, 13 How. 71; *Fertilizing Co. v. Hyde*

select any system that will furnish lights of the required brilliancy at the lowest rates.⁵⁹ Contracts for lighting cities are limited by a provision in the New Jersey statute giving them power to order any public street to be lighted, and to make and enter into contracts therefor with any other parties, "and to cause the annual expense thereof" to be certified, etc.⁶⁰ A grant by a city to a gas company of the exclusive privilege of lighting the city with gas does not deprive the city of the power to contract with an electric light company for lighting the city with electric lights.⁶¹

§ 1415. Authorized contracts illustrated.—It has been held in Louisiana that the council of a city might make a contract for lighting for more than one year where there was a charter provision that it should have power to pass such ordinances as might be necessary to light the streets, etc., and their power in this regard was not limited by other provisions for annual levies to meet current expenses.⁶² Nor was a stipulation in a contract made by the city with an electric light company to furnish it lights for ten years, at a given price per light, that the city should annually appropriate out of its current revenues a sum sufficient to pay what was then due under the contract, within the prohibition in the general statutes of a city's contracting any debt without providing means in the same ordinance to pay both principal and interest.⁶³ Nor was such a contract a restriction upon the legislative power of the council.⁶⁴ A city which has absorbed by consoli-

Park, 97 U. S. 659; *State v. Cincinnati Gas &c. Co.*, 18 Ohio St. 262; *Richmond &c. Gas Light Co. v. Town of Middletown*, 59 N. Y. 228.

⁵⁹ *City of Detroit v. Hosmer*, 79 Mich. 384; s. c. 44 N. W. 622.

⁶⁰ *Taylor v. Common Council &c.*, 43 N. J. Eq. 107; s. c. 10 Atl. 809.

⁶¹ *Gas Co. v. Parkersburg*, 30 W. Va. 435; s. c. 4 S. E. 650.

⁶² *New Orleans Gas-light Co. v. City of New Orleans*, 42 La. An. 188; s. c. 7 So. 559.

⁶³ *New Orleans Gas-light Co. v. City of New Orleans*, supra. See also, *Weston v. Syracuse*, 17 N. Y. 110; *City of Valparaiso v. Gardner*, 97 Ind. 1.

⁶⁴ *New Orleans Gas-light Co. v. City of New Orleans*, supra. "The power to legislate conferred upon the city by its charter has reference

to its power to legislate for governmental functions, such as passing and enforcing ordinances to govern itself, and authorized under what is known as the 'police power;' and it is distinct from the power to contract, which is similar in its effects to the right of contracting as exercised by natural persons. Hence the rules of law and the principles settled in jurisprudence which prohibit municipal corporations from legislating future restrictions to its own legislative power are not applicable to a time contract entered into by such a corporation. These views find sanction and ample support from numerous decisions rendered by courts of last resort in our sister states on precisely similar questions: *City of Indianapolis v. Indianapolis Gas-Light &c. Co.*, 66 Ind.

dation another city is burdened with the contracts which a gaslight company had with the latter at the time of consolidation for lighting its streets.⁶⁵

§ 1416. Unauthorized contracts.—Authority to a city to cause its streets to be lighted, and to make reasonable regulations with reference thereto, does not authorize the grant of an exclusive right to one company to furnish gas for thirty years.⁶⁶ The supreme court of South Carolina has held that where the charter of a city gave the city council power to make all needful police regulations for the welfare, convenience and safety of its citizens, the power to light the streets might be lawfully exercised, and the council might purchase and operate an electric light plant for that purpose.⁶⁷ But a purchase by the city council of an electric light plant, for the purpose of lighting the streets of the city, and also supplying electric light to private houses and business buildings, was *ultra vires*, as being outside of the police power of the city.⁶⁸

§ 1417. Contract for gas-lighting construed.—A city may treat a contract with a gaslight company for the exclusive privilege of laying mains and pipes under its streets for a term of years, on condition that the city shall have the right to purchase the company's gas plant at a certain time, on refusal by the company to sell at that time, as annulled, so far as the grant of the exclusive privilege is concerned.^{68a} The court, however, held that if the grant was on condition that the city shall have the privilege of purchasing the plant at the expiration of twenty-five years, "at such price as may be deter-

396; *Weston v. Syracuse*, 17 N. Y. 110; *City of Valparaiso v. Gardner*, 97 Ind. 1; *Atlantic City Water-works Co. v. Atlantic City*, 48 N. J. L. 378; s. c. 6 Atl. 24. The rule established by jurisprudence seems to be that in the absence of special legislative prohibition or restriction, a municipal corporation vested with the general power to make a contract for the supply of gas or any other commodity has the right to make it according to its own discretion as to its prudence or good policy within the limits of its franchise, including the power to make it for more than one year, if by thus contracting it believes that better terms or lower rates can be obtained. After a thorough examination of our legislation

on the subject, and an exhaustive study of our own reports, we find no law, reason or authority which would justify us in removing the present case from the effect of this general rule." *New Orleans Gaslight Co. v. City of New Orleans*, *supra*.

⁶⁵ *State v. City of New Orleans*, 41 La. An. 91; s. c. 5 So. 262.

⁶⁶ *Saginaw Gaslight Co. v. City of Saginaw*, 28 Fed. 529.

⁶⁷ *Mauldin v. City Council &c.*, 33 S. C. 1; s. c. 11 S. E. 434.

⁶⁸ *Mauldin v. City Council &c.*, *supra*.

^{68a} *Montgomery Gaslight Co. v. City Council*, 87 Ala. 245; s. c. 6 So. 113.

mined by five disinterested men," two of whom are to be chosen by the city, two by the company, and the fifth by those four, the city must make its election as to the purchase at a price to be thereafter determined by appraisers to be thereafter appointed, and, until it exercises this option, the company was not bound to proceed with the appraisement; and its refusal to appoint two appraisers, after the city had appointed two, the city not having elected to purchase, was not a breach of the contract.^{68b} And on a bill by the company to enjoin the city from granting the privilege of laying gas-pipes in the streets to others, filed more than twelve years after the expiration of the time "at" which the city was to have the privilege of purchasing the plant, it was not required to embody an offer to sell in its bill.⁶⁹

§ 1418. **The same subject continued.**—The Kentucky court of appeals has held the authority in the charter of a city to "construct, maintain and operate gas-works, and to pass all ordinances necessary to regulate the same," to be a general one to have the city lighted with gas, including the power to enter on the streets for the purpose of laying pipes, and the power to contract for furnishing the city with light. And a contract thus made with a gas company, by which exclusive right is given to furnish gas to the city for public and private use for twenty-five years, and the exclusive right to enter the streets to lay its pipes, was held to be one which might be enforced; and where the city subsequently contracted with another company to furnish light, and authorized it also to enter on the streets to lay its pipes, injunction would lie to preserve the franchise granted the first company.⁷⁰ A contract between a company and a city as to lighting it by gas, electricity or any other mode is authorized where the charter of an electric light company authorizes it to "furnish any city * * with gas or other light for such time, and upon such terms, as may be agreed upon by the parties," and the charter of a city gives it power to contract and provides that its board of councilmen should have power "to construct, maintain and operate gas and water-works, and to pass all ordinances necessary to regulate the same."⁷¹ There was a contract with a gas company for lighting the streets of a city with a provision that the company might adopt "any other mode equal to gas for supplying light to the city and its inhabitants," etc. There being named in the ordinance no use of the streets except for gas apparatus and fixtures, it was held that a consent on the part of the

^{68b} *Montgomery Gaslight Co. v. City Council*, 87 Ala. 245; s. c. 6 So. 113.

⁶⁹ *Montgomery Gaslight Co. v. City Council*, *supra*.

⁷⁰ *City of Newport v. Newport Light Co.*, 84 Ky. 166.

⁷¹ *City of Newport v. Newport Light Co.*, 89 Ky. 454; s. c. 12 S. W. 1040.

city would be necessary in case of a light other than gas requiring a different use of the streets, such as the erection of poles upon which to stretch wires for electric illuminating purposes.⁷²

§ 1419. Construction of statutory and charter provisions.—A municipal ordinance granting a franchise to occupy the city streets with poles and wires for the purpose of distributing electric light and power is within the provisions of the Iowa statute which provides that municipal corporations shall have power to authorize the erection of gas-works or electric light plants upon approval by a majority of the voters of the city at a general or special election.⁷³ Where a city ordinance grants the right to transmit electric light and power, the further grant therein of a privilege to conduct to the electric light plant water from an artesian well flowing at the intersection of two streets in the city is incident to the object of supplying electricity, and does not contravene the statute which prohibits the passage by a municipal corporation of any ordinance containing more than one subject.⁷⁴ A gas company may be chartered by the legislature for the purpose of supplying a city with gas, without regard to the wishes of the city in the premises; and the city may not prevent the corporation from laying pipes under the streets.⁷⁵

§ 1420. The same subject continued.—It has been held in Nebraska that a city will be compelled to pay the fair value of light actually furnished and used by it under a contract with a corporation of which a member of the city council was a stockholder, notwithstanding the declaration of the statute that the interest of any officer of a city in a contract to which the city is a party shall avoid the obligation thereof.⁷⁶ Where a city furnishes gas to its inhabitants under an ordinance which provides that the use of gas may be refused until all arrearages for gas used on the premises have been paid, it can not be compelled by mandamus to furnish gas to the occupant of a building whose previous tenants are in arrears for gas, such ordinance being a proper and reasonable one.⁷⁷ The validity of an ordinance giving a gas company the perpetual and exclusive right to furnish gas to the city does not arise in an action by the company for

⁷² *City of Newport v. Newport Light Co.*, 89 Ky. 454; s. c. 12 S. W. 1040.

⁷³ *Hanson v. Wm. A. Hunter Elec. L. Co.*, 86 Iowa 722; s. c. 48 N. W. 1005; 53 N. W. 84.

⁷⁴ *Hanson v. Wm. A. Hunter Elec. L. Co.*, *supra*.

⁷⁵ *City of Atlanta v. Gate City Gas-light Co.*, 71 Ga. 106.

⁷⁶ *Grand Island Gas Co. v. West*, 28 Neb. 852; s. c. 45 N. W. 242.

⁷⁷ *Commonwealth v. Philadelphia*, 132 Pa. St. 288; s. c. 19 Atl. 136.

gas furnished the city under that ordinance.⁷⁸ And a gas company which supplies a city with gas under an ordinance providing that it shall be "at rates as favorable" as those of another company in a neighboring city can not charge rates in excess of those charged at the same time by the other company.⁷⁹

⁷⁸ Decatur Gas-light &c. Co. v. City of Decatur, 24 Ill. App. 544; s. c. affirmed in 120 Ill. 67; 11 N. E. 406.

⁷⁹ Decatur Gas-light &c. Co. v. City

CHAPTER XXXIV.

PUBLIC EDUCATION.

SECTION	SECTION
1421. Introductory.	1433. Fiduciary capacity.
1422. Constitutional provisions and state statutes.	1434. Limitation of power.
1423. Legal status of school system.	1435. Personal liability of directors.
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§ 1421. **Introductory.**—Public educational institutions are a development of modern times. Some of the earlier lights, as Erasmus in the Renaissance and Luther in the period of the Reformation, seemed to have recognized the necessity for a national system of education; and Pestalozzi presented to Napoleon, in the height of his power, an earnest appeal that the education of the masses might be considered in the scheme of his great enterprises, but he met with the reply that the first duty of every citizen was to become a soldier and after that he could study the alphabet. Germany was perhaps the first to establish an organized system of public schools. There the question was handled from a national standpoint, and the world has learned her best lessons of public instruction from that source. Great Britain relied upon parish organization and assessment upon local land-holders, and this system was maintained until a very late date, when the matter was taken up by the parliament and fully revised and

modified.¹ The same parochial system prevailed in the United States and proved inadequate, to the end that there was very little provision for the education of the young in the early part of the century, except that which was derived from the parish priest or some theological student who might be enlisted to take charge of the local school.²

§ 1422. Constitutional provisions and state statutes.—With the formation of the several states of the Union, provision was made without exception for the education of the people. The language by which it is expressed in the several constitutions is substantially the same, sometimes reciting “that a diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, it shall be the duty of the legislature to encourage the promotion of intellectual and scientific improvement,” and again providing directly for free schools, and setting apart certain funds for that purpose. The spirit of all of them is, however, to the effect that it is the duty of the state to provide educational facilities for the people. The constitution of the United States has no direct provision authorizing the federal government to establish a national system of education, unless that clause providing for the general good of the people could be construed sufficiently broad for that purpose. But it is not likely that such a construction would be maintained in view of the fact that the states have made ample provision for this matter. The national government has, however, provided a bureau of education at Washington for the purpose of collecting statistics of facts showing the progress, state and condition of education in the United States, and distributing information with regard to the same.³ Pursuant to these constitutional provisions the states have enacted laws establishing complete systems of education. These statutes vary in many particulars, but in their material elements they are the same. The general plan or scheme upon which they are based is substantially as follows:—A board of directors having jurisdiction of the state is vested with the guardianship of educational interests within the state, and usually consists of the governor and treasurer of the state, and a superintendent of public instruction, who is the secretary of the board and in general charge of the state system. A superintendent of education for each county is the representative of the state superintendent in that county. The counties are divided into dis-

¹ *Elementary Education, Act of* 1870; *Am. ed. Encyc. Brit.*, tit. *Education*.

² *McMaster Hist. of People of U. S.* 24-27; *Story on Const.* 51.

³ *Rev. Stat. U. S.* (2d ed., 1878), §§ 516-519; *Am. & Eng. Encyc. of Law*, tit. *Education*.

tricts, and a board of school trustees have control of all matters pertaining to the schools within their district. The state board of education prescribe rules and regulations for the management of the schools throughout the state, the text-books that shall be used, the salary of teachers, the standard of examination, and such other regulations as may be incidental and necessary to the general management of the system.

§ 1423. **Legal status of school system.**—The school system consisting of the state board of education and the school districts throughout the state is regarded as a body corporate with power to contract; to sue and to be sued; to hold and convey property of all descriptions; and to do all acts incidental and necessary to such holding. The statutes of some of the states, as that of Dakota, specifically prescribe that the officers of the school system shall be considered a body corporate; but as a rule this has been left to the courts, as where the court said:—"A school district is a body corporate, and may ask the aid of equity to prevent a consummation of illegal and void apportionments, and creation of a debt against it."⁴ But in Kansas a school district is only a quasi-corporation.⁵ Again, in Illinois it was held that townships having control of the schools within their boundaries are not municipal corporations, but partake of many of the attributes of a corporation; that is to say, they can only exercise powers expressly conferred by statute.⁶

§ 1424. **State board and superintendent of education.**—It is the duty of the state board of education to prescribe rules and regulations for the government of the schools throughout the state; to select a uniform system of text-books; to prescribe the salaries of teachers; and to apportion the school fund among the several districts in amounts as prescribed by statute. And the state superintendent is required to make an annual report to the governor of the condition of the schools, and to be generally responsible for their management. The state treasurer, who is a member of this board, is the treasurer of and in charge of the school fund. The state superintendent exercises a general supervision over the schools through his subordinates, the county superintendents, who are required to make periodical reports to him. The state superintendent has a quasi-judicial position as regards

⁴ School Dist. v. School Dist., 63 Mich. 51; s. c. 29 N. W. 489; School Dist. v. Bodenhamer, 43 Ark. 140.

⁵ Beach v. Leahy, 11 Kan. 23.

⁶ People v. School Trustees, 78 Ill. 136; Wharton v. School Directors, 42

Pa. St. 358; Rapelye v. Van Sickler, 1 Edm. Sel. Cas. (N. Y.) 175; School Dist. v. Thompson, 5 Minn. 280; Littlewort v. Davis, 50 Miss. 403; School Dist. v. Macloon, 4 Wis. 98.

certain questions; as in Wisconsin, questions arising in the district board are appealed directly to him;⁷ and he may prescribe such rules and regulations as he may deem fit in the proceedings; and his decisions are regarded with weight.⁸ He has power to veto certificates issued to teachers, or acts shown to be invalid.⁹ He may also remove district trustees where they have disregarded the authority of the state superintendent, and disobeyed his directions.¹⁰

§ 1425. County superintendents.—The county superintendent acts as the deputy of the state superintendent in the county of his appointment. He is clothed with many of the powers of the state superintendent to regulate the management of schools within his county. His duties are those of visiting the schools, examining into their condition, the character of the school building, the method of instruction, qualifications of teachers, and to procure an enumeration of the scholars, and from time to time to make reports to the state superintendent. He also has control of the regulation of the boundaries of school districts, and in this regard and in the performance of his duties he is allowed a very large discretion. His position is of a quasi-judicial nature.¹¹ His compensation is usually regulated by per diem, or ratably according to the population,¹² and he is required to have an office within the county; but it was decided that the fact that he did not hold his office at the place where the county seat was originally located did not render his acts void.¹³ He is usually required to file a bond for the faithful performance of duty on entering

⁷ *State v. Whitford*, 54 Wis. 150; s. c. 11 N. W. 424; *State v. Custer*, 11 Ind. 210.

⁸ *State v. Burton*, 45 Wis. 150.

⁹ *People v. Collins*, 34 How. Pr. (N. Y.) 336; *People v. Board &c.*, 126 N. Y. 528; s. c. 27 N. E. 968.

¹⁰ *People v. Draper*, 18 N. Y. S. 282, where it appeared that the trustee had refused to comply with an order from the state superintendent of instruction, requiring him to discontinue certain proceedings that had been begun against a local board of managers of a normal school, to compel them to pay over certain public school moneys they had received, to teachers employed by the trustees. The court said "that a refusal of the trustee to abandon such proceeding when directed so to do

by the superintendent constitutes a wilful disobedience justifying his removal."

¹¹ *Knight v. Woods*, 129 Ind. 101; s. c. 28 N. E. 306; *Independent School Dist. v. Duser*, 45 Iowa 391; *Cowles v. School Dist.*, 23 Neb. 655; s. c. 37 N. W. 493; *State v. Clary*, 25 Neb. 403; s. c. 41 N. W. 256; *Trustee &c. v. Jamison*, 12 Ky. L. 719; s. c. 15 S. W. 1, 779.

¹² *Smith v. Jefferson Co.*, 10 Colo. 17; s. c. 13 Pac. 917; *Pickett v. Harrod*, 86 Ky. 485; s. c. 5 S. W. 473; *Jimison v. Adams Co.*, 130 Ill. 558; s. c. 22 N. E. 829; *Pickett v. Adams*, 12 Ky. L. 957; s. c. 15 S. W. 865; 16 S. W. 132.

¹³ *School Dist. v. Roach*, 41 Kan. 531; s. c. 21 Pac. 597.

upon the duties of his office,¹⁴ but it is not necessary that he should qualify as a teacher.¹⁵

§ 1426. **Change of boundaries of school districts.**—The matter of the change of the boundaries of school districts lies primarily in the discretion of the county superintendent. Of his own motion he may proceed to submit the question of the creation or change of school districts to the electors of the district, and in some states the question of such a change can not be presented to the electors without his consent.¹⁶ But the usual course of procedure is that of presenting to the county superintendent, or in some cases to the county court, a petition signed by a designated proportion of the electors of the district. Upon this petition the court or superintendent, as the case may be, is required to authorize the calling of an election and the submission to the electors of the question of the desirability of changing the boundaries.¹⁷ A change of boundaries will sometimes occur by acquiescence, where for a long period of time the change has been recognized.¹⁸ In the annexation of one district to another the consent of

¹⁴ By the Indiana statutes it is provided that the several county superintendents shall file a bond within thirty days from the date of their appointment, and that their office shall be vacant on the failure to perform this requirement; but it was held that where the statute was ambiguous, and the county superintendent had failed to file his bond within the required time, a strict interpretation of the statute would not be made: *Knox Co. v. Johnson*, 124 Ind. 145; s. c. 24 N. E. 148.

¹⁵ *Davis v. School Dist.*, 81 Mich. 214; s. c. 45 N. W. 989; *Winn v. State* (Miss.), 7 So. 353; *State v. Clary*, 25 Neb. 403; s. c. 41 N. W. 256.

¹⁶ *State v. Independent School Dist.*, 42 Minn. 357; s. c. 44 N. W. 120.

¹⁷ Requisites of petition: *Carrico v. People*, 123 Ill. 198; s. c. 14 N. E. 66; *Allen v. District Tp.*, 70 Iowa 434; s. c. 30 N. E. 684; *Hudspeth v. State*, 55 Ark. 323; s. c. 15 S. W. 184; *School Directors &c. v. School Direc-*

tors &c., 135 Ill. 464; s. c. 28 N. E. 49; *State v. Levertton*, 53 Iowa 483; s. c. 5 N. W. 613; *School Dist. v. School Dist.*, 20 Kan. 76. Requisites of notice in calling elections: *People v. Sisson*, 98 Ill. 335; *Haines v. School Dist.*, 41 Maine 246; *Williamstown G. F. School v. Webb*, 89 Ky. 264; s. c. 12 S. W. 298; *People v. Lansing*, 55 Cal. 393; *Reynolds Land &c. Co. v. McCabe*, 72 Tex. 57; s. c. 12 S. W. 165; *People v. Saele*, 52 Cal. 620; *Bump v. Smith*, 11 N. H. 48; *Wakefield v. Patterson*, 25 Kan. 709; *Donough v. Dewey*, 82 Mich. 309; s. c. 46 N. W. 782; *Dooley v. Muse*, 31 Neb. 424; s. c. 48 N. W. 143; *State v. Compton*, 28 Neb. 485; s. c. 44 N. W. 660; *School Dist. v. School Dist.*, 63 Mich. 51; s. c. 29 N. W. 489.

¹⁸ *City of Winona v. School Dist.*, 40 Minn. 13; s. c. 41 N. W. 539; *Scofield v. Mattoon*, 55 Conn. 144; s. c. 10 Atl. 511; *School Dist. v. Union School Dist.*, 81 Mich. 339; s. c. 45 N. W. 993; *Lathrop v. Town of Sunderland*, 64 Vt. 35; s. c. 23 Atl. 619.

the electors is required;¹⁹ and where there is no express provision to the contrary, each district will remain liable for its debts and retain its property, and there will be no merger of districts until such debts are paid and the affairs of each settled.²⁰

§ 1427. **Presumption of legal organization of district.**—A school district originally legally organized in one town claimed that a portion of the adjoining town had been annexed to and become a legal part of it. There was no record evidence of the fact. But it was declared that the legal annexation of the part in question might be shown by such conduct of the district and of others with regard to it for a period of forty years as to raise a presumption of such annexation.²¹ In a case raising a similar question, the supreme court of Vermont used the following language:—"No records of the town were produced to show either the existence or organization of the district, and if no other proof is admissible for that purpose the defendant has failed in making out his title. The court, however, considered that the existence of a school or highway district may be proved by reputation. If the records of the town have been examined and the organization of such districts does not appear of record, their existence in point of fact may be proved. All that is necessary in such a case is to show that there is a district long known and recognized as such. If there are persons claiming to act as inhabitants of a school district within certain boundaries, and who have for a long time acted as a

¹⁹ *Hewett v. Miller*, 21 Vt. 402; *Sayre v. Tomkins*, 23 Mo. 443.

²⁰ *Needham v. School Dist.*, 62 Vt. 176; s. c. 20 Atl. 198; *School Dist. v. Greenfield*, 64 N. H. 84; s. c. 6 Atl. 484; *State v. Grimshaw (Mo.)*, 1 S. W. 363; *School Dist. v. School Dist.*, 63 Mich. 51; s. c. 29 N. W. 489; *City of Winona v. School Dist.*, 40 Minn. 13; s. c. 41 N. W. 539; *Thompson v. Abbott*, 61 Mo. 176; *Aleppo School District's Appeal*, 96 Pa. St. 76; *Borough of Manchester v. Reserve Tp.*, 4 Pa. St. 35; *McGurn v. Board of Education*, 133 Ill. 122; s. c. 24 N. E. 529; *Parker v. Titcomb*, 82 Maine 180; s. c. 19 Atl. 162; *Gravel Hill School Dist. v. Old Farms School Dist.*, 55 Conn. 244; s. c. 10 Atl. 689; *Scoville v. Mattoon*, 55 Conn. 144; s. c. 10 Atl. 511; *Hancock v. District Tp. of Perry*, 78

Iowa 550; s. c. 43 N. W. 527; *State v. Edison*, 76 Tex. 302; s. c. 13 S. W. 263; *People v. Gartland*, 75 Mich. 143; s. c. 42 N. W. 687. As regards the liability of school districts: *School Dist. v. Greenfield*, 64 N. H. 84; s. c. 6 Atl. 484; *Board &c. v. Board &c.*, 30 W. Va. 424; s. c. 4 S. E. 640; *Ford v. School Dist.*, 121 Pa. St. 543; s. c. 15 Atl. 812; *McKenna v. Kimball*, 145 Mass. 555; s. c. 14 N. E. 789.

²¹ *State v. Bradley*, 54 Conn. 74; s. c. 5 Atl. 861, where it was held that the district claiming the territory in question was bound to show a definite line bounding it. Sundry facts were also considered and adjudged to be sufficient to raise a presumption of the annexation, and to determine the existence and location of such a boundary line.

school district, whether those boundaries are designated by any particular lines or by the farms of the individuals belonging thereto, they may be regarded as belonging to a district regularly organized. Without this kind of proof there would be a failure of evidence as to the existence or organization of most of the highway and school districts in this state."²²

§ 1428. District school boards.—Trustees composing a district school board are chosen from the residents of the district, and are elected by a majority of the electors of the district.²³ They are required before entering upon the duties of their office to subscribe to

²² *Barnes v. Barnes*, 6 Vt. 388. In *Sherwin v. Bugbee*, 16 Vt. 439, it was said:—"It is now well settled in this state, notwithstanding the decisions reported to the contrary, that the mere fact of a school district maintaining its existence and operation for a great number of years, say fifteen, is sufficient evidence of its regular organization." And in *Bassett v. Porter*, 4 Cush. (Mass.) 487, the court said:—"It was by no means necessary to produce a record of the layout of the district or any direct and positive evidence of such layout; the fact that such a district had existed, had been known and recognized and had acted as such in all respects, would be ample evidence from which a jury might well infer or presume that it had a legal origin, though no direct or positive evidence of its origin could be produced. In truth the simple fact of the existence in such a town as Taunton of a school district known and acting as such for many years would lead the mind almost unavoidably and irresistibly to the conclusion that it must have had a legal origin. The longer its existence could be shown the stronger would be the presumption that it was originally duly established and that the direct evidence of its existence had been lost by time or accident. That it would be perfectly competent and proper for the jury to make such

presumption there can be no doubt. Such presumption would be warranted by one of the most familiar and well-settled principles of the law of evidence. It is a matter of every day's practice that a long-continued possession furnishes ground of presumption that such possession was rightfully commenced, and thus a legal title is established to land, or to an easement upon land, though no grant or deed is shown, and no positive evidence of such grant or deed is introduced." See also, *Bow v. Allentown*, 34 N. H. 351; *Dillingham v. Snow*, 5 Mass. 547. The question whether a de facto school district is legally organized and existing can not be tried on quo warranto proceedings against persons claiming to be its officers: *State v. North*, 42 Conn. 79, 89.

²³ In Kansas women are considered electors, and have a right to vote: *Wheeler v. Brady*, 15 Kan. 26; but have no right to vote for state or county superintendents: *Winans v. Williams*, 5 Kan. 227. And in New Jersey aliens are prohibited from voting by the laws of 1851: *State v. Deshler*, 25 N. J. L. 177; *Crawford v. Wilson*, 4 Barb. (N. Y.) 504; *Woodcock v. Bolster*, 35 Vt. 632; *School Dist. v. Town of Bridport*, 63 Vt. 383; s. c. 22 Atl. 570; *State v. Hutchins*, 33 Neb. 335; s. c. 50 N. W. 165; *State v. Wright*, 8 Blackf. (Ind.) 65.

and make an oath pledging themselves to the faithful performance of their duty. A verbal oath was held not to be sufficient.²⁴ They have the management and control of the schools within their district, subject, of course, to the rules and regulations prescribed by the state board of education; and in the discharge of their duty they are allowed a large discretion, so long as they act within the provisions of the statute. A majority of the board is the governing power.²⁵ It is their duty to provide schoolhouses; see that they are properly equipped with teachers and text-books, and located in suitable positions; and to prescribe such rules and regulations as may be incidental and necessary to the local management of the same. They will not be enjoined in the exercise of their discretion in selecting a site for a school building even if their action appears to be unwise and ill-advised.²⁶ But under certain statutes where it has been held that they could not purchase property they have been allowed to lease a site temporarily;²⁷ but the method by which they may acquire real estate is usually prescribed by statute.²⁸ They may also prescribe

²⁴ The provisions of Mansfield's Ark. Dig., § 6206, as amended by the act of Ark., April 4, 1877, requiring school directors, in order to qualify, to subscribe an oath of office and file it with the clerk, are mandatory, and a verbal oath is not sufficient: *School Dist. v. Bennett*, 52 Ark. 511; s. c. 13 S. W. 132.

²⁵ In *Hanover School Tp. v. Gant*, 125 Ind. 557; s. c. 25 N. E. 872, it was held that where two boards of trustees acted in conjunction a majority of the same had the ruling voice.

²⁶ *Witherop v. Titusville School Board*, 7 Pa. Co. Ct. 451. Ind. Rev. Stat. 1881, § 4460 (*Burns R. S.* 1901, § 5939), in its fifth clause confers the broadest powers on boards of school commissioners in cities of more than thirty thousand inhabitants, limited only by the wants of the schools, in the exercise of a reasonable discretion; and the eighth clause, instead of imposing limitations, enlarges the powers. Such a board therefore may contract for the erection of a schoolhouse, and may agree to pay partly in cash and

partly on time, and may give its promissory notes for the deferred payments: *Fatout v. Board &c.*, 102 Ind. 223; s. c. 1 N. E. 389. A school trustee may for good cause discontinue a school in his township; and where it appears that there are other schools being taught therein which the pupils can conveniently attend, and that the average daily attendance at the school in question during the last term was but four pupils, the number not being reduced by sickness or other providential cause, no abuse of the trustee's discretion is shown: *Tufts v. State*, 119 Ind. 232; s. c. 21 N. E. 892.

²⁷ *Millard v. Board &c.*, 19 Ill. App. 48.

²⁸ Under Ind. Rev. Stat. 1881, § 4517 (*Burns R. S.* 1901, § 6006), providing that, whenever a township trustee shall consider it necessary to purchase real estate on which to build a schoolhouse, such trustee may file a petition in the circuit court asking for the appointment of appraisers, etc., the location of schoolhouses, and the time when such real estate shall be acquired,

the hours, tuition, regulate the conduct of the pupils, and similar details.²⁹

§ 1429. Meetings of district school boards.—The district board is called together for special or general meetings. The general meetings are at stated intervals, and it is understood that all matters pertaining to the management and government of the schools are subject to be considered at such meetings. In some cases no regular time is fixed for the holding of such meeting, and when it is found necessary to assemble the board for a special meeting, the notice calling such meeting must state the purpose and object thereof. This question has been considered in many cases turning upon the sufficiency of the notice required and the manner of communicating the same, but it is sufficient to say that the notice must clearly state the purpose and object of the meeting.³⁰

are in the discretion of such trustees: *Braden v. McNutt*, 114 Ind. 214; s. c. 16 N. E. 170.

²⁹ *Starr & C.* Ill. Stat., ch. 122, par. 83, p. 2250, empower the board of education to establish schools of different grades and make regulations for the admission of pupils into the same, to lay off and divide the district into subdistricts, and to apportion pupils to the several schools. They may refuse to admit the children of parents living in a subdistrict provided with a proper school to another school within whose territory they have been sent to board, but whose rooms are already crowded beyond their capacity: *People v. Board &c.*, 26 Ill. App. 476. The language of the Illinois supreme court in *Chase v. Stephenson*, 71 Ill. 385, that "if the schoolhouse was too small it would have been proper for the directors to have enlarged the building," and Ill. Rev. Stat., ch. 122, § 119 et seq., making attendance at school for twelve weeks in the year compulsory, do not deprive the directors of the power to exclude children temporarily from a school on the ground of want of room: *People v. McFall*, 26 Ill. App. 319.

³⁰ Under a call for a school district

meeting "for the purpose of obtaining information" on a certain subject, a committee can not be appointed at the meeting with power to employ counsel to institute legal proceedings at the expense of the district. This is not embraced in the call: *Wright v. North School Dist.*, 53 Conn. 576; s. c. 5 Atl. 708. Notices of school district meetings posted, one on the schoolhouse, another on a building formerly used as a grain building, and a third on a board fastened in or against a wall facing the road, were held to be posted in "public places:" *Seabury v. Howland*, 15 R. I. 446; s. c. 8 Atl. 341. The official certificate of the director of a school district that notice of a certain special school meeting was given by posting up notices, which certificate was received in evidence under a stipulation in which it was recited that such stipulation was for the purpose of using the same as testimony to save taking depositions, was held to be evidence of the due publication of the notice of such meeting: *State v. School Dist.*, 21 Neb. 725; s. c. 33 N. W. 266. Act of Illinois of 1889, p. 296, art. 5, § 19, does not invalidate official actions taken by board of directors at

§ 1430. **Prescribing text-books—Rescission of resolution.**—The school law of Ohio provided for a board of education for each district or city, and these boards were required to hold regular meetings every two weeks, and were empowered to hold such special meetings as they might deem necessary. The statute also provided that “each board of education shall determine the studies to be pursued and the text-books to be used in the schools under their control, and no text-book shall be changed within three years after its adoption without the consent of three-fourths of the members of the board of education given at a regular meeting. The board at a regular meeting accepted a proposition to furnish different text-books from those then in use, and adjourned without any motion to reconsider. At a meeting held two weeks later it was voted by a bare majority to reconsider the vote taken at the previous meeting. But the court held that this action was a nullity. “When the action of the board was consummated [at the first meeting],” said the court, “its power over the subject was exhausted for the period of three years from that date, unless the text-book so adopted should be changed within that time by the consent of three-fourths of the members of the board, given at a regular meeting thereof. The three years’ limitation begins to run from the date of the official adoption of a text-book, and not from the time such book is introduced and brought into actual use in the schools.”³¹ But an opposite conclusion was reached in Nevada under a statute containing slightly different provisions. In this case the board had power “to prescribe and cause to be adopted a uniform series of text-books,” with a qualification that they should not be changed oftener than once in four years. The board had express authority to do at a special session any act that it might do at a regular session. The supreme court of Nebraska decided that the board might, after it had passed a resolution prescribing a certain series of text-books, reconsider its action and rescind such resolution at any time before the adoption of such books by the different school districts.³² And, independent of statu-

a meeting at which all of the directors are present, though such a meeting is not a regular one nor one specially called in the statutory manner: *Lawrence v. Traner*, 136 Ill. 474; s. c. 27 N. E. 197.

³¹ *State v. Board &c.*, 35 Ohio St. 368.

³² *State v. State Board &c.*, 18 Nev. 173; s. c. 1 Pac. 844. Referring to the Ohio case cited in the preceding note the court said:—“There is an

important difference between the Ohio statute and ours. The reason why the Ohio court said the board could not reconsider its former vote or adoption was because the statute prohibited further action for three years after . . . the time of adoption. There is no semblance of such prohibition in ours. Here text-books can not be changed oftener than once in four years. There they could not be changed within three

tory provisions, it would not be competent to rescind at one meeting a resolution taken at a previous meeting where vested rights have been acquired under the first vote; as, for instance, where the publishers of the book adopted and the patrons of the school had acted in reliance upon the rescinded resolution in the sale and purchase of books.³³

§ 1431. Power of board of school trustees to contract.—A board of school trustees have power to contract for things within the scope and contemplation of their authority and power. Such contracts must be incidental and necessary to the ordinary management of the schools, and as a rule must be the result of a resolution of the board authorizing the making of such contract; but the board may delegate to one of its members the power to make a contract, in which case the limitations of his powers must be clearly defined and he must follow them. In many instances this power is regulated by statute,³⁴ but where the trustees receive goods for the benefit of the district and use the same, an implied contract will arise to pay a reasonable price for them. In one instance the court said:—"If supplies are received and

years after their adoption, and the action of the board alone constituted an adoption. Under our law it is the board's duty to prescribe and cause to be adopted a text-book, etc. . . . Before the reconsideration the board did nothing furthering their adoption, which must be done by the districts, and not by the board. . . . The different districts must adopt the books prescribed by the board. But if before they are adopted, the board concludes that it has made an unwise prescription, we know of nothing in the law forbidding a reconsideration. . . . By prescribing a text-book simply the board's duties are only half done. It must also see that the prescribed book is adopted, and thereafter for four years it can not be changed."

³³ *Jones v. Board &c.*, 88 Mich. 371; s. c. 50 N. W. 309. In that case a change of text-books was prohibited except under certain rules, which were not complied with, and the court declined to express an opinion as to whether the reconsideration

could have been upheld if the publishers and patrons had acquired no rights in the interim.

³⁴ Under Ind. Rev. Stat. 1881, §§ 6006, 6007 (*Burns R. S. Ind.* 1901, §§ 8081, 8082), and acts of 1883, p. 114 (repealed by acts of 1889, p. 278), regulating the powers of school trustees to contract debts, a school trustee could not, without an order from the county commissioners, bind the school township by a contract for the erection of a school-house when the township was indebted to an amount exceeding the money in the hands of the trustee and that to be raised by the tax levy for the year: *Middleton v. Greeson*, 106 Ind. 18; s. c. 5 N. E. 755; *Roseboom v. Jefferson School Tp.*, 122 Ind. 377; s. c. 23 N. E. 796. A contract made by two of three directors of a school district at a meeting held at a different time from the time fixed for regular meetings, and of which the third director had no notice, is not binding on the district: *School Dist. v. Bennett*, 52 Ark. 511; s. c. 13 S. W. 132.

used for the benefit of the district under such circumstances and for such length of time as to raise the presumption that it was with the common consent of the district, it will be bound to pay for them."³⁵ But one who contracts with and renders services for a de facto school board, which is not de jure, while the de jure officers are acting as such and performing the duties of their office, can not recover from the school district the value of such services.³⁶ Where a prudential committee de facto, not legally elected but acting in good faith as such, furnished labor and material and board for a teacher, and the district stood by in silence and availed itself of the benefit, the court ruled that there was an implied promise on the part of the district to pay.³⁷ Contracts may be ratified by the board of trustees either by special resolution or by acquiescence.³⁸

§ 1432. Power to require parents to sign and return teacher's report.—The trustees of a school district were expressly authorized by

³⁵ *Andrews v. School Dist.*, 37 Minn. 96; s. c. 33 N. W. 217.

³⁶ *White v. School Dist. (Pa.)*, 8 Atl. 443.

³⁷ *Rowell v. School Dist.*, 59 Vt. 658; s. c. 10 Atl. 754. See also, on the general subject of contracts, *O'Neil v. Battle*, 15 N. Y. S. 818; *Dolan v. Joint School Dist.*, 80 Wis. 155; s. c. 49 N. W. 960; *Kittinger v. Monroe School Tp.*, 3 Ind. App. 411; s. c. 29 N. E. 931; *Hull v. Independent School Dist.*, 82 Iowa 686; s. c. 46 N. W. 1053; 48 N. W. 82; *Sullivan v. School Dist.*, 39 Kan. 347; s. c. 18 Pac. 287; *Litten v. Wright School Tp.*, 127 Ind. 81; s. c. 27 N. E. 329; *Weitz v. Independent Dist.*, 79 Iowa 423; s. c. 44 N. W. 696; *Black v. Cornell*, 30 Mo. App. 641; *Creager v. Wright School Dist.*, 62 Mich. 101; s. c. 28 N. W. 794; *State v. Clark (N. J.)*, 19 Atl. 462; *Andrews v. School Dist.*, 37 Minn. 96; s. c. 33 N. W. 217; *Dubuque & Co. College v. District Tp. & Co.*, 13 Iowa 555; *Huse v. City of Lowell*, 10 Allen (Mass.) 149; *Independent & Co. Dist. v. Kelley*, 55 Iowa 568; s. c. 8 N. W. 426; *Kimball v. School Dist.*, 28 Vt. 8; *Shankland v. Phillips*, 3 Tenn. Ch. 556; *Kingman v. Inhabitants & Co.*, 2 Cush. (Mass.) 426; *School Di-*

rectors v. McBride, 22 Pa. St. 215; *Garland v. Jackson*, 7 La. An. 68; *Weidman v. Board & Co.*, 7 N. Y. S. 309; *Barrett v. School Dist.*, 37 N. W. 445; *Hill v. School Dist.*, 17 Maine 316; *Middleton v. Greeson*, 106 Ind. 18; s. c. 5 N. E. 755; *State v. Tiedmann*, 69 Mo. 515; *Board & Co. v. Chitwood*, 8 Ind. 504; *Ohio v. Treasurer & Co.*, 22 Ohio St. 144; *McCortle v. Bates*, 29 Ohio St. 419; *Hazen v. Lerche*, 47 Mich. 626; s. c. 11 N. W. 413; *McLain v. Snyder Tp. School Dist.*, 12 Pa. St. 204; *Gene-see Tp. & Co. School Dist. v. McDon-ald*, 98 Pa. St. 444; *White v. School Dist. (Pa.)*, 8 Atl. 443; *School Dist. v. Bennett*, 52 Ark. 511; s. c. 13 S. W. 132; *Pennsylvania L. Rod Co. v. Board & Co.*, 20 W. Va. 360; *Sanborn v. School Dist.*, 12 Minn. 17; *Worm-ley v. District Tp.*, 45 Iowa 666; *In-habitants & Co. v. Bailey*, 12 Maine 254; *Wilson v. School Dist.*, 32 N. H. 118; *Harris v. School Dist.*, 23 N. H. 58.

³⁸ *Norris v. School Dist.*, 12 Maine 293; *Everts v. District Tp.*, 77 Iowa 37; s. c. 41 N. W. 478; *Dubuque & Co. College v. District Tp. & Co.*, 13 Iowa 555; *Rowell v. Tunbridge School Dist.*, 59 Vt. 658; s. c. 10 Atl. 754; *Trustees v. Trustees*, 81 Ill. 470.

statute (among other things) "to classify and grade the scholars" in the district, and "to make such rules and regulations as they may think needful for the government of the schools." A rule was adopted to the effect that the teacher keep a record showing the attendance, deportment and standing in scholarship of each pupil, and that at the end of each month the teacher should make from such report a report card and send the same by each pupil to his parent or guardian; the rule further requiring each pupil within three days to return to the teacher this report card, signed by his parent or guardian, and on failure to do so he was to be sent home to get it signed. The parents of a pupil refused to sign the card, and the enforcement of the rule had the effect of excluding him from the school. Upon mandamus to compel the trustees to reinstate him it was contended that the rule was unreasonable and did not concern the education of the pupil or the discipline of the school. But the court took a different view, and upheld the rule upon the ground that in order to classify and grade the scholars it was important to know the progress made by each pupil, and that there was probably no better manner of determining the proficiency of the students than by a correct system of marking by the teachers on their daily recitations.³⁹

§ 1433. Fiduciary capacity.—The office of trustee does not differ in its obligation from that of other trustees in the application of the doctrine that a trustee shall not benefit by his trust, and shall have an eye single to the interests intrusted to his care. The court will watch with the closest scrutiny any attempt on his part to make a profit out

³⁹ *Bourne v. State*, 35 Neb. 1; s. c. 52 N. W. 710. Touching that provision of the rule requiring the report to be signed and returned by the parent the court remarked that "by this method the parent is not only informed of the standing of his child, but the regularity of his attendance." Several cases were distinguished:—*State v. Board &c.*, 63 Wis. 234; s. c. 23 N. W. 102 (where a pupil was suspended for refusing to comply with a regulation of the school to the effect that each scholar when returning to school after recess should bring a stick of wood for the fire. It was decided that the regulation was invalid); *Holman v. School Trustees*, 77 Mich. 605; s. c. 43 N. W. 997 (where it

was held that a rule adopted by the school board, which authorized the suspension of a pupil from school for failure to pay for or replace a window pane broken by him, was without authority and void). To the same effect is *Perkins v. Board &c.*, 56 Iowa 476; s. c. 9 N. W. 356. In *State v. School Dist.*, 31 Neb. 552; s. c. 48 N. W. 393, it was held that while the school trustees of a high school have the power to prescribe what branches shall be taught and what text-books shall be used, the parent has the right to decide what particular branch of studies of those prescribed to be taught shall be pursued by his child, and if the selection is reasonable it must be respected by the board.

of his trust, and will enjoin any such action; for instance, where a single director held a legal title to a portion of a piece of property, and two others held equitable interests in it, they were enjoined from voting at a meeting to purchase the property. It was immaterial, the court said, that the acts were done in good faith.⁴⁰ So also an agreement by a board of directors of an independent school district to employ one of the directors as local superintendent of construction of a school building, and to pay him for such services, is void, and its performance may be restrained by a taxpayer without showing actual fraud.⁴¹

§ 1434. Limitations of power.—School trustees can only act within the powers prescribed by statute, and the liberty of action of executive officers of private corporations is not accorded to such trustees. They are required to act as a board in all matters of importance. Their action must be duly recorded and strictly complied with. They may, however, delegate members of their board to act for them.⁴² Where district trustees, however, act beyond their authority, such acts may be ratified by the taxpayers, either by actual vote of electors authorized to settle a disputed claim,⁴³ or by acquiescence; and it was held

⁴⁰ *Appeal of Witmer (Pa.)*, 15 Atl. 428.

⁴¹ *Weitz v. Independent Dist.*, 78 Iowa 37; s. c. 42 N. W. 577. But the right of the plaintiff to compensation could not be resisted on the ground that the committee of which he was a member stood in the relation of public officers to the district, and could not claim compensation for the discharge of an official duty: *McCaffrey v. School Dist.*, 74 Wis. 100; s. c. 42 N. W. 103.

⁴² The duties devolved upon the members of the school district board or upon the moderator or director by compiled statutes of Nebraska, ch. 79, § 8, can only be performed by those two officers acting in conjunction; any attempt on the part of either of them to perform such duties alone, and without the joint action of the other, is ineffectual and void: *State v. School Dist.*, 22 Neb. 48; s. c. 33 N. W. 480. See also, *Honey Creek School Tp. v.*

Barnes, 119 Ind. 213; s. c. 21 N. E. 747, where it was held that Rev. Stat. Ind. 1881, § 4444 (superseded by § 5920 Burns R. S. Ind. 1901), which provides that trustees of school townships shall take charge of the educational affairs thereof, and shall employ teachers, provide "houses, furniture, apparatus and other articles and educational appliances necessary for the thorough organization and efficient management of said schools," does not authorize a trustee to purchase textbooks for the use of the pupils individually; *Andrews v. School Dist.*, 37 Minn. 96; s. c. 33 N. W. 217; *Boyd v. Mill Creek School Tp.*, 114 Ind. 210; s. c. 16 N. E. 511; *Shakespeare v. Smith*, 77 Cal. 638; s. c. 20 Pac. 294; *School Dist. v. Roach*, 43 Minn. 495; s. c. 45 N. W. 1097; *Cross v. School Directors*, 24 Ill. App. 191.

⁴³ *Everetts v. District Tp. &c.*, 77 Iowa 37; s. c. 41 N. W. 478.

that a finding will not be disturbed after a long period of time, and the action of the board so long acquiesced in would be sustained.⁴⁴

§ 1435. **Personal liability of directors.**—The officers and trustees are required to act in strict conformity to the provisions of statute, and when delegated by the board of trustees to perform any particular duty are given little discretion, and are required to act in accordance with their instructions; as where one was required to collect moneys belonging to the trustees and pay them to a certain officer, or to invest them in a certain manner, he will be required to do so; but his liability will not extend to a case where he relied upon the instructions of the board as he had a right to do, and loss accrued.⁴⁵ But where the treasurer released a mortgage due to a school fund without the order of the board of trustees, he was held liable.⁴⁶ So, also, where money was paid out of the special school fund, and should have been paid out of the general school fund. As a general rule his bond will not be liable unless a gross abuse of authority can be shown,⁴⁷ but where the statute imposes a duty which the trustee fails to perform, his bond will be liable.⁴⁸ Where, also, it is their duty to

⁴⁴ *School Dist. v. Riverside Tp.*, 67 Mich. 404; s. c. 34 N. W. 886.

⁴⁵ *State v. May*, 22 Ark. 445; *Moore v. Fessenbeck*, 88 Ill. 422; *Board &c. v. Baker*, 34 Ill. App. 620; *Longan v. Taylor*, 31 Ill. App. 263; s. c. affirmed in 130 Ill. 412; 22 N. E. 745; *People v. Yeazel*, 84 Ill. 539; *Adams v. State*, 82 Ill. 132.

⁴⁶ *McHarrey v. School Trustees*, 68 Ill. 140; *Tappan v. People*, 67 Ill. 339; *Lovington v. Board &c.*, 99 Ill. 564; *Boone v. People*, 4 Ill. App. 231; *Humiston v. School Trustees*, 7 Ill. App. 122; *Board &c. v. Misenheimer*, 78 Ill. 22; *Trustees v. Shepherd*, 139 Ill. 114; s. c. 28 N. E. 1073.

⁴⁷ *Board &c. v. Baker*, 24 Ill. App. 231; *Finney v. State*, 126 Ind. 577; s. c. 26 N. E. 150; *Mullikin v. State*, 7 Blackf. (Ind.) 77; *Lathrop v. State*, 6 Blackf. (Ind.) 502; *Tuley v. State*, 1 Ind. 500; *State v. Julian*, 93 Ind. 292; *Hadley v. State*, 66 Ind. 271; *District Tp. &c. v. Hardinbrook*, 40 Iowa 130; *Parish School &c. v. Pack-*

wood, 42 La. An. 468; s. c. 7 So. 537; *School Dist. v. Randall*, 7 Cush. (Mass.) 478; *Allen v. Metcalf*, 17 Pick. (Mass.) 208.

⁴⁸ *School Dist. v. Deshon*, 51 Maine 454; *School Dist. v. Tebbetts*, 67 Maine 239; *People v. Wright*, 34 Mich. 371; *School Dist. v. Thelander*, 31 Minn. 333; s. c. 17 N. W. 866; *Soule v. Thelander*, 31 Minn. 227; s. c. 17 N. W. 373. Under the code of civil procedure of New York, §§ 1927, 1929, 1931, providing that trustees of school districts shall be individually liable for judgments recovered against them on contracts made by them in their official capacity, a judgment so recovered may be collected from their individual property, and a writ of mandamus will not be granted to enforce the payment of such a judgment out of funds belonging to a school district in the hands of its trustees: *People v. Abbott*, 107 N. Y. 225; s. c. 13 N. E. 779.

require a bond as security for the payment by the contractors for labor and materials furnished, and the school directors enter into a contract for building a school-house without taking such bond from the contractor, the officers of the board become personally liable to material-men and laborers, but they are entitled to an action for the contract price against the contractor when they have anything that may be due to the contractor on the building.⁴⁹ But the trustees are not liable for the negligent act of servants employed by them, where they have exercised due diligence in procuring such servants.

§ 1436. Meetings of district electors—Elections.—The district school board, as heretofore recited, have power to act in all matters relating to the management and government of the schools; but it is usually the provision of statute that where any matter of importance is to be acted upon it shall be submitted to a vote of the electors of the district; as, for instance, change of boundaries, annexation or separation of a district, levying of a tax for school purposes, the building of a schoolhouse or the change of location thereof, or any extraordinary or unusual expense which either materially affects the residents of the districts or calls for an assessment upon them. Such election is called upon a petition⁵⁰ by a certain number of the free-

⁴⁹ *Wells v. Board &c.*, 78 Mich. 260; s. c. 44 N. W. 267. Session laws of Michigan 1883, act 94, provide, among other things, that school trustees, before entering upon a contract for the erection of any building for school purposes, shall first exact, in addition to the bond for the performance of the work, a bond conditioned for the payment by the contractor, as the same shall become due, of all indebtedness which may accrue to any person on account of labor or material furnished in the erection of such buildings. It was held that, although the statute requires that before accepting the bond the trustees shall first fix the amount in which it shall be given, and pass upon the sufficiency of the sureties, their functions in the matter are ministerial; but for failure to take such bond the trustees were liable in damages at the suit of a material man in-

jured thereby: *Owen v. Hill*, 67 Mich. 43; s. c. 34 N. W. 649.

⁵⁰ Under the general laws of New Hampshire, ch. 88, § 6, providing that if ten voters of a school district are aggrieved by the location of a schoolhouse by the district or school committee they may apply by petition to the county commissioners, who shall hear and determine the location thereof, the jurisdiction of the commissioners extends to towns in which the district system has been abolished, as the towns, under laws 1870, ch. 8, had power to abolish the same at the time such statute was enacted: *Adams v. State*, 65 N. H. 188; s. c. 18 Atl. 321; *State v. Compton*, 28 Neb. 485; s. c. 44 N. W. 660. Under Revised Statutes of Missouri, 1879, § 7023, providing for changes in the lines of old and the formation of new school districts, the petition and notice for the reorganization of the districts

holders of a district; in some instances addressed to the county court; in others to the county superintendent or other officer designated, requesting that a town meeting be called; the same being approved, notice is duly given by advertisement or otherwise as prescribed by statute.⁵¹ Such notice must fully state the purpose of the meeting, as, for instance, that the same is for the purpose of appropriating money to build a schoolhouse or to pay a debt on behalf of the school;⁵² and the failure to comply with the requirements of the no-

of a town must each specify the exact changes proposed in the boundary lines: *School Dist. v. School Dist.*, 94 Mo. 612; s. c. 7 S. W. 285; *Carrico v. People*, 123 Ill. 198; s. c. 14 N. E. 66; *City of Lynn v. County Com'rs*, 148 Mass. 148; s. c. 19 N. E. 171; *Dartmouth Sav. Bank v. School Dist.*, 6 Dak. 332; s. c. 43 N. W. 822.

⁵¹ *Holland v. Davies*, 36 Ark. 446; *Wilson v. Waterville School Dist.*, 44 Conn. 157; *Wright v. North School Dist.*, 53 Conn. 576; s. c. 5 Atl. 708; *Bartlett v. Kingsley*, 15 Conn. 327; *South School Dist. v. Blakslee*, 13 Conn. 227; *Merritt v. Farriss*, 22 Ill. 303; *Aikman v. School Dist.*, 27 Kan. 129; *Hazen v. Lerche*, 47 Mich. 626; s. c. 11 N. W. 413; *School Directors &c. v. Jennings*, 10 Ill. App. 643; *Ballard v. Davis*, 31 Miss. 525, 533; *Downing v. Rugar*, 21 Wend. (N. Y.) 178; *School Dist. v. Bennett*, 52 Ark. 511; s. c. 13 S. W. 132; *Perkins v. Crocker*, 109 Mass. 128; *Little v. Merrill*, 10 Pick. (Mass.) 543; *Perry v. Inhabitants &c.*, 12 Pick. (Mass.) 206; *George v. Inhabitants &c.*, 6 Met. (Mass.) 497; *Alden v. Roundseville*, 7 Met. (Mass.) 218; *Kingsbury v. Center School Dist.*, 12 Met. (Mass.) 99; *Stone v. Inhabitants &c.*, 8 Cush. (Mass.) 592; *Third School Dist. v. Atherton*, 12 Met. (Mass.) 105; *Hayward v. Inhabitants &c.*, 2 Cush. (Mass.) 419; *Holbrook v. Faulkner*, 55 N. H. 311; *Rideout v. Inhabitants &c.*, 1 Allen (Mass.) 232; *School Dist. v. Lord*, 44 Maine 374; *Soper v. Inhabitants*

&c., 28 Maine 193; *Fletcher v. Inhabitants &c.*, 20 Maine 439; *Moor v. Newfield*, 4 Maine 44; *Leavitt v. Eastman*, 77 Maine 117; *Passage v. Board &c.*, 19 Mich. 330; *Andress v. Board &c.*, 19 Mich. 332; *Sturm v. School Dist.*, 45 Minn. 88; s. c. 47 N. W. 462; *State v. City of St. Anthony*, 10 Minn. 433; *People v. Peters*, 4 Neb. 254; *State v. School Dist.*, 21 Neb. 725; s. c. 33 N. W. 266; *School Dist. v. Carr*, 55 N. H. 452; *Denniston v. School Dist.*, 17 N. H. 492; *Chapin v. School Dist.*, 30 N. H. 25; *Harris v. School Dist.*, 28 N. H. 58; *Giles v. School Dist.*, 31 N. H. 304; *Weare v. Sawyer*, 44 N. H. 198; *Pickering v. De Rochemont*, 66 N. H. 377; s. c. 23 Atl. 88; *State v. Hurff*, 38 N. J. L. 310; *State v. Trustees &c.*, 43 N. J. L. 358; *State v. Browning*, 28 N. J. L. 556; *Ring v. Grout*, 7 Wend. (N. Y.) 341; *Marchant v. Langworthy*, 6 Hill (N. Y.) 646; *People v. Board &c.*, 1 N. Y. S. 593; s. c. 15 N. Y. St. 803; *Clearfield Ind. School Dist.*, 79 Pa. St. 419; *Howland v. School Dist.*, 15 R. I. 184; s. c. 8 Atl. 337; *Seabury v. Howland*, 15 R. I. 446; s. c. 8 Atl. 341; *Holt's Appeal*, 5 R. I. 603; *Sherwin v. Bugbee*, 17 Vt. 337; *Brady v. Dickenson*, 48 Vt. 599; *Mason v. School Dist.*, 20 Vt. 487; *Hunt v. School Dist.*, 14 Vt. 300; *Ovitt v. Chase*, 37 Vt. 196; *Weeks v. Batchelder*, 41 Vt. 317.

⁵² *People v. Board &c.*, 1 N. Y. S. 593; s. c. 15 N. Y. St. 803; *Witherop v. Titusville School Board*, 7 Pa. Co. Ct. Rep. 451.

tice can not be cured by the consent of the majority of the citizens.⁵³ At such meeting a majority vote governs, but this does not mean a majority of the whole of the voters in the district, but a majority of those voting.⁵⁴ This vote is certified to by the district clerk and becomes operative thereafter.⁵⁵

§ 1437. Term of school officer—Holding over.—The term of every office is provided for by statutory enactment, but such enactment must not be in conflict with the constitutional provision; as, for instance, where the term of office is limited by the constitution to four years, a statute creating an office for five years was held to be void.⁵⁶ The appointee to a vacancy caused by death or otherwise holds only for the unexpired term,⁵⁷ but such a vacancy does not occur where an ineligible candidate is elected. The election in such a case is void, and the former incumbent holds over.⁵⁸ Where an office is filled and acts bona fide performed by a person, though his appointment or election is in some respects irregular, the general rule is to consider such incumbent a *de facto* officer until the office is regularly filled.⁵⁹

⁵³ *Elder v. Territory*, 3 Wash. T. 438; s. c. 19 Pac. 29; Am. Dig. 1888, p. 1227, § 7.

⁵⁴ *Gentle v. Board &c.*, 73 Mich. 40; s. c. 40 N. W. 928; *Smith v. Proctor*, 6 N. Y. S. 212; s. c. 53 Hun (N. Y.) 143; *State v. Echols*, 41 Kan. 1; s. c. 20 Pac. 523; *Briggs v. Borden*, 71 Mich. 87; s. c. 38 N. W. 712; *Point Pleasant Land Co. v. School District*, 47 N. J. L. 235.

⁵⁵ *Appeal of Luburg (Pa.)*, 17 Atl. 245; s. c. 23 W. N. C. (Pa.) 454; *Board of Education v. Roehr*, 23 Ill. App. 629; *Capital Bank v. School Dist.*, 6 Dak. 248; s. c. 42 N. W. 774; *Fitzpatrick v. Board &c.*, 87 Ky. 132; s. c. 7 S. W. 896; *State v. Hansen*, 20 Nev. 401; s. c. 22 Pac. 753; *Baldwin v. Nickerson*, 3 Wyo. 208; s. c. 19 Pac. 439; *State v. Vreeland*, 79 Iowa 466; s. c. 44 N. W. 709; *Perryman v. Bethune*, 89 Mo. 158; s. c. 1 S. W. 231; *People v. English*, 139 Ill. 622; s. c. 29 N. E. 678; *Irvin v. Gregory*, 86 Ga. 605; s. c. 13 S. E. 120; *State v. Trustees &c.*, 49 N. J. L. 607; s. c. 10 Atl. 191; *Graves v. Jasper School Tp.*, 2 S. Dak. 414; s. c. 50 N. W. 904; *Willard v. Pike*, 59 Vt. 202; s.

c. 9 Atl. 907; *People v. Stone*, 78 Mich. 635; s. c. 44 N. W. 333; *Fractional School Dist. v. Boards of Inspectors*, 63 Mich. 611; s. c. 30 N. W. 198; *State v. Clark*, 52 N. J. L. 291; s. c. 19 Atl. 462.

⁵⁶ *State v. Harris*, 19 Nev. 222; s. c. 8 Pac. 462; *Pendleton v. Miller*, 82 Va. 390. Act of Mississippi of March 7, 1888, which provides for the election of county superintendents of education in part only of the counties of the state, does not thereby conflict with the constitution of Mississippi, art. 8, § 1, requiring "a uniform system of public schools:" *Wynn v. State*, 67 Miss. 312; s. c. 7 So. 353.

⁵⁷ *People v. Stone*, 78 Mich. 635; s. c. 44 N. W. 333.

⁵⁸ *Howard v. Cornett*, 8 Ky. L. 52; s. c. 1 S. W. 1.

⁵⁹ *School Dist. v. Root*, 61 Mich. 373; s. c. 28 N. W. 132; *People v. Board &c.*, 1 N. Y. S. 743; s. c. 48 Hun (N. Y.) 608; *Cleveland v. Amy*, 88 Mich. 374; s. c. 50 N. W. 293; *Pettigrew v. Bell*, 34 S. C. 104; s. c. 12 S. E. 1023; *Barrett v. Sayer*, 12 N. Y. S. 170; *State v. Horton*, 19 Nev.

§ 1438. **School fund.**—The school fund is an endowment set apart for educational purposes. In many of the states it has been derived from federal grants of land, and increased by the operation of state statutes, whereby certain annual revenues go to this end. The laws regulating the care and custody of the fund are jealous of its preservation intact, and provide as a primary exaction that the principal shall never be decreased or diminished, and that only the revenue shall be used. In many of the states the donations of land made for the benefit of this fund are of vast extent and value, and form the basis of a permanent endowment for educational purposes.⁶⁰ The distribution of the fund among the schools has occasioned some conflict, but the general rule is that it is regulated by the number of children in each district.⁶¹ The treasurer of the state is the custodian of the fund, and has the duty of investing the same. The statute usually limits such investments to a certain class of securities. The holding and handling of the fund is regarded as a trust, and regulated by rules of the court of equity relating thereto.⁶²

§ 1439. **The same subject continued—Mandamus to state comptroller.**—In Connecticut it is made the duty of the state comptroller by general statute to distribute annually among the several towns a certain sum for every person of school age, together with a proportionate share of the income of the school fund. Upon application for a writ of mandamus to compel him to perform this duty, it was urged in opposition that the official action which the writ required him to perform was included in and was the exercise of the powers and duties vested in and imposed upon him as an independent officer of the

199; s. c. 8 Pac. 171; *State v. Lane*, 16 R. I. 620; s. c. 18 Atl. 1035.

⁶⁰ *Board &c. v. Thomas*, 12 Ky. L. 832; s. c. 15 S. W. 670.

⁶¹ *School Dist. v. Twitchell*, 63 N. H. 11; *School Dist. v. Town of Bridport*, 63 Vt. 383; s. c. 22 Atl. 570; *Towle v. Brown*, 110 Ind. 599; s. c. 10 N. E. 628; *School Dist. v. Prentiss*, 66 N. H. 145; s. c. 19 Atl. 1090; *Yaggy v. District Tp. &c.*, 80 Iowa 121; s. c. 45 N. W. 553; *Cooke v. School Dist.*, 12 Colo. 453; s. c. 21 Pac. 496, 719; *Montgomery Co. v. Auchley*, 92 Mo. 126; s. c. 4 S. W. 425; *Moiles v. Watson*, 60 Mich. 415; s. c. 27 N. W. 553.

⁶² *State v. Levi*, 99 Ind. 77; *Stockwell v. State*, 101 Ind. 1; *Edwards*

v. Trustees &c., 30 Ill. App. 528; *Snodgrass v. Morris*, 123 Ind. 425; s. c. 24 N. E. 151. Property in school fund: *Case v. Blood*, 71 Iowa 632; s. c. 33 N. W. 144. How money is drawn from the fund: *State v. Bloom*, 19 Neb. 562; s. c. 27 N. W. 638; *Goose River Bank v. Willard Lake School Tp.*, 1 N. Dak. 26; s. c. 44 N. W. 1002; *In re McGraw's Estate*, 111 N. Y. 66; s. c. 19 N. E. 233; *State v. Board &c.*, 17 Nev. 96; s. c. 28 Pac. 122; *Montgomery Co. v. Auchley*, 103 Mo. 492; s. c. 15 S. W. 626; *Board &c. v. School Dist.*, 81 Wis. 543; s. c. 51 N. W. 874; *Merritt v. School Dist.*, 54 Ark. 468; s. c. 16 S. W. 287; *Porter v. State*, 78 Tex. 591; s. c. 14 S. W. 794.

executive department by the constitution, which could not lawfully be enforced by writ of mandamus. The court said that if it was intended to assert that he could not be controlled by mandamus in the exercise of merely discretionary duties the objection was sound; but the fact that he derived his powers from the constitution rather than from the statutes was not a tenable defense. "It is the nature of the thing to be done," said Andrews, C. J., "by which the propriety or the impropriety of issuing a mandamus is to be determined, and not the office of the person to whom the writ is directed, nor the source from which he derives his power. Subject, possibly, to some exceptions, we think the law to be this: That whenever any public officer, however humble, is intrusted with power, in the exercise of which he may use discretion in respect to such exercise, he can not be controlled by mandamus; and that whenever any public officer, however high, is commanded by the constitution, or by any statute, to perform a ministerial act, the performance of such act may be compelled by mandamus."⁶³ The court held that the constitutional duty of the comptroller "to adjust and settle all public accounts and demands except grants and orders of the general assembly" imposed a ministerial duty in the case in hand, to enforce performance of which mandamus was the appropriate proceeding.⁶⁴

⁶³ *State v. Staub*, 61 Conn. 553; s. c. 23 Atl. 924; citing High Extr. Rem., §§ 24-34.

⁶⁴ *State v. Staub*, *supra*, where the court said:—"A ministerial duty, the performance of which in proper cases may be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law;" Chief Justice Chase, in *Mississippi v. Johnson*, 4 Wall. 475. 'A ministerial act is one which a person performs in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his judgment upon the propriety of the act being done;' *American & C. Ins. Co. v. Fyler*, 60 Conn. 448; s. c. 22 Atl. 494. . . . The meaning of the terms 'adjust and settle' can be better understood if one bear in mind that some accounts and demands are

liquidated and others are unliquidated. A liquidated account is one the amount of which is agreed upon by the parties or is fixed by operation of law: *Hargroves v. Cooke*, 15 Ga. 321; *Bull v. Bull*, 43 Conn. 455, 469; *Warren v. Skinner*, 20 Conn. 559, 562. The word 'settle' when applied to a liquidated account or demand means to pay it: *Pinkerton v. Bailey*, 8 Wend. (N. Y.) 600; *Stilwell v. Coope*, 4 Denio (N. Y.) 225. The word 'adjust' when used in reference to a liquidated claim has the same meaning though perhaps not quite so clearly. The word 'settle' when applied to an unliquidated claim or demand means its mutual adjustment between the parties and an agreement upon the balance: *Baxter v. State*, 9 Wis. 38, 44. . . . We have no occasion to discuss unliquidated claims. It may well be that as to such claims the comptroller exercises a discretion. But when a claim is liquidated in

§ 1440. **School taxes.**—As a general rule the schools are supported by a local school tax on the property holders of each school district. A state tax is also levied in some of the states for educational purposes. This is usually made in the general tax levy, but sometimes per capita on every male resident.⁶⁵

§ 1441. **School lands.**—The title to school lands is held by the state. It may also be taken by a district for the use of the state or school fund.⁶⁶ And the district trustees are proper parties to bring suit with reference thereto in the name of the state.⁶⁷ As to sales of such lands the requirements are strict, and are made with a view to throwing around such sales every safeguard to prevent fraud. The usual requirement is that such sales must be made at auction to the highest bidder. Sales on contract, payments to be made from time to time, are not uncommon.⁶⁸ The presumption is that a sale of school lands is regular.⁶⁹ And title in the schools will not be affected by a judgment against trustees individually relating to school lands.⁷⁰ Where it is deemed desirable or necessary by the board of trustees to locate a school on certain lands, condemnation proceedings may be had to acquire the same, and the question of location is in the discretion of the school trustees.⁷¹ Foreclosure proceedings are had in the

the sense that its amount is fixed by operation of law, it is difficult to see how the comptroller can use any discretion in respect to it. When the law fixes definitely the amount of any claim, and also fixes the manner and time of its payment and the person to whom it is due, and the claim is presented to the comptroller by that person, and at that time, he has in respect to it 'no discretion to exercise, no judgment to use, and no duty to perform,' but to draw his order in payment of it."

⁶⁵ As to levy of tax: *Bordeaux v. Meridan Land &c. Co.*, 67 Miss. 304; s. c. 7 So. 286; *Cowart v. Foxworthy*, 67 Miss. 322; s. c. 7 So. 350; *State v. Clark*, 52 N. J. L. 291; s. c. 19 Atl. 462; *People v. Mayor &c.*, 130 Ill. 406; s. c. 22 N. E. 833; *Lawrence v. Traner*, 136 Ill. 474; s. c. 27 N. E. 197. Constitutionality of tax: *Macklin v. Trustees &c.*, 88 Ky. 592; s. c. 11 Ky. L. 75; 11 S. W. 657. As to

purposes for which tax may be levied: *Torrey v. Willard*, 8 N. Y. S. 392; s. c. 55 Hun (N. Y.) 78; *Zartman v. State*, 109 Ind. 360; s. c. 10 N. E. 94; *School Dist. v. Wickersham*, 34 Mo. App. 337; *Griggs v. St. Croix Co.*, 27 Fed. 333; *Wilcox v. Engle Tp.*, 81 Mich. 271; s. c. 45 N. W. 987.

⁶⁶ *People v. Roche*, 124 Ill. 9; s. c. 14 N. E. 701.

⁶⁷ *Widner v. State*, 49 Ark. 172; s. c. 4 S. W. 657; *School Dist. v. Driver*, 50 Ark. 346; s. c. 7 S. W. 387; *State v. Benton*, 29 Neb. 460; s. c. 45 N. W. 794.

⁶⁸ *McPheeters v. Wright*, 110 Ind. 519; s. c. 10 N. E. 634; *Barker v. Torrey*, 69 Tex. 7; s. c. 4 S. W. 646.

⁶⁹ *McPheeters v. Wright*, *supra*.

⁷⁰ *Lockett v. Buckman*, 8 Ky. L. 255; s. c. 1 S. W. 391.

⁷¹ *Braden v. McNutt*, 114 Ind. 214; s. c. 16 N. E. 170; *Howland v. School Dist.*, 15 R. I. 184; s. c. 8 Atl. 337.

usual way, where default is made in payment of interest or instalment of principal, on mortgages or contracts of sale, due the school fund.^{71a}

§ 1442. School bonds.—School bonds are obligations of indebtedness bearing interest, which are issued for the purpose of raising money to make permanent improvements or provide funds for school purposes. The usefulness of such a plan is manifest, for the reason that oftentimes in starting a school district, and undertaking the erection of the necessary school buildings, the burden would be too great on the taxpayers should the whole amount be required to be paid in one year. To avoid this a series of bonds are issued bearing interest and redeemable either at the end of a given period or certain amounts of the principal and interest each year, and to meet this charge an annual tax is levied which is not large enough to be a burden upon the people.⁷²

§ 1443. School-teacher — Appointment — Contract — Removal.—The power to appoint school-teachers is in the hands of the district school boards, subject to such rules and regulations as may be pre-

^{71a} Board &c. v. State, 122 Ind. 333; 24 N. E. 347 (where it was held that when a county has loaned out part of its school fund on a mortgage, and, on default of the mortgagor, paid the interest, and at the foreclosure sale of the mortgaged premises the property was bid in for account of the school fund, and at a subsequent sale more than enough was realized to pay the principal and interest, the county is entitled to be reimbursed for the interest paid); Clark v. State, 109 Ind. 388; s. c. 10 N. E. 125; State v. Graham, 21 Neb. 329; s. c. 32 N. W. 142 (where it was held that the mortgagor was required to pay interest annually on mortgages to the school fund or purchase of school lands, and that a long discontinuance of such payment would raise a presumption of forfeiture. As regards notice and title and lease: Martin v. Brown, 62 Tex. 485; Anderson v. Prairie School Tp., 1 Ind. App. 34; s. c. 27 N. E. 439; Robinson v. Hague, 63 Iowa 273; s. c. 19 N. W. 208; Peck v. Louisville &c. R. Co.,

101 Ind. 366; School Dist. &c. v. Everett, 52 Mich. 314; s. c. 17 N. W. 926; Bres v. Louviere, 37 La. An. 736. Fraudulent conveyances: Pulliam v. Runnels Co., 79 Tex. 363; s. c. 15 S. W. 277. Administration of bequest: Myers v. School Trustees, 21 Ill. App. 223.

⁷² St. Joseph School Board v. Gaylord, 86 Mo. 401; Rogers v. Trustees &c., 11 Ky. L. 934; s. c. 13 S. W. 587. In order that such an issue may be valid a vote of the electors of the district to be charged must be had: State v. Benton, 29 Neb. 460; s. c. 45 N. W. 794. But where the law does not authorize the people of a school district to vote that bonds be issued for a specific purpose, such a vote does not make the bonds valid, even in the hands of innocent purchasers: Ashuelot Nat'l Bank v. School Dist., 41 Fed. 514. So also, where the issue was for a purpose not authorized by statute, they are void: State v. County Com'rs, 31 Neb. 465; s. c. 48 N. W. 146; Burk v. Galveston Co., 76 Tex. 267; s. c. 13 S. W. 455.

scribed by the board of education, as to the qualifications of teachers, term of office, compensation and contract of employment,⁷³ contract in writing and salary.⁷⁴ A teacher may be removed for cause independently of the terms of the contract of employment.⁷⁵

⁷³ *Board &c. v. Arnold*, 112 Ill. 11. A majority vote of the district board is required for the appointment of a teacher and an entry on the minutes of the board to this effect: *Cleveland v. Amy*, 88 Mich. 374; s. c. 50 N. W. 293; *Dryberry School Dist. v. Mercer*, 115 Pa. St. 559; s. c. 9 Atl. 64; *State v. Grosvenor*, 19 Neb. 494; s. c. 27 N. W. 728. The contract with the teacher is regulated by the rules of law concerning contracts of employment, excepting the clause that the same may be terminated by the board at any time. When this is the case no notice is necessary: *Dunavon v. Board &c.*, 47 Hun (N. Y.) 13; *Weidman v. Board &c.*, 7 N. Y. S. 309; s. c. 54 Hun (N. Y.) 634. When employment without authority,—see *State v. Bateman*, 96 N. C. 5; s. c. 1 S. E. 538.

⁷⁴ *Faulk v. McCartney*, 42 Kan. 695; s. c. 22 Pac. 712; *Armstrong v. School Dist.*, 28 Mo. App. 169; *Holloway v. Ogden School Dist.*, 62 Mich. 153; s. c. 28 N. W. 764; *People v. Coffey*, 16 N. Y. S. 501; s. c. 6 Hun (N. Y.) 86; *School Town of Milford v. Powner*, 126 Ind. 528; s. c. 26 N. E. 484; *Patterson v. Mayor &c.*, 83 Ga. 606; s. c. 11 S. E. 399; *Cobb v. School Dist.*, 63 Vt. 647; s. c. 21 Atl. 957; *School Town of Milford v. Zeigler*, 1 Ind. App. 138; s. c. 27 N. E. 303; *Caviel v. Coleman*, 72 Tex. 550; s. c. 10 S. W. 679; *McGuinness v. School Dist.*, 39 Minn. 499; s. c. 41 N. W. 103; *De Wolf v. Watterson*, 35 Hun (N. Y.) 111; *Lee v. School Dist.*, 71 Mich. 361; s. c. 38 N. W. 867. In an action for compensation by one employed by a director as superintendent, it is error to exclude evidence that the

board of trustees, which alone has authority to make a contract for such employment, knew of the services in that behalf and accepted them: *Davis v. School Dist.*, 81 Mich. 214; s. c. 45 N. W. 989. Collection of salary: *Caldwell Co. v. Harbert*, 68 Tex. 321; s. c. 4 S. W. 607; *McCauley v. School Dist.*, 133 Pa. St. 493; s. c. 19 Atl. 410; 25 W. N. C. (Pa.) 519. Where school is discontinued district relieved from payment of salary: *Goodyear v. School Dist.*, 17 Or. 517; s. c. 21 Pac. 664; *Gilroy v. School Dist.*, 17 Or. 522; s. c. 21 Pac. 665. Where school-house destroyed by fire: *School Directors v. Crews*, 23 Ill. App. 367. Want of sufficient funds to pay does not avoid contract or the closing of a school: *Rudy v. School Dist.*, 30 Mo. App. 113. And legal holidays do not count against a teacher: *Holloway v. Ogden School Dist.*, 62 Mich. 153; s. c. 28 N. W. 764. Qualifications of teachers: *Hotz v. School Dist.*, 1 Colo. App. 40; s. c. 27 Pac. 15; *Goose River Bank v. Willow Lake School Tp.*, 1 N. Dak. 26; s. c. 44 N. W. 1002; *Smith v. School Dist.*, 69 Mich. 589; s. c. 37 N. W. 567; *Devoe v. School Dist.*, 77 Mich. 610; s. c. 43 N. W. 1062. Under Minnesota constitution, art. 7, § 8, providing that a woman shall be eligible to hold "any office pertaining solely to the management of schools," it was held that a woman could hold the office of county superintendent of schools: *State v. Gorton*, 33 Minn. 345; s. c. 23 N. W. 529.

⁷⁵ Supervisors may be removed for "omission of duty," and a superintendent who has neglected his duty through intoxication, and without giving him a hearing: *People v.*

§ 1444. **Pupils.**—The children of resident parents of a school district are entitled to all the privileges and benefits of the public schools. And where a child's father has deserted it, and the mother is living in another district where she is unable to keep the child, but has found a home for the child in this district, the court decided that the child was entitled to the school privileges as if its parents were residents.⁷⁶ But the children of one district may attend the schools of another upon the payment of a tuition fee. This fee is usually fixed at the average cost to the district of each child attending the school.⁷⁷ The "legal school age" is under twenty-one years.⁷⁸ Where a child has graduated from one department it is ineligible to that department again.⁷⁹ Teachers have the power to prescribe rules and regulations for the government of the pupils within the school, and

Mays, 17 Ill. App. 361. So also, in *Tingley v. Vaughn*, 17 Ill. App. 347, for immoral conduct. But in *Armstrong v. School Dist.*, 19 Mo. App. 462, it was held that the board of school directors could not remove a teacher for immoral conduct, the power being in the county commissioners. But no personal liability attaches to the trustees' acts in discharging a teacher unless malice can be clearly proven: *Adams v. Thomas*, 11 Ky. L. 701; s. c. 12 S. W. 940. Misconduct: *School Dist. v. Maury*, 53 Ark. 471; s. c. 14 S. W. 669; *Kennedy v. Board &c.*, 82 Cal. 483; s. c. 22 Pac. 1042; *School Directors v. Ewington*, 26 Ill. App. 379. But a teacher is not discharged by abolishing the department in which he is engaged, or removing him to another and lower grade: *School Town of Milford v. Zeigler*, 1 Ind. App. 138; s. c. 27 N. E. 303; *Kennedy v. Board &c.*, 82 Cal. 483; s. c. 22 Pac. 1042. But in many states the board of trustees have power to discharge teachers without a hearing or alleging a cause: *Swartwood v. Walbridge*, 10 N. Y. S. 862; *McLellan v. Board &c.*, 15 Mo. App. 362; *People v. New York Board of Ed.*, 52 N. Y. Super. 520; *Hull v. Independent*

School Dist., 82 Iowa 686; s. c. 46 N. W. 1053; 48 N. W. 82.

⁷⁶ *State v. Thayer*, 74 Wis. 48; s. c. 41 N. W. 1014; *Yale v. West Middle School Dist.*, 59 Conn. 489; s. c. 22 Atl. 295.

⁷⁷ *Binde v. Klinge*, 30 Mo. App. 285 (where it was decided "that a minor who is neither an orphan nor an apprentice, and whose parents reside without the school district, is not entitled to attend school without payment of tuition fees, although having a home more or less permanent within the district"); *Irvin v. Gregory*, 86 Ga. 605; s. c. 13 S. E. 120. Referring to nonresident pupils it was said in the case last cited that such pupils can not be received at a less rate per scholar than the inhabitants of the town pay by taxation for their children, nor can they be received at all to the exclusion of resident children. For meaning of "pro rata cost of tuition," see *State v. Hamilton*, 69 Miss. 116; s. c. 10 So. 57. Admission on payment of tuition: *Rogers v. Trustees &c.*, 11 Ky. L. 934; s. c. 13 S. W. 587.

⁷⁸ *Inhabitants &c. v. Inhabitants &c.*, 139 Mass. 372; s. c. 31 N. E. 732.

⁷⁹ *People v. Board &c.*, 4 N. Y. S. 102.

to preserve order and discipline;⁸⁰ but such regulations must be reasonable, and not reaching beyond the limits of the school.⁸¹ And a teacher may punish a pupil in a reasonable manner.⁸²

§ 1445. **Race question in schools.**—The question as to a discrimination between children as to color has been a subject to which legislators and the courts have given much consideration. The theory that the schools are based upon the principle that they are free institutions and intended for the equal benefit of all the people without regard to race or color has been the guiding motive of all of these discussions. In the earlier cases the tendency was to apply the rule strictly, leaning towards an effort to break down all barriers between the races, and not to permit any separation or grading of the schools; while the modern doctrine accepts the previous theory, but evades the question by holding that it is not a violation of the freedom of the school or the equality of the privileges thereof to classify the scholars according to a standard which shall be found expedient and necessary by those controlling the government of the schools. The supreme court of the United States,⁸³ in reviewing the question in a case arising in Ohio, declared "that it worked no substantial inequality of school privileges between the children of the two classes in the locality of the parties; that equality of rights does not involve the necessity of having white and colored persons in the same school, any more than it does that of taking children of both sexes in the same school, or that different grades of scholars must be kept in the same school; and that any classification which preserves substantially equal school privileges is not prohibited by either the state or federal constitution, nor would it contravene the provisions of either."⁸⁴

⁸⁰ *Deskins v. Gose*, 85 Mo. 485; s. c. 55 Am. R. 387.

⁸¹ A regulation that a scholar could not go to a social party was held void: *State v. Osborne*, 32 Mo. App. 536. Defacing school property: *Holman v. Trustees &c.*, 77 Mich. 605; s. c. 43 N. W. 996. Insubordination: *State v. School Dist.*, 31 Neb. 552; s. c. 48 N. W. 393.

⁸² What is reasonable punishment is a question of fact for the jury, and past offenses may be considered in inflicting the punishment, where they aggravate the present one, and show habitual disobedience: *Sheehan v. Sturges*, 53 Conn. 481; s. c. 2 Atl. 841. A teacher has a right to

use force in taking away a pistol from a pupil: *Metcalf v. State*, 21 Tex. App. 174; s. c. 17 S. W. 174. But where the teacher oversteps the limit of reasonable punishment, malice will be inferred: *Boyd v. State*, 88 Ala. 169; s. c. 7 So. 268.

⁸³ *Hall v. De Cuir*, 95 U. S. 485.

⁸⁴ *State v. McCann*, 21 Ohio St. 198; *Irvin v. Gregory*, 86 Ga. 605; s. c. 13 S. E. 120; *State v. Union Dist. School Trustees*, 46 N. J. L. 76; *Board &c. v. State*, 45 Ohio St. 555; s. c. 16 N. E. 373; *Tape v. Hurlley*, 66 Cal. 473; s. c. 6 Pac. 129; *Halls Free School Trustees v. Horne*, 80 Va. 470; *In re Malone*, 21 S. C. 435; *City of Jacksonville v.*

§ 1446. **Bible in schools.**—Some of the state statutes expressly provide that the school funds shall not be used for sectarian or religious purposes. And the constitutional provisions are uniform that taxation shall not be had for religious purposes. The courts in interpreting these provisions have uniformly maintained a strict rule. For instance, as regards the reading of the Bible in schools, a wide discussion has been had, and in some states it has been held unconstitutional to use the Bible at all in the school, whilst in others the reading of the text without comment has been permitted.⁸⁵

Akers, 11 Ill. App. 393; Claybrook v. City of Owensboro, 23 Fed. 634; Knox v. Board &c., 45 Kan. 152, 156; s. c. 25 Pac. 616; Board &c. v. Tinnon, 26 Kan. 1; People v. Board &c., 101 Ill. 308; Maddox v. Neal, 45 Ark. 121; Ward v. Flood, 48 Cal. 36; Wyingler v. Crookshank, 82 Cal. 588; s. c. 23 Pac. 54; Reid v. Mayor &c., 80 Ga. 755; s. c. 6 S. E. 602; Chase v. Stephenson, 71 Ill. 383; Smith v. Directors &c., 40 Iowa 518; Dove v. Independent School Dist., 41 Iowa 689; Clark v. Board &c., 24 Iowa 266; People v. Board &c., 18 Mich. 400; State v. Duffy, 7 Nev. 342; Stewart v. Southard, 17 Ohio 402; Lane v. Baker, 12 Ohio 237; Williams v. Directors &c., Wright (Ohio) 579; Commonwealth v. Williamson, 10 Phila. (Pa.) 490; Cory v. Carter, 48 Ind. 327; Bertonmeau v. Directors &c., 3 Woods 177; County Court v. Robinson, 27 Ark. 116; People v. Easton, 13 Abb. Pr. (N. S.) (N. Y.) 159, 164, 165; Puitt v. Commissioners, 94 N. C. 709; Van Camp v. Board &c., 9 Ohio St. 406; Draper v. Cambridge, 20 Ind. 268; Dallas v. Fostick, 40 How. Pr. (N. Y.) 249; State v. City of Cincinnati, 19 Ohio 178; Lebew v. Brummel, 103 Mo. 546; s. c. 15 S. W. 765; Elsberry v. Seay, 83 Ala. 614; s. c. 3 So. 804; McMillan v. School Com'rs, 107 N. C. 609; s. c. 12 S. E. 330; People v. McFall, 26 Ill. App. 319; State v. Gray, 93 Ind. 303; State v. Grubb, 85 Ind. 213; Kaine v. Commonwealth, 101 Pa. St.

490; Roberts v. City of Boston, 5 Cush. (Mass.) 198.

⁸⁵ State v. District Board &c., 76 Wis. 177; s. c. 44 N. W. 967, was a petition by a resident and taxpayer of a city for a writ of mandamus to compel the discontinuance of the practice of reading the Bible in the public schools therein, averring that the residents of the city who are taxed for the support of the schools are equally entitled to the benefits thereof, by having their children instructed therein according to law, and that the reading complained of was contrary to the rights of conscience and in violation of law. The whole Bible, without exception, having been designated as a text-book for use in schools, and it being claimed by the school board that the whole contents thereof might lawfully be read in such school, if the teacher so elected, the Bible was to be regarded as a whole in determining whether such reading was sectarian instruction; and it was immaterial that the only portion thereof thus far read in such schools was not sectarian. The use of any version of the Bible as a text-book in the public schools and the stated reading thereof in such schools by the teacher without restriction, though unaccompanied by any comment, was held to have a tendency to inculcate sectarian ideas within the meaning of Wisconsin laws of 1883, § 3, ch. 251, and was "sectarian

§ 1447. **Actions and defenses.**—The school districts in their corporate capacity have the power to sue and defend suits brought against them, subject to a limitation in some states that one district can not sue another, and limitations as to the times of bringing suit.⁸⁶ Claims against a school district are assignable,⁸⁷ but when suit is brought the parties to the record should also be changed.⁸⁸ The general rules of pleading apply,⁸⁹ and the parties to the action should be all the parties in interest.⁹⁰ Appeals may be taken under some statutes from the action of the district board to the county and state superintendents, but the questions involved can usually be better considered by

instruction" within the meaning of constitution of Wisconsin, § 3, art. 10. The reading of the Bible as a text-book in public schools may be "worship," and the schoolhouse thereby become for the time being "a place of worship," within the meaning of § 18, art. 1, of the constitution, and to such use of the schoolhouse the taxpayers, who are compelled to aid in the erection and in the maintenance of the school, have a legal right to object. Such reading being religious instruction, the money drawn from the state treasury for the support of a school in which the Bible is read is for the benefit of a "religious seminary," within the meaning of said section: *Spiller v. Inhabitants &c.*, 12 Allen (Mass.) 127; *Board &c. v. Minor*, 23 Ohio St. 211; *State v. District Board &c.*, 76 Wis. 177; s. c. 44 N. W. 967; *Donahoe v. Richards*, 38 Maine 376; *McCormick v. Burt*, 95 Ill. 263. In the case of *Cook Co. v. Chicago Indust. School*, 125 Ill. 540; s. c. 18 N. E. 183, it was decided that:—A school is sectarian and comes within constitutional provisions that public funds shall not be paid out in aid of any sectarian purpose, or in aid of any school, etc., controlled by any church, where such school is a corporation organized as an industrial school for girls, but does not lease or own any building, although its charter contemplates that it shall have a situs, or otherwise comply

with the provisions of its charter, but places all girls nominally committed to it under the sole charge, care and control of two institutions controlled by a church, where they are taught, maintained and clothed by them alone, and in which institution the inmates, although not obliged to receive instruction in the Roman faith, are yet taught no other faith or creed; and in such a case a suit to recover for tuition and clothing furnished girls so placed can not be maintained against the county. See also, *State v. Hallock*, 16 Nev. 373.

⁸⁶ *District &c. v. District &c.*, 18 Mo. App. 266; *Parker v. Buckner*, 67 Tex. 20; s. c. 2 S. W. 746.

⁸⁷ *Caldwell Co. v. Harbert*, 68 Tex. 321; s. c. 4 S. W. 607.

⁸⁸ *Loverin v. School Dist.*, 64 N. H. 102; s. c. 6 Atl. 483.

⁸⁹ *Moll v. School Directors*, 23 Ill. App. 508; *Caldwell Co. v. Harbert*, 68 Tex. 321; s. c. 4 S. W. 607; *Brown v. Town Board &c.*, 77 Wis. 27; s. c. 45 N. W. 678; *Jefferson School Tp. v. Litton*, 116 Ind. 467; s. c. 19 N. E. 323; *School Dist. v. Selectmen*, 63 N. H. 277; *Trustees &c. v. People*, 121 Ill. 552; s. c. 13 N. E. 526; *Western Pub. House v. Bachman*, 2 S. Dak. 512; s. c. 51 N. W. 214.

⁹⁰ *Burke v. Galveston Co.*, 76 Tex. 267; s. c. 13 S. W. 455; *Independent School Dist. v. Gookin*, 72 Iowa 387; s. c. 34 N. W. 174; *Ellsberry v. Seay*, 83 Ala. 614; s. c. 3 So. 804.

the courts of law on a writ of mandamus and certiorari;⁹¹ and the courts of equity may also interfere by injunction.⁹²

⁹¹ In re Merrill, 8 N. Y. S. 737; 45 Ark. 121; s. c. 55 Am. R. 540. Moede v. Stearns Co., 43 Minn. 312; s. c. 45 N. W. 435; People v. Board &c., 4 N. Y. S. 102; Independent School Dist. v. Gookin, 72 Iowa 387; s. c. 34 N. W. 174; Newby v. Free, 72 Iowa 379; s. c. 34 N. W. 168; Park v. Independent School Dist., 65 Iowa 209; s. c. 21 N. W. 567; Merritt v. School Dist., 54 Ark. 468; s. c. 16 S. W. 287. Mandamus: Culver v. Armstrong, 77 Mich. 194; s. c. 43 N. W. 776. To compel apportionment of school funds: State v. Grimshaw (Mo.), 1 S. W. 363; Maddox v. Neal, 45 Ark. 121; s. c. 55 Am. R. 540. Formation of new districts: Trustees &c. v. People, 121 Ill. 552; s. c. 13 N. E. 526. Assessors to make payments: Phillips v. School Dist., 79 Mich. 170; s. c. 44 N. W. 429. But mandamus will not lie: People v. Roche, 124 Ill. 9; s. c. 14 N. E. 701; Elder v. Territory, 3 Wash. Ter. 438; s. c. 19 Pac. 29; Watts v. McLean, 28 Ill. App. 537; Hale v. Risley, 69 Mich. 596; s. c. 37 N. W. 570.

⁹² Briggs v. Borden, 71 Mich. 87; s. c. 38 N. W. 712.

CHAPTER XXXV.

TAXATION.

SECTION

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§ 1448. **Taxation defined.**—Taxes are defined as being the enforced personal contribution of persons and property levied by authority of the state for the support of the government and for all public needs. They are the property of the citizen, demanded and received by the government, to be disposed of to enable it to carry into effect its mandates and to discharge its manifold functions. In the exercise of the power to tax the purpose always is that a common burden shall be sustained by common contributions, regulated by some fixed general rule and apportioned by the law according to some uniform

ratio of equality.¹ A tax is imposed for some general or public object. It is an exaction made for the purpose of carrying on the government directly, or through the medium of municipal corporations, which are but parts of the machinery employed in conducting the operations of the government.² Special taxes are not regarded as burdens on the citizen, but are imposed as an equivalent or compensation for the enhanced value, real or presumptive, of the property, from the public improvement for which they are assessed. Special taxation for a local improvement, as well as special assessments of benefits for the same, necessarily proceeds upon the theory of benefits to the property upon which it is levied. Special taxation differs from the assessment of special benefits only that in the one the benefits are ascertained in a mode prescribed by law, while in the other they are determined by the municipal authority.³ There is a broad and clear distinction between general taxation and what is known as special taxation or special assessments. The former is an exaction placed on the citizen for the support of the government, paid to the state as a state, the consideration of which is protection by the state, and special taxation or special assessment is a tax imposed upon property within a limited area for the payment of a local improvement supposed to enhance the value of all property within that area. Both are properly called taxes, and the proceedings for their collection are by the same officers and by substantially similar methods. But special taxes or assessments proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for the improvement.⁴

§ 1449. **Distinction between "tax" and "assessment."**—The subject of "local assessments" has been discussed elsewhere,⁵ but it is proper to observe that such assessments, though levied under the taxing power, are not taxes in the technical sense of that term, and that they may be levied by some other standard than that of value if the legislature shall so prescribe, and there is no constitutional inhibition. The rule usually adopted and the equitable rule is apportionment by benefits.⁶ It is an unsettled question as to whether the legislature may

¹ Cooley Taxation, 1, 2; Blackwell Tax Titles, 7; Opinion of Judges, 58 Maine 590; City of Shreveport v. Gregg, 28 La. An. 836; People v. McCreery, 34 Cal. 432; Jack v. Weienett, 115 Ill. 105; s. c. 3 N. E. 445.

² City of Chicago v. Baptist Theological Union, 115 Ill. 245; s. c. 2 N. E. 254.

³ Davis v. City of Litchfield, 145 Ill. 313; s. c. 33 N. E. 888.

⁴ Illinois &c. R. Co. v. Decatur, 147 U. S. 190; s. c. 13 S. Ct. 293; Wright v. City of Boston, 9 Cush. (Mass.) 233; McGonigle v. City of Allegheny, 44 Pa. St. 118.

⁵ See ch. 28, ante.

⁶ Barnes v. Dyer, 56 Vt. 469; Hans-

declare that no part of the expense of a local improvement for the public use shall be borne by a general tax. Unless there is some inhibiting constitutional provision the weight of authority is in favor of leaving the matter with the legislature.⁷ The equitable rule would seem to be the levying of local assessments to the extent of any special benefits received, any excess of cost being borne by the general treasury, on the ground of benefit to the municipality at large.⁸

§ 1450. **Situs of taxable property.**—The taxing power of a municipality does not extend beyond the geographical limits of the corporation, and the question of what property is within the corporate limits has been passed upon with various conclusions. But it is plain that tangible property, actually within the corporation, may be taxed by it irrespective of the domicile of the owner.⁹ The doctrine of mobilia

com v. City of Omaha, 11 Neb. 37. See Hare Amer. Const. Law, 286 et seq. A leading case on this subject is *People v. Mayor &c.*, 4 N. Y. 419.

⁷ *Inhabitants &c. v. Morton*, 25 Mo. 593; *City of St. Louis v. Clemens*, 36 Mo. 467; *Eyerman v. Blaksley*, 78 Mo. 145; *Busbee v. Commissioners*, 93 N. C. 143; *White v. People*, 94 Ill. 604; *Dickson v. City of Racine*, 61 Wis. 545; s. c. 21 N. W. 615; *In re Vacation of Centre St.*, 115 Pa. St. 247; s. c. 8 Atl. 56.

⁸ *Seeley v. City of Pittsburgh*, 82 Pa. St. 360; *In re Washington Ave.*, 69 Pa. St. 352; *Protestant Orphan Asylum's Appeal*, 111 Pa. St. 135; s. c. 3 Atl. 217; *Wistar v. City of Philadelphia*, 111 Pa. St. 604; s. c. 4 Atl. 511.

⁹ *St. Louis v. Ferry Co.*, 11 Wall. 423; *Trigg v. Trustees &c.*, 2 Bush (Ky.) 594; *Loud v. City of Charleston*, 103 Mass. 278; *People v. Niles*, 35 Cal. 282; *City of New Albany v. Meekin*, 3 Ind. 481; *City Council &c. v. Dunbar*, 50 Ga. 387; *Mills v. Thornton*, 26 Ill. 300; *Finley v. City of Philadelphia*, 32 Pa. St. 381; *Sangamon &c. R. Co. v. Morgan Co.*, 14 Ill. 163; *Pomeroy Salt Co. v. Davis*, 21 Ohio St. 555; *City of Dunleith v. Reynolds*, 53 Ill. 45; *People v. Board &c.*, 48 N. Y. 390; *City of St. Louis v. Wiggin Ferry Co.*, 40 Mo. 580;

People v. Commissioners, 23 N. Y. 224, 228; *Gilchrist's Appeal*, 109 Pa. St. 600. The power to tax all property within the corporate limits of a city does not authorize the taxation of its own bonds: *Mayor &c. v. Jones*, 67 Ga. 489. When, at the time of making out an assessment roll, the agent of a non-resident has on deposit in a bank moneys belonging to his principal, such money is liable to be assessed and taxed, although, prior to the time appointed for the correction of the roll, it has been withdrawn and used: *People v. Board &c.*, 48 N. Y. 390, holding also, that money due upon a contract for the sale of lands is personalty, and such a contract, belonging to a non-resident, in the hands of a resident agent, may, for purposes of municipal taxation, be assessed to the agent. The Kentucky court of appeals held that the fact that a part of a bridge was within the corporate limits of a city did not authorize municipal taxation of the bridge because the corporate limits might be larger than the taxable boundary, and since the bed of the river could not be taxed the bridge could not. This case also held that a city has no power to tax property which is not benefited by its government: *Louisville Bridge Co. v. City of*

sequuntur personam is not allowed to stand in the way of the taxing power in the locality where the property has its actual situs and the requisite legislative jurisdiction exists. "Such property is undoubtedly liable to taxation there in all respects as if the proprietor were a resident of the same locality. The personal property of a resident at the place of his residence is liable to taxation although he has no intention to become domiciled there."¹⁰ The legislatures of the states usually limit municipal taxation to property within the corporate limits; and the questions which come before the courts are for the most part questions as to what property is considered to be within the municipality so as to give the right to tax it. In *City of New Albany v. Meekin*,¹¹ Perkins, J., in delivering the opinion of the court, said: "We do not think that, for purposes of taxation, a court is authorized to apply the rule of law governing the personal estate of deceased persons which regards its situs as following the domicile of the owner."¹² Unless there is a statutory provision to the contrary, the situs of stock in a corporation follows the owner and adheres to his domicile;¹³ and if taxable at all to a person, shares of stock are taxable only at the place of residence of the holder.¹⁴ A statute or the charter

Louisville, 81 Ky. 189. Decisions opposite to this were given in *St. Louis Bridge Co. v. City of East St. Louis*, 121 Ill. 238; s. c. 12 N. E. 723, and *State v. City of Columbia*, 27 S. C. 137; s. c. 3 S. E. 55.

¹⁰ Mr. Justice Swayne, in *St. Louis v. Ferry Co.*, 11 Wall. 423; citing *International & Ins. Co. v. Commissioners*, 28 Barb. (N. Y.) 318; *People v. Commissioners*, 23 N. Y. 224; *Finley v. City of Philadelphia*, 32 Pa. St. 381; *Story Conflict of Laws*, § 550. The situs of personal property, for the purposes of taxation, does not follow the domicile of the owner: *City of New Albany v. Meekin*, 3 Ind. 481.

¹¹ 3 Ind. 481.

¹² See also, *Gardiner & Co. v. Inhabitants &c.*, 5 Maine 133; *People v. Commissioners*, 59 N. Y. 40; *Bates v. Mayor &c.*, 46 Ala. 158; *Kirtland v. Hotchkiss*, 100 U. S. 491. As to the power to tax non-residents exercising a vocation within the corporation, see *Worth v. Commissioners*, *Winst. Eq.* (N. C.) 70; *State v.*

Council, 2 Speers' L. (S. C.) 623; *State v. City Council &c.*, 2 Speers' L. (S. C.) 719; *Bates v. Mayor*, 46 Ala. 158. As to taxableness of goods sold on commission but owned elsewhere, see *Shriver v. Pittsburg*, 66 Pa. St. 446; *Cumming v. Mayor &c.*, R. M. Charl. (Ga.) 26; *Green v. Mayor &c.*, R. M. Charl. (Ga.) 368; *Paddleford v. Mayor &c.*, 14 Ga. 438; *Pearce v. City Council &c.*, 37 Ga. 597.

¹³ *Whitesell v. Northampton Co.*, 49 Pa. St. 526; *State v. Branin*, 23 N. J. L. 484; *Bradley v. Bauder*, 36 Ohio St. 28, 36; *Newark City Bank v. Assessor*, 30 N. J. L. 13; *Inhabitants &c. v. Commissioners*, 16 Pick. (Mass.) 572; *Olliver v. Mills*, 11 Allen (Mass.) 268.

¹⁴ *Conwell v. President &c.*, 15 Ind. 150; *Griffith v. Watson*, 19 Kan. 23; *Griffith v. Carter*, 8 Kan. 565, 571; *Seward v. City of Rising Sun*, 79 Ind. 351. Shares in a corporation are also shares of the stockholder, and if taxed to him as personalty can only be so taxed by the jurisdic-

may provide for the taxation of the shares at the place of business of the corporation, and then the tax may be enforced by requiring the corporation to withhold the amount from the dividends.¹⁵ An insurance company was held not liable to municipal taxation on the annual premiums received by an agent residing in the city, under a general power conferred upon the city to provide for the taxation of all taxable property within the corporation.¹⁶ The situs of invisible and intangible property is with the owner. Notes, mortgages, etc., of an estate, under the control of an executor living in an incorporated city, though deposited outside the city, are liable to municipal taxation.¹⁷ The situs of sea-going vessels, for purposes of taxation, is the port where they are registered under the federal laws as their home port. This situs is not lost by mere absence and employment elsewhere, but con-

tion to which he is subject, whether the corporation be domestic or foreign: *Whitesell v. Northampton Co.*, 49 Pa. St. 526; *State v. Bentley*, 23 N. J. L. 532; *Inhabitants &c. v. Commissioners*, 16 Pick. (Mass.) 572; *State v. Branin*, 23 N. J. L. 484; *Newark City Bank v. Assessor*, 30 N. J. L. 13.

¹⁵ *Tappan v. Merchants' &c. Bank*, 19 Wall. 490; *Dwight v. Mayor*, 12 Allen (Mass.) 322; *Savings Bank v. City of Nashua*, 46 N. H. 389; *Dela-ware Railroad Tax*, 18 Wall. 206; *National Bank v. Commonwealth*, 9 Wall. 353; *Van Allen v. Assessors*, 3 Wall. 573; *Union Bank v. State*, 9 Yerg. (Tenn.) 489; *City of Richmond v. Daniel*, 14 Gratt. (Va.) 385.

¹⁶ *City of Dubuque v. Northwestern &c. Ins. Co.*, 29 Iowa 9. But see *Humphreys v. City of Norfolk*, 25 Gratt. (Va.) 97.

¹⁷ *Johnson v. City Council*, 2 Or. 327. But see *Johnson v. City of Lexington*, 14 B. Mon. (Ky.) 648. In *City of Louisville v. Henning*, 1 Bush (Ky.) 381, it was held that money, debts and choses in action were not taxable under authority to tax all personal and real property of the inhabitants of the city. Power to tax "every species of property, real and personal, within the limits

of the city, . . . which is or may be subject to taxation by the laws of the state," gives no power to tax notes or other evidences of debt on or against non-residents, belonging to residents: *Bridges v. Mayor &c.*, 33 Ga. 113. But bonds owned by citizens and residents of Augusta, on non-residents, were held to be property within the city and subject to municipal taxation under a general power to tax property within the city: *City Council &c. v. Dunbar*, 50 Ga. 387. This case supports the text, and the current of authorities, as cited by the judge (p. 393), is in the same direction. Money due upon a contract for the sale of lands is personal property, and where such a contract belonging to a non-resident is in the hands of an agent, it may be taxed by the municipality in which the agent resides: *People v. Board &c.*, 48 N. Y. 390, holding, also, that moneys of a non-resident, deposited by an agent at his residence, are taxable there. Power to tax all personal estate gives authority to tax money loaned: *President &c. v. McConnell*, 12 Ill. 138. For the purpose of taxation a debt has its situs at the residence of the creditor, and may be there taxed: *Kirtland v. Hotchkiss*, 100 U. S. 491.

tinues until a new situs is acquired.¹⁸ Under a power to tax boats "within the city," it was held that a municipality had no authority to tax ferryboats of a foreign private corporation when the relation of the boats to the city was simply that of contact, as a terminus of the voyage; and the real estate of the corporation, the home of the pilots and engineers, and the place where the boats were laid up when not in use, were on the opposite shore. This conclusion was not affected by the facts that the company had an office in said city, that its principal officers resided there, as well as most of its stockholders, and that the business meetings were held there, and moneys received and disbursed.¹⁹

§ 1451. **Subjects of taxation.**—The power to determine what persons or property shall be taxed is left exclusively to the legislative department of the state or municipality;²⁰ but the tax must be levied

¹⁸ *People v. Commissioners &c.*, 58 N. Y. 242; *Hays v. Pacific &c. Co.*, 17 How. 596; *Morgan v. Parham*, 16 Wall. 471; *Transportation Co. v. Wheeling*, 99 U. S. 273; *Johnson v. Drummond*, 20 Gratt. (Va.) 417; *Howell v. State*, 3 Gill (Md.) 14; *Perry v. Torrence*, 8 Ohio 521. Cf. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365. The situs of a boat is the port where it is laid up when not in use, without respect to the residence of the owner: *Irvin v. New Orleans &c. R. Co.*, 94 Ill. 105. In Alabama it was held that a city, authorized to levy a tax "upon real and personal estate within the city," might assess a steamboat plying on the Alabama river, though registered and enrolled as a coasting vessel under the laws of the United States, if owned by citizens of the state residing in the city; and that the city had the same power if the owner was a citizen of another state, but resided in the city during the business season, even though the boat was assessed and taxed in the state in which the owner was a citizen: *Battle v. Corporation &c.*, 9 Ala 234. For the opposite and better view, see *City of New Albany v. Meekin*, 3 Ind. 481; *Wilkey v. City of Pekin*, 19 Ill. 159. Cf.

Mayor &c. v. Baldwin, 57 Ala. 61, as to ferryboats.

¹⁹ *St. Louis v. Ferry Co.*, 11 Wall. 423. See contra, *City of St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580.

²⁰ *Butler's Appeal*, 73 Pa. St. 448; *City of Sioux City v. Independent School Dist.*, 55 Iowa 150; s. c. 7 N. W. 488; *Wilson v. Mayor &c.*, 4 E. D. Smith (N. Y.) 675; *Hill v. Higdon*, 5 Ohio St. 243; *State v. Parker*, 33 N. J. L. 313; *State v. County Court*, 19 Ark. 360. The legislature may levy state taxes on corporations and exempt them from municipal taxation: *City of Portland v. Portland Water Co.*, 67 Maine 135; *Kneeland v. City of Milwaukee*, 15 Wis. 454; *Illinois &c. R. Co. v. McLean Co.*, 17 Ill. 291; *City of New Orleans v. Louisiana &c. Co.*, 31 La. An. 826; *Hunsaker v. Wright*, 30 Ill. 146. Unless the constitutional rule is decisive, the state legislature has full discretion: *Wisconsin &c. R. Co. v. Taylor Co.*, 52 Wis. 37; s. c. 8 N. W. 833; *State v. Collins*, 43 N. J. L. 562; *Le Duc v. City of Hastings*, 39 Minn. 110; s. c. 38 N. W. 803; *University &c. v. Skidmore*, 87 Tenn. 155; s. c. 9 S. W. 892; *Gibbon v. District of Columbia*, 116 U. S. 404; s. c. 6 S. Ct. 427; *City of New Orleans v.*

on the subjects thus chosen, so as to meet the constitutional requirement of equality and uniformity.²¹ The state legislature is limited in its selection of subjects only by the constitution, but municipalities are not allowed such a wide discretion. Municipal charters may contain express limitations, or certain limitations may be implied. A charter power to "tax property within the city" has been held to authorize the taxation of visible property only, and not credits.²² License or privilege taxes can not be imposed under a grant of general local legislation;²³ and the power to tax personalty has been held not to authorize the taxation of corporate stocks.²⁴ Some miscellaneous cases touching the subject are cited in the notes.²⁵ There is no subject of more vital interest to municipal corporations than that of taxation. The methods of raising the necessary revenue to meet the

Fourchy, 30 La. An. (pt. 1) 910; *City of New Orleans v. People's Bank*, 32 La. An. 82.

²¹ *Weeks v. City of Milwaukee*, 10 Wis. 242; *Brewer & Co. v. Inhabitants &c.*, 62 Maine 62; s. c. 16 Am. R. 395; *People v. Coleman*, 4 Cal. 46; *State v. North*, 27 Mo. 464; *Durach's Appeal*, 62 Pa. St. 491.

²² *City of Covington v. Powell*, 2 Met. (Ky.) 226; *City of Louisville v. Henning*, 1 Bush (Ky.) 381; *Johnson v. City of Lexington*, 14 B. Mon. (Ky.) 648. Cf. *City Council v. National Bank*, 47 Ga. 562, where a general power was held to justify taxing bank shares.

²³ *Sanders v. Town Com'rs*, 30 Ga. 679; *City Council &c. v. Walton*, 37 Ga. 620.

²⁴ *City of Richmond v. Daniel*, 14 Gratt. (Va.) 385. Cf. *City Council &c. v. National Bank*, 47 Ga. 562. See also, *Second St. R. Co. v. City of Philadelphia*, 51 Pa. St. 465; *Philadelphia v. Philadelphia &c. R. Co.*, 52 Pa. St. 177; *City Bank v. Bogel*, 51 Tex. 355. A statute for the assessment of a special tax will not interfere with a general law unless there is the clearest language to justify it: *State v. Douglass*, 33 N. J. L. 363; *Smith v. City of Vicksburg*, 54 Miss. 615.

²⁵ A provision in a city charter

that "all property not exempt from taxation under the general laws of this state shall be subject to taxation, as herein mentioned, for city purposes," was held to embrace choses in action: *Trimble v. City of Mt. Sterling*, 11 Ky. L. 727; s. c. 12 S. W. 1066. A Georgia statute reserves to the state the right to tax railroad property, and provides the method. Under this statute a city can not tax railroad property without charter authority: *Albany v. Savannah &c. R. Co.*, 71 Ga. 158. A statute authorizing a city to levy a tax "upon all goods, wares and merchandise, and upon all articles of trade and commerce sold in said city," does not authorize a tax upon the gross receipts of a natural-gas company doing business in the city: *Appeal of City of Pittsburgh*, 118 Pa. 458; s. c. 16 Atl. 92. In North Carolina, in a constitutional provision that laws shall be passed taxing by a uniform rule "all moneys, credits, . . . and also all real and personal property, according to its true value in money," the words "real and personal property" are held to include every kind of property, and a municipality exercising the taxing power must, regardless of charter provisions, tax ad valorem.

municipal requirements are legislative and political, and no system has probably yet been devised that is entirely equitable and just under all the circumstances and conditions that arise. There is but little difficulty, so far as tangible property is concerned, in reaching an equitable and just apportionment of the burdens of taxation and the enforcement of collection. But with corporate franchises and the many other forms of intangible property which receive the protection of the government, state and municipal, just and equitable modes of apportionment, under all circumstances, as well as adequate means of enforcement of taxation thereon, seem to be among the unsolved problems in civil government. Evasion of a proportionate share in the burdens of taxation, in so far as intangible property is concerned, has become an object of alarm to all good citizens, and in its effects threatens serious impairment, to say the least, of municipal government. It is probably true, however, that the difficulty in this regard is not so much in the methods of taxation and collection, or the theories upon which they are based, as in the lax methods of enforcement. The laws are not so defective as the enforcement is ineffective from various causes.

§ 1452. **Property subject to taxation.**—All property within a city is subject to taxation for municipal purposes regardless of benefits.²⁶ Public property of a county is not subject to taxation, though outside the county limits, if held for public use.²⁷ But where a city is in possession under an option contract giving it a right to become owner on payment of certain amounts, but where there is no obligation on the part of the city to purchase, it is subject to taxation;²⁸ and so where property is bought and held for sale or rent for profit, it is taxable.²⁹ And it has been held that property, such as water-works, purchased and owned for the convenience and profit of the citizens, and not governmental purposes, is taxable.³⁰ Where property belongs to a municipality it is not taxable, notwithstanding it may derive pecuniary profits therefrom.³¹ Property exempt from taxation under general law is exempt under municipal charter,³² but as elsewhere seen, property exempt from taxation in its general sense does not mean that it is exempt from special assessments for local im-

²⁶ *Hughes v. Carl*, 21 Ky. L. 6; s. c. 50 S. W. 852.

²⁷ *State v. Collins*, 60 N. J. L. 367; s. c. 37 Atl. 623.

²⁸ *City of Milwaukee v. Milwaukee Co.*, 95 Wis. 424; s. c. 69 N. W. 819.

²⁹ *School Dist. &c. v. Howe*, 62 Ark. 481; s. c. 37 S. W. 717.

³⁰ *City of Covington v. Commonwealth*, 19 Ky. L. 105; s. c. 39 S. W. 836.

³¹ *State v. Conover*, 63 N. J. L. 191; s. c. 42 Atl. 838.

³² *Johnson Home &c. v. Village of Seneca Falls*, 55 N. Y. S. 803; s. c. 37 App. Div. (N. Y.) 147.

provements. Agricultural lands within city limits are not exempt from municipal taxation,³³ nor is good will of a business.³⁴ The cost of an improvement may be assessed against a life tenant.³⁵

§ 1453. **Constitutional restrictions.**—A statute which provides that an assessment shall be a first lien on the property affected, and the bonds issued therefor shall be conclusive evidence of the validity of such lien, is unconstitutional, in that it deprives the owner of his property without due process of law.³⁶ In most of the states there is a constitutional requirement that taxes shall be uniform, and independently of such constitutional requirement uniformity as near as may be is exacted. The uniformity required by a constitution in reference to taxes does not apply to special assessments.³⁷ A license tax for street cars being for revenue does not contravene the constitution, which provides that all taxes shall be uniform.³⁸ Taxes levied to pay indebtedness incurred in excess of the limitation are void.³⁹ A statute apportioning the costs of repaving streets on abutting property according to front foot without regard to benefits and without affording an opportunity to question the benefits, is taking property without due process of law and void.⁴⁰ And so is a statute directing commissioners to determine annually the just and equitable sewer charges against estates and to take into consideration the benefits and such

³³ *Town of Latonia v. Hopkins*, 20 Ky. L. 620; s. c. 47 S. W. 248. Property consisting of sixteen acres, valued at \$20,000, used and occupied as a dwelling place, with improvements thereon valued at \$30,000, is subject to a city tax under a statute providing that no lands that have not been divided into lots of ten acres or less which are in good faith occupied and used for agricultural or horticultural purposes shall be subject to a city tax, except road tax: *Windsor v. Polk County*, 109 Iowa 156; s. c. 80 N. W. 323.

³⁴ *People v. Feitner*, 60 N. Y. S. 687; s. c. 44 App. Div. (N. Y.) 278.

³⁵ *Hackworth v. Louisville & Co. Stone Co.*, 20 Ky. L. 1789; s. c. 50 S. W. 33. It has been held that property laid off and platted for public use is not subject to taxation:

Mayor &c. v. O'Shee, 51 La. An. 719; s. c. 25 So. 382. The levy should describe the property: *In re Wood*, 54 N. Y. S. 30; s. c. 24 Misc. (N. Y.) 561.

³⁶ *Ramish v. Hartwell*, 126 Cal. 443; s. c. 58 Pac. 920. Cf. *McCready v. Sexton*, 29 Iowa 356, 389; *Rollins v. Wright*, 93 Cal. 395; s. c. 29 Pac. 58; *Haaren v. High*, 97 Cal. 445; s. c. 32 Pac. 518; *Ensign v. Barse*, 107 N. Y. 329; s. c. 14 N. E. 400; 15 N. E. 401.

³⁷ *Hansen v. Hammer*, 15 Wash. 315; s. c. 46 Pac. 332.

³⁸ *Denver City R. Co. v. City of Denver*, 21 Colo. 350; s. c. 41 Pac. 826.

³⁹ *Schulenberg &c. Co. v. East St. Louis*, 63 Ill. App. 214; s. c. affirmed in 166 Ill. 232; 46 N. E. 728.

⁴⁰ *Fav v. City of Springfield*, 94 Fed. 409.

other matters as they shall deem just and proper.⁴¹ If the rate of taxation be uniform as to both real and personal property, one method of valuing the realty and another the personalty would not render the scheme unconstitutional so long as the purpose is to ascertain the true value of both classes.⁴² A constitutional provision that all taxation shall be equal and uniform, and requiring the legislature to provide a uniform and equal rate of assessment, does not apply to special assessments for street improvements.⁴³ A statute giving authority to a city to levy a tax to assist a domestic private corporation for pecuniary profit in constructing a toll bridge, to be used as a highway and for railroad purposes, is not unconstitutional in the sense that it takes private property for use without compensation.⁴⁴ A law imposing a tax to defray expenses of defending officers for official misconduct is unconstitutional, not being a tax for municipal purposes.⁴⁵

§ 1454. Implied power of taxation.—There are certain purposes for which a municipality has implied power of taxation. Power to create a debt for certain purposes carries with it implied power to levy taxes to pay it.⁴⁶ Where there is a charter limitation on the extent of taxation and subsequently the legislature confers express power, to any city or village, to contract for water for fire protection and other purposes, it, by implication, clothes a city with power to levy the necessary taxes to discharge a debt created in excess of the charter

⁴¹ *Sears v. Street Com'rs of Boston*, 173 Mass. 350; s. c. 53 N. E. 876; *Hutcheson v. Storrie*, 92 Tex. 685; s. c. 51 S. W. 848.

⁴² *McLendon v. City of La Grange*, 107 Ga. 356; s. c. 33 S. E. 405.

⁴³ *Ladd v. Gambell*, 35 Or. 393; s. c. 59 Pac. 113. Cf. *Hammond v. School Board &c.*, 109 Mich. 676; s. c. 67 N. W. 973; *Youngblood v. Sexton*, 32 Mich. 406; *City of Aurora v. McGannon*, 138 Mo. 38; s. c. 39 S. W. 469.

⁴⁴ *Pritchard v. Magoun*, 109 Iowa 364; s. c. 80 N. W. 512.

⁴⁵ *In re Jensen*, 60 N. Y. S. 933; s. c. 44 App. Div. (N. Y.) 509. A special assessment on abutting property in proportion to the frontage is not unconstitutional: *Webster v. City of Fargo*, 9 N. D. 208; s. c. 82 N. W. 732; *Cass Farm Co. v. City of Detroit*, 124 Mich. 433; s. c. 83 N. W.

108. The laying out and extension of streets by special assessment is constitutional: *Cohen v. City of Alameda*, 124 Cal. 504; s. c. 57 Pac. 377. The assessment of property for local improvements, according to benefits in proportion to frontage, is not taking private property for public use without just compensation: *City Council of Montgomery v. Birdsong*, 126 Ala. 632; s. c. 28 So. 522. Cf. *City of Indianapolis v. Holt*, 155 Ind. 222; s. c. 57 N. E. 966, 988, 1100. See contra, *Scranton v. Levers*, 9 Pa. Dist. R. 176. In Michigan the inhabitants of a city can not be taxed to support a water-works system without their consent: *Beades v. Board &c.*, 122 Mich. 366; s. c. 81 N. W. 271.

⁴⁶ *Slocomb v. City of Fayetteville*, 125 N. C. 362; s. c. 34 S. E. 436.

limit.⁴⁷ Power to levy and collect taxes carries with it the adoption of any reasonable method to effect the purpose.⁴⁸ Where by charter the board of aldermen have power to provide the city with water, it does not, by implication, include power to levy and collect taxes for such purpose. A water supply is not a necessary expense, and hence, under the constitution, had to be submitted to the voters.⁴⁹

§ 1455. License fees and taxes on business.—The authority to license and regulate particular branches of business is usually regarded as a police power, but when license fees are imposed for purposes of revenue they are taxes.⁵⁰ Such license fees can only be considered as taxes when clearly authorized as such by the legislature.⁵¹ And when a revenue authority seems to be conferred, the amount of the tax, unless limited by the grant, is left to the discretion of the municipality; but such a grant of authority would not warrant taxes sufficiently heavy to be prohibitory.⁵² A municipality may tax vocations pursued within its limits by persons whose domestic residence is outside the corporation, as though they were residents.⁵³ The

⁴⁷ *Oconto City Water Supply Co. v. City of Oconto*, 105 Wis. 76; s. c. 80 N. W. 1113.

⁴⁸ *City of Aurora v. McGannon*, 138 Mo. 38; s. c. 39 S. W. 469.

⁴⁹ *Edgerton v. Goldsboro Water Co.*, 126 N. C. 93; s. c. 35 S. E. 243.

⁵⁰ *Ould v. City of Richmond*, 23 Gratt. (Va.) 464; *City of Wilmington v. Macks*, 86 N. C. 88; *Lightburne v. Taxing Dist.*, 4 Lea (Tenn.) 219; *Ward v. Maryland*, 12 Wall. 418; *City of St. Louis v. Spiegel*, 75 Mo. 145. For a statement of the difference between the two powers, see *City of Rochester v. Upman*, 19 Minn. 108; *State v. Mayor &c.*, 33 N. J. L. 280.

⁵¹ *Kip v. Mayor &c.*, 26 N. J. L. 298; *Mayor &c. v. Second Ave. R. Co.*, 32 N. Y. 261; *City of St. Louis v. Boatman's Ins. &c. Co.*, 47 Mo. 150; *Van Hook v. City of Selma*, 70 Ala. 361; *Davis v. Mayor &c.*, 64 Ga. 128; s. c. 37 Am. R. 60; *Board &c. v. Watson*, 5 Bush (Ky.) 660. Property taxed for revenue may also be subject to license taxes: *City of St. Louis v. Bucher*, 7 Mo. App. 169. A

city which is authorized to impose a license tax on business may require the payment of the tax as a condition precedent to issuing the license: *Sights v. Yarnalls*, 12 Gratt. (Va.) 292. An ad valorem tax on property does not preclude a license tax on the business in which the property is used: *Ex parte Mirande*, 73 Cal. 365; s. c. 14 Pac. 888.

⁵² *Craig v. Burnett*, 32 Ala. 728; *City of Burlington v. Putnam Ins. Co.*, 31 Iowa 102; *Kniper v. City of Louisville*, 7 Bush (Ky.) 599; *Mason v. Trustees &c.*, 4 Bush (Ky.) 406; *Kitson v. Mayor &c.*, 26 Mich. 325. A constitutional inhibition of imprisonment for debt has no application to a license tax: *Charleston v. Oliver*, 16 S. C. 47. See also, *Butler's Appeal*, 73 Pa. St. 448.

⁵³ *Worth v. Commissioners &c.*, Winst. Eq. (N. C.) 70 (Repr. 617); *State v. City Council &c.*, 2 Speers L. (S. C.) 623; *State v. City Council &c.*, 2 Speers L. (S. C.) 719. A party carrying on a business outside the corporate limits, but residing within the city, and who keeps the capi-

power of the state to tax professions is unquestioned, and the state may delegate the authority to municipalities.⁵⁴ The provisions of the constitutions as to equality and uniformity apply to property alone and not to taxation on privileges or occupations. A special tax on a business or profession does not violate the rule of uniformity, for it is uniform as to all persons who come within the same category.⁵⁵

tal employed in his business there, is not liable to pay a city license tax: *Bates v. Mayor &c.*, 46 Ala. 158, where the court states that the converse of this would be true. The imposition of a tax upon goods conveyed from other states to be sold on commission is not in violation of the federal constitution: *Cumming v. Mayor &c.*, *R. M. Charl't.* (Ga.) 26. Of similar import is *Green v. Mayor &c.*, *R. M. Charl't.* (Ga.) 368. See also, *Padelford v. Mayor &c.*, 14 Ga. 438; *Pearce v. City Council &c.*, 37 Ga. 597; *Shriver v. Pittsburgh*, 66 Pa. St. 446.

⁵⁴ *City of St. Louis v. Laughlin*, 49 Mo. 559; *Simmons v. State*, 12 Mo. 268; *City of St. Louis v. Sternberg*, 4 Mo. App. 453.

⁵⁵ *City of Sacramento v. Crocker*, 16 Cal. 119; *Magneau v. City of Fremont*, 30 Neb. 843; s. c. 47 N. W. 280; *People v. Hartwell*, 12 Mich. 508; *State v. Jones*, 19 Ind. 356; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Young v. Town of Henderson*, 76 N. C. 420; *Dishon v. Smith*, 10 Iowa 212; *State v. Orvis*, 20 Wis. 235; *Washington v. State*, 13 Ark. 752; *Ash v. People*, 11 Mich. 347; *Addison v. Saulnier*, 19 Cal. 82; *City of New Orleans v. Turpin*, 13 La. An. 56; *McGehee v. Mathis*, 21 Ark. 40; *Bohler v. Schneider*, 49 Ga. 195; *Bright v. McCullough*, 27 Ind. 223; *Pleuler v. State*, 11 Neb. 547; *Thomasson v. State*, 15 Ind. 449; *Baker v. City of Cincinnati*, 11 Ohio St. 534; *Chaddock v. Day*, 75 Mich. 527; s. c. 42 N. W. 977; 4 L. R. A. 809; *People v. Coleman*, 4 Cal. 46;

Ex parte Robinson, 12 Nev. 263; *Gatlin v. Town of Tarboro*, 78 N. C. 119; *Walters v. Duke*, 31 La. An. 668; *Glasgow v. Rowse*, 43 Mo. 479; *Home Ins. Co. v. City Council*, 50 Ga. 530; *Eyre v. Jacob*, 14 Gratt. (Va.) 422; *Slaughter v. Commonwealth*, 13 Gratt. (Va.) 767; *Adams v. Mayor &c.*, 2 Head (Tenn.) 363; *Aulanier v. Governor*, 1 Tex. 653; *Walker v. City of Springfield*, 94 Ill. 364; *Wiggins Ferry Co. v. City of East St. Louis*, 102 Ill. 560; *Boye v. Girardey*, 28 La. An. 717; *Texas Banking Ins. Co. v. State*, 42 Tex. 636; *City of St. Louis v. Green*, 7 Mo. App. 468; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521. A power to impose a license tax upon specified occupations, and "upon any other person or employment which it (the city) may deem proper, whether such person or employment be herein specially enumerated or not," was held not to confer power to tax a railroad: *City of Lynchburg v. Norfolk &c. R. Co.*, 80 Va. 237. A charter provision giving power to license and tax certain enumerated classes of persons and business, and "all other business, trades, avocations and professions whatever," was held not to authorize a license tax upon lawyers: *City of St. Louis v. Laughlin*, 49 Mo. 559. Contra, *Lanier v. Mayor &c.*, 59 Ga. 187. Authority to tax a profession may be executed by taxing each member of a firm: *Lanier v. Mayor*, *supra*; *Wilder v. Mayor &c.*, 70 Ga. 760.

§ 1456. **The same subject continued—The power strictly construed.**—The power to tax occupations is peculiarly subject to the rule of strict construction, and any exaction of such a tax not authorized by a strict construction of the statute will be illegal.⁵⁶ Yet it is held competent for the legislature to authorize a tax on business where the business is one which the legislature is forbidden by the constitution to license. There is no necessary connection between a license and a tax, as a business may be licensed and not taxed, or it may be taxed and not licensed. A license confers a privilege, and the privilege is sometimes taxed, as when a city is authorized to tax an occupation licensed by the state.⁵⁷

§ 1457. **Local taxation of transportation companies.**—The property of a street-railroad company, including its roadbed, is ordinarily subject to municipal taxation, and, unless other provision is made, a street railway may be taxed as realty.⁵⁸ The payment to the city of a tax or license fee of twenty-five dollars, as required by contract, securing certain franchises to the company, was held not to exonerate the company from the payment of an ad valorem tax on its property assessable for municipal purposes.⁵⁹ And an exclusive grant of the

⁵⁶ *Latta v. Williams*, 87 N. C. 126; *Robinson v. Mayor &c.*, 1 Humph. (Tenn.) 156; *City of St. Louis v. Laughlin*, 49 Mo. 559; *City of Du-buque v. Northwestern &c. Ins. Co.*, 29 Iowa 9; *Charleston v. Oliver*, 16 S. C. 47; *Board &c. v. Miguez*, 32 La. An. 923; *Kip v. Mayor &c.*, 26 N. J. L. 298. If a minimum tax has been prescribed by statute, one which exceeds that sum, but is measured by the business, is void: *Kniper v. City of Louisville*, 7 Bush (Ky.) 599.

⁵⁷ *Youngblood v. Sexton*, 32 Mich. 406, where the subject is fully discussed and cases cited. Cf. *State v. Hipp*, 38 Ohio St. 199; *Butzman v. Whitbeck*, 42 Ohio St. 223; *State v. Sinks*, 42 Ohio St. 345. See also, *Kehrig v. Peters*, 41 Mich. 475; *Richland Co. v. Village of Richland Center*, 59 Wis. 591; s. c. 18 N. W. 497. Neither a power to tax nor a power to regulate gives authority to license: *City of Burlington v. Bum-gardner*, 42 Iowa 673. A license fee charged by a municipality for the doing of a thing which it has

the power to license or prohibit is not a tax but a price paid for a privilege, and the corporation may apply the funds so raised to schools, though the constitution requires municipal taxes to be applied to municipal purposes: *City of East St. Louis v. Trustees &c.*, 102 Ill. 489.

⁵⁸ *People v. Cassity*, 2 Lans. (N. Y.) 294; *North Beach &c. R. Co.'s Appeal*, 32 Cal. 499; *Middlesex R. Co. v. City of Charleston*, 8 Allen (Mass.) 330; *Providence &c. R. Co. v. Wright*, 2 R. I. 459. For construction of statutes respecting elevated railroads in New York, see *People v. Commissioners &c.*, 82 N. Y. 459, 462.

⁵⁹ *Louisville &c. R. Co. v. City of Louisville*, 4 Bush (Ky.) 478. See further, as to license fees, *Mayor &c. v. Broadway &c. R. Co.*, 17 Hun (N. Y.) 242; *Railway Co. v. Philadelphia*, 101 U. S. 528; *City of Newport v. South Covington &c. R. Co.*, 80 Ky. 29; s. c. 11 S. W. 954.

use of streets to such railway company does not deprive the municipality of the right, existing in respect to such lines in general, to require the license fee or tax.⁶⁰ Municipal taxation of railroads depends upon statutory provisions, which are very diverse. Most of the decisions of the courts relate to the construction of special statutes, and such statutes and cases can not be profitably cited in this connection.⁶¹

§ 1458. **Banks.**—Where under a special charter or a general statute the capital of a state bank is taxable only for state purposes, a municipal tax on real estate forming part of the capital stock was held illegal;⁶² and when the state was restricted in the taxation of banks, such restriction was held to apply to municipalities.⁶³ A banker is liable to taxation only on such moneys and credits as he holds as *owner* and not for those he holds in trust. Deposits are taxable to depositors and not to the bank.⁶⁴ Bank stocks in which a savings institution has invested its deposits for income can not be taxed to the corporation under a statute which provides for taxing the deposits to depositors at their residences.⁶⁵ All the property of a bank, including its franchise and capital stock, is taxable like the property of an individual unless the charter provides otherwise.⁶⁶ A private banker is for purposes of taxation a resident where the bank is located, although actually residing elsewhere.⁶⁷ Shares of stock are assessed to the owner at his residence; and while a city may tax stockholders of a bank on their shares, this taxation would imply the exclusion of taxation on the capital stock.⁶⁸ Taxes should be assessed directly

⁶⁰ *State v. Herod*, 29 Iowa 123; *City of Columbus v. Street R. Co.*, 45 Ohio St. 98; s. c. 12 N. E. 651; *City of Los Angeles v. Southern Pacific R. Co.*, 67 Cal. 433; s. c. 7 Pac. 819. See also, *City of Des Moines v. Chicago & c. R. Co.*, 41 Iowa 567.

⁶¹ The rolling stock of a company was held taxable where the property of the superintendent or agent is taxed, it being in contemplation of law, his own: *City of Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56.

⁶² *State Bank v. City of Madison*, 3 Ind. 43. Cf. *Gardner v. State*, 21 N. J. L. 557.

⁶³ *City of New Orleans v. Mechanics' & c. Bank*, 15 La. An. 107; *City of New Orleans v. Southern Bank*, 11 La. An. 41; *Municipality & c. v. Lou-*

isiana State Bank, 5 La. An. 394; *City of New Orleans v. Commercial Bank*, 10 La. An. 735.

⁶⁴ *Branch v. Town of Marengo*, 43 Iowa 600.

⁶⁵ *Providence Institution v. Gardner*, 4 R. I. 484.

⁶⁶ *State v. President & c.*, 2 Houst. (Del.) 99. Investments abroad are still the property of the bank and part of its capital: *Nevada Bank v. Sedgwick*, 104 U. S. 111.

⁶⁷ *Miner v. President & c.*, 27 N. Y. 155. Cf. *Gardiner & c. Co. v. Inhabitants & c.*, 5 Maine 133; *Bates v. Mayor & c.*, 46 Ala. 158. Bank stock is personal estate and follows the person of the owner: *Duer v. Small*, 4 Blatchf. 263.

⁶⁸ *Newman v. Wait*, 46 Vt. 689;

against the shares of stockholders in national banks.⁶⁹ The term "inhabitants" includes corporations,⁷⁰ and it has been held that a banking corporation located in a village is liable to pay its proportion of village taxes, and its real and personal estate is accordingly subject to taxation; and that, where such village taxes are directed to be levied upon the "*freeholders and inhabitants* of the village according to law," a moneyed or stock corporation, having its banking-house or office within such village, is an inhabitant within the meaning of the act.⁷¹

§ 1459. **Water companies.**—A water company which supplies a city with water, and whose rates are regulated by the city council, is nevertheless a private corporation whose property is subject to taxation.⁷² The property of gas and water companies within the municipality is usually taxable by it.⁷³ And the proprietor of city water-works for a term of twenty years, whose contract did not stipulate for exemption, was held to be taxable on such works, they being treated as realty.⁷⁴ But it was subsequently decided that such proprietor could not be required to pay a license or privilege tax during the

Bank &c. v. Mayor &c., Dud. (Ga.) 130. See also, State v. Tunis, 23 N. J. L. 546; Johnson v. Commonwealth, 7 Dana (Ky.) 338.

⁶⁹ Lionberger v. Rowse, 43 Mo. 67; First Nat'l Bank v. Meredith, 44 Mo. 500; State v. Dowling, 50 Mo. 134. For other decisions on the taxation of banks and bank stock by municipalities, see City of Evansville v. Hall, 14 Ind. 27; King v. City of Madison, 17 Ind. 48; President &c. v. Bank &c., 16 Ind. 105; City of Madison v. Whitney, 21 Ind. 261; State Bank v. City of Madison, 3 Ind. 43; Gordon v. Mayor &c., 5 Gill (Md.) 231; and compare Gordon v. Appeal Tax Court, 3 How. 133; Bank &c. v. Town Council, 10 Rich. L. (S. C.) 104; State v. City Council, 5 Rich. L. (S. C.) 561; State Bank v. City Council, 3 Rich. L. (S. C.) 343; Bulow v. City Council, 1 N. & Mc. (S. C.) 527; Cherokee &c. Co. v. Justices &c., 28 Ga. 121; Bank &c. v. Mayor &c., Dud. (Ga.) 130; Mayor &c. v. Hartridge, 8 Ga. 23; Mayor &c. v. Thomas, 5 Coldw. (Tenn.) 600; O'Donnell v.

Bailey, 24 Miss. 386; Mayor &c. v. Macon &c. Bank, 60 Ga. 133; City Bank v. Bogel, 51 Tex. 355. In City of Madison v. Whitney, 21 Ind. 261, it was decided that bank stock owned by non-residents can not be taxed by the city, as it can have no situs other than the domicile of the owner.

⁷⁰ People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 382.

⁷¹ Ontario Bank v. Bunnell, 10 Wend. (N. Y.) 186.

⁷² Des Moines Water Co.'s Appeal, 48 Iowa 324. In this case it was decided that the land, buildings, machinery, water mains, and all real estate were taxable in the township in which was situated the machinery which propelled the water. The legislature may restrict the tax authorized to be levied for water-works to the district which is to be benefited: Grant v. Davenport, 36 Iowa 396.

⁷³ Commonwealth v. Lowell Gas &c. Co., 12 Allen (Mass.) 75.

⁷⁴ Stein v. Mayor &c., 24 Ala. 591; Stein v. Mayor &c., 17 Ala. 234.

twenty years, the contract stipulating that he should remain in "quiet possession of said water-works during said term, without let, molestation or hindrance" on the part of the city.⁷⁵ It has been held that, in the absence of constitutional inhibition, the legislature might empower a city to exempt from taxation for a term of years the property of a water company in consideration of an agreement by the company to furnish free of cost a supply of water for municipal purposes.⁷⁶

§ 1460. Gas companies.—There is a conflict of authority as to taxation of gas pipes as real estate. On the one hand they are regarded as the personal property of the company, and as mere appurtenances of the realty on which the works are situated, and are so assessed;⁷⁷ while on the contrary they have been held subject to taxation as real estate.⁷⁸ The legislature may tax the capital stock of gas companies, while it exempts the stock of manufacturing companies, as they are different classes.⁷⁹ "Machinery" includes gas pipes under the streets and gas meters, and when the value of machinery is deducted in ascertaining the value of stock, gas pipes used in distributing the gas are regarded as "machinery" used in the manufacture of gas.⁸⁰

§ 1461. Miscellaneous corporations.—An act exempting the capital stock and personal property of specified corporations applies to state taxation only and does not affect the right to tax for municipal purposes.⁸¹ And a provision that a certain rate shall be paid in lieu of

⁷⁵ *Stein v. Mayor &c.*, 49 Ala. 362; s. c. 20 Am. R. 283. Cf. *Stein v. Mayor &c.*, 17 Ala. 234, where the value of the franchise was considered in estimating the value of the taxable property.

⁷⁶ *City of Portland v. Portland Water Co.*, 67 Maine 135. Contra, *City of Austin v. Austin Gas-Light &c. Co.*, 69 Tex. 180, 187; s. c. 7 S. W. 200; *Altgelt v. San Antonio (Tex.)*, 17 S. W. 75.

⁷⁷ *People v. Board &c.*, 39 N. Y. 81; *Memphis Gas-light Co. v. State*, 6 Coldw. (Tenn.) 310; *Capital City Gas-light Co. v. Charter Oak Ins. Co.*, 51 Iowa 31, 34; s. c. 50 N. W. 579; *Des Moines Water Co.'s Appeal*, 48 Iowa 324; *West Chester Gas Co. v. Chester Co.*, 30 Pa. St. 232. In the latter case it was decided that houses erected by the company for the use of their workmen were taxable as realty, they not being neces-

sary to the performance of the company's work.

⁷⁸ *Providence Gas Co. v. Thurber*, 2 R. I. 15.

⁷⁹ *Coatesville Gas Co. v. Chester Co.*, 97 Pa. St. 476; *Williams v. Rees*, 9 Biss. 405.

⁸⁰ *Commonwealth v. Lowell Gas &c. Co.*, 12 Allen (Mass.) 75; *Providence Gas Co. v. Thurber*, 2 R. I. 15; *Hamilton Co. v. Massachusetts*, 6 Wall. 632; *Memphis Gas-light Co. v. State*, 6 Coldw. (Tenn.) 310. See *Kentucky Lead &c. Co. v. New Albany Water-works*, 62 Ind. 63.

⁸¹ *State v. Mayor &c.*, 35 N. J. L. 157; *People v. Davenport*, 91 N. Y. 574; *Orange &c. R. Co. v. City Council*, 17 Gratt. (Va.) 176; *In re Mayor &c.*, 11 Johns. (N. Y.) 77; *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506. An exemption from a state tax will not preclude the levy of a municipal tax: *City of St.*

all other taxes to the state does not exempt from liability for municipal taxes.⁸² A state tax which entitles an insurance company to do business in any part of the state "without payment of any additional tax" will not prohibit a municipal tax on the same company.⁸³

§ 1462. Apportionment by benefits.—State legislatures have sometimes applied the principle of taxation by benefits to the case of general city taxation, constituting two districts; one, consisting of the whole city, to be assessed equally; the other, consisting of the more compact portions, and receiving a larger share of benefit from the city government, being required to pay a greater share of the expenses of the government.⁸⁴ The same principle is applied in constituting

Joseph v. Hannibal &c. R. Co., 39 Mo. 476; *City of Lexington v. Aull*, 30 Mo. 480; *Town of Paris v. Farmers' Bank*, 30 Mo. 575; *Pacific R. Co. v. Cass Co.*, 53 Mo. 17. Nor from a school tax: *Martin v. City Council*, 13 Rich. Eq. (S. C.) 50.

⁸² *Brightman v. Kirner*, 22 Wis. 54; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; *Dunleith &c. Bridge Co. v. City of Dubuque*, 32 Iowa 427. Exemption from taxation includes exemption from a privilege tax: *State v. Branin*, 23 N. J. L. 484. Exemption from taxation of every kind does not exempt from taxation for street improvements: *Grand Gulf &c. R. Co. v. Buck*, 53 Miss. 246. An exemption of a corporation applies not merely to the state but to every public corporation created by it: *State Bank v. City Council*, 3 Rich. L. (S. C.) 342; *President &c. v. Edwards*, 5 Ired. L. (N. C.) 516; *City of Richmond v. Richmond &c. R. Co.*, 21 Gratt. (Va.) 604.

⁸³ *Humphreys v. City of Norfolk*, 25 Gratt. (Va.) 97. So held as to telegraph companies, unless a plain intention to exempt such companies from municipal taxes appears: *Western U. Tel. Co. v. City of Richmond*, 26 Gratt. (Va.) 1. Other cases on the subject: *Ottawa Gas Co. v. McCaleb*, 81 Ill. 556; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Dan-*

ville &c. Co. v. Parks, 88 Ill. 463; *Porter v. Rockford &c. R. Co.*, 76 Ill. 561; *St. Louis v. Insurance Co.*, 12 R. I. 435; *City of Dubuque v. Northwestern &c. Ins. Co.*, 29 Iowa 9; *Republic &c. Co. v. Pollak*, 75 Ill. 292. An exemption of stock of a corporation does not exempt it from a license tax: *City of New Orleans v. New Orleans &c. Co.*, 32 La. An. 105.

⁸⁴ *Norris v. City of Waco*, 57 Tex. 635; *Marshall v. Donovan*, 10 Bush (Ky.) 681; *City of Henderson v. Lambert*, 8 Bush (Ky.) 607; *Serrill v. City of Philadelphia*, 38 Pa. St. 355, 358; *Benoist v. City of St. Louis*, 19 Mo. 179; *Lee v. Thomas*, 49 Mo. 112. See also, *Gillette v. City of Hartford*, 31 Conn. 351; *City of Zanesville v. Richards*, 5 Ohio St. 589. The doctrine is opposed in *Knowlton v. Board &c.*, 9 Wis. 410; *City of New Orleans v. Cazelar*, 27 La. An. 156. Cf. *Wisconsin &c. R. Co. v. Taylor Co.*, 52 Wis. 37, 69; s. c. 8 N. W. 833. Since special taxation is not dependent upon the receipt of special benefit, it is not necessary that before the ordinance is passed there should be an examination and determination of the probable benefits to be received from the improvements: *City of Galesburg v. Searles*, 114 Ill. 217; s. c. 29 N. E. 686. It should be stated that in Illinois a special tax

"overlying districts" for the assessment of a tax for a local improvement, such as a state capitol or a canal, where a local benefit would be conferred.⁸⁵ Sometimes the legislature apportions the tax as between *districts* according to the supposed interest which each has in the proposed improvement. This is often necessary in the case of roads and bridges.⁸⁶ Local city improvements, including the construction and improvement of streets, may be provided for in the same way; but it is perceived that in no case whatever can a special assessment or tax be levied without express authority of the state legislature. Such a tax can not be imposed under a general power to tax for corporate purposes, and a power of that kind, when plainly granted, must be strictly construed.⁸⁷

§ 1463. **Agricultural lands.**—The law does not appear to be clearly settled as to the power of a city or village to tax, for municipal purposes, agricultural lands lying within the corporate limits. A majority of the cases seem to decide that, when the legislature fixes the corporate boundaries, without any provision for a discrimination in taxation, it in effect determines that no such discrimination should be made. The constitution leaves the whole subject to the discretion of the legislature; and usually any injustice or irregularity can be relieved only by the legislature.⁸⁸ But in Iowa and Kentucky it is held

and a special assessment are governed by different rules.

⁸⁵ Kirby v. Shaw, 19 Pa. St. 258; Thomas v. Leland, 24 Wend. (N. Y.) 65; President &c. v. State, 45 Ala. 399; Gordon v. Cornes, 47 N. Y. 608; Livingston Co. v. Darlington, 101 U. S. 407; Merrick v. Inhabitants &c., 12 Allen (Mass.) 500.

⁸⁶ Board &c. v. People, 110 Ill. 511; Salem Tpk. &c. Co. v. Essex Co., 100 Mass. 282; Shaw v. Dennis, 10 Ill. 405.

⁸⁷ See Cooley Taxation 609; Municipality v. White, 9 La. An. 446; City of Chicago v. Larned, 34 Ill. 203; Municipality v. Dunn, 10 La. An. 57; City of Ottawa v. Spencer, 40 Ill. 211; Patton v. City of Springfield, 99 Mass. 627. A city has no power to tax property which derives no benefit from its government: Louisville Bridge Co. v. City of Louisville, 81 Ky. 189. Contra, St. Louis Bridge Co. v. City of East

St. Louis, 121 Ill. 238; s. c. 12 N. E. 723.

⁸⁸ Agricultural lands within a city were held not subject to city taxation. Seven years later, improvements were extended toward these lands, and additional houses were built upon them, but no streets or improvements were near enough to be of any use. The land was still held not subject to taxation by the city: City of Covington v. Arthur, 12 Ky. L. 163; s. c. 14 S. W. 121. See also, Mendenhall v. Burton, 42 Kan. 570; s. c. 22 Pac. 558. On the other hand, it has been held that the fact that the owner chose to hold such land for agricultural purposes did not exempt it from city taxation: State v. Brown, 53 N. J. L. 162; s. c. 20 Atl. 772; Torbett v. City of Louisville, 9 Ky. L. 202; s. c. 4 S. W. 345. See also, Perkins v. City of Burlington, 77 Iowa 553; s. c. 42 N. W. 441. Lands situate with-

that municipal taxation can not be imposed upon real estate within the corporate limits if it derives no benefit from its connection with the municipality.⁸⁹ And the courts must consider the purpose for which land is held, whether for agricultural purposes or for sale as city lots, before relief from taxation is granted.⁹⁰ A late New Jersey case decides that presumptive, not actual, benefit to the taxpayer applies to general taxation, as distinguished from special taxation for local benefits, and rural land within the city limits can not be relieved from municipal taxation on the ground that it receives no benefit from the city government.⁹¹ In a Wisconsin case the court said:—"If a

in the corporate limits of a city, though used solely for agricultural purposes, are subject to municipal taxation: *Town of Dixon v. Mayes*, 72 Cal. 166; s. c. 13 Pac. 471; following *City of Santa Rosa v. Coulter*, 58 Cal. 537. Farming land in the corporate limits, but entirely outside the platted and settled portions, can not be taxed for municipal purposes where the owner will derive no benefit from the expenditure of the tax by the extension of improvements in that direction: *Ellison v. Linford*, 7 Utah 166; s. c. 25 Pac. 744. Contra, *Hurla v. City of Kansas City*, 46 Kan. 738; s. c. 27 Pac. 143; *McClay v. City of Lincoln*, 32 Neb. 412; s. c. 49 N. W. 282. A farm inside the corporate limits is subject to taxation for municipal purposes if it is within the range of municipal improvements and benefits: *Cook v. Crandall*, 7 Utah 344; s. c. 26 Pac. 927. In Wisconsin a statute provides that, upon the resolution of the electors of towns which contain an unincorporated village of at least one thousand inhabitants, such towns may exercise the powers conferred on certain incorporated villages. Taxes were levied by the town for the support and improvement of a village of that kind after the required resolution had been passed at a town meeting. Such taxes were held not invalid on the ground of public policy, though property outside of the village, on

which the tax fell, was not directly benefited: *Land &c. Co. v. Brown*, 73 Wis. 294; s. c. 40 N. W. 482. The provision of a city charter regulating taxes on agricultural lands within the corporation limits is not a contract, and may be changed by amendment: *Washburn v. City of Oshkosh*, 60 Wis. 453; s. c. 19 N. W. 364; 5 Am. & Eng. Corp. Cas. 517. See further, as to taxation of agricultural lands: *Municipality &c. v. Michaud*, 6 La. An. 605; *City of St. Louis v. Allen*, 13 Mo. 400; *Russell v. City of St. Louis*, 9 Mo. 507; *Lee v. Thomas*, 49 Mo. 112; *Walden v. Dudley*, 49 Mo. 419; *State v. McReynolds*, 61 Mo. 203; *Turner v. Althaus*, 6 Neb. 54. See also, *Oliver v. City of Omaha*, 3 Dill. 368; *Kountze v. City of Omaha*, 5 Dill. 443.

⁸⁹ *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Sharp's Ex'r v. Dunavan*, 17 B. Mon. (Ky.) 223; *Courtney v. Louisville*, 12 Bush (Ky.) 419; *Butler v. City of Muscatine*, 11 Iowa 433; *Buell v. Ball*, 20 Iowa 282; *Brooks v. Polk Co.*, 52 Iowa 460; s. c. 3 N. W. 494. See also, *Cary v. City of Pekin*, 88 Ill. 154.

⁹⁰ *Maltus v. Shields*, 2 Met. (Ky.) 553; *Arbegust v. City of Louisville*, 2 Bush (Ky.) 271; *Swift v. City of Newport*, 7 Bush (Ky.) 37; *Durant v. Kauffman*, 34 Iowa 194.

⁹¹ *State v. Brown*, 53 N. J. L. 162; s. c. 20 Atl. 772.

rule of taxation should be adopted which limits the right of taxation for public improvements to such property only as it can be shown is directly benefited by such improvement, it would result in endless confusion and litigation and render void very many acts for the government of towns and counties."⁹² In most of the states there are statutory provisions respecting the taxation of rural property within corporation limits.⁹³

§ 1464. **Taxation after changing the corporate limits.**—When the corporate limits are extended the courts will sometimes inquire into the facts, to determine whether or not the extension was made to subject to taxation property that would not receive benefits from the municipality, and will protect the owners of such property from unjust taxation. The courts do not assume to nullify the act of extension, but undertake to relieve against its consequences. It is only a palpable perversion of the power to tax that justifies judicial interference; and even in cases of that kind the judicial authority is doubtful, since the judiciary has no general authority to correct legislative action in matters of taxation.⁹⁴ But if the state legislature attempts to bring in territory not contiguous, for the purpose of increasing local revenues, its action may be treated as void.⁹⁵ Iowa and Kentucky stand firmly in favor of judicial interference.⁹⁶ The legislature has power

⁹² Taylor, J., in *Land &c. Co. v. Brown*, 73 Wis. 294; s. c. 40 N. W. 482.

⁹³ Such acts have been construed in the following cases: *Serrill v. City of Philadelphia*, 38 Pa. St. 355; *Kalbrier v. Leonard*, 34 Ind. 497; *Barker v. State*, 18 Ohio 514; *Gillette v. City of Hartford*, 31 Conn. 351; *United States v. Memphis*, 97 U. S. 284; *Dickerson v. Franklin*, 112 Ind. 178; s. c. 13 N. E. 579; *Leeper v. City of South Bend*, 106 Ind. 375; s. c. 7 N. E. 1; *Simms v. City of Paris*, 8 Ky. L. 344 (mem.); s. c. in full 1 S. W. 543.

⁹⁴ *City of Logansport v. Seybold*, 59 Ind. 225; *Stilz v. City of Indianapolis*, 55 Ind. 515; *Kirby v. Shaw*, 19 Pa. St. 258, 261; *Norris v. City of Waco*, 57 Tex. 635; *Martin v. Dix*, 52 Miss. 53; *Giboney v. City of Cape Girardeau*, 58 Mo. 141; *Linton v. Mayor &c.*, 53 Ga. 588; *City of New Orleans v. Cazelar*, 27 La. An. 156;

Stoner v. Flournoy, 28 La. An. 850; *Kelley v. City of Pittsburgh*, 85 Pa. St. 170; s. c. 104 U. S. 78; *Hewitt's Appeal*, 88 Pa. St. 55; *Cary v. City of Pekin*, 88 Ill. 154; *Oliver v. City of Omaha*, 3 Dill. 368; *Washburn v. City of Oshkosh*, 60 Wis. 453; s. c. 19 N. W. 453.

⁹⁵ *Smith v. Sherry*, 50 Wis. 210; s. c. 6 N. W. 561. A city can not be permitted to retain land within its boundaries not needed for city purposes, and not benefited by being within the corporation, merely to raise money from it by taxation: *Evans v. City of Council Bluffs*, 65 Iowa 238; s. c. 21 N. W. 584; 8 Am. & Eng. Corp. Cas. 510.

⁹⁶ *Deeds v. Sanborn*, 26 Iowa 419; *Davis v. City of Dubuque*, 20 Iowa 458; *Deiman v. City of Fort Madison*, 30 Iowa 542; *Durant v. Kauffman*, 34 Iowa 194; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Swift v. City of Newport*, 7 Bush (Ky.)

to include within the corporate limits contiguous or other territory, and this without consulting with the old or new inhabitants. This would extend the taxing power over the new territory, and, in the absence of constitutional restrictions or statutory provisions, this annexed property may be taxable to discharge pre-existing municipal debts.⁹⁷ Kentucky and Iowa go even to the extent of affirming that the legislature not only lacks power to tax lands outside the limits of a city for city purposes, but declare that it can not extend the limits of a city in order to include in the corporation farming lands, occupied for agricultural purposes, and not needed for streets or houses, or other city purposes, when the purpose is to increase the municipal revenue by taxation.⁹⁸

37; *City of Covington v. Southgate*, 15 B. Mon. (Ky.) 491; *Sharp v. Dunavan*, 17 B. Mon. (Ky.) 223; *Arbegust v. City of Louisville*, 2 Bush (Ky.) 271; *Courtney v. Louisville*, 12 Bush (Ky.) 419; *Morford v. Unger*, 8 Iowa 82; *Langworthy v. City of Dubuque*, 13 Iowa 86; *Fulton v. City of Davenport*, 17 Iowa 404; *Buell v. Ball*, 20 Iowa 282.

⁹⁷ *Washburn v. City of Oshkosh*, 60 Wis. 453; s. c. 19 N. W. 364; *Blanchard v. Bissell*, 11 Ohio St. 96; *Powers v. County Com'rs*, 8 Ohio St. 258. See further, *Chandler v. City of Boston*, 112 Mass. 200; *Burlington &c. R. Co. v. Spearman*, 12 Iowa 112; *Wade v. City of Richmond*, 18 Gratt. (Va.) 583; *Norris v. Mayor*, 1 Swan (Tenn.) 167; *Smith v. McCarthy*, 56 Pa. St. 359; *City of St. Louis v. Allen*, 13 Mo. 400; *Queen v. Board*, L. R. 8 Q. B. 227; *Commissioners &c. v. Commissioners &c.*, 92 U. S. 307; *Woods v. Henry*, 55 Mo. 560; *State v. McReynolds*, 61 Mo. 203; *Layton v. City of New Orleans*, 12 La. An. 515; *Inhabitants &c. v. Inhabitants &c.*, 21 Maine 58; *City of St. Louis v. Russell*, 9 Mo. 507; *Elston v. Board &c.*, 20 Ind. 272; *Edmunds v. Gookins*, 20 Ind. 477; *Girard v. Philadelphia*, 7 Wall. 1; *Covington v. City of East St. Louis*, 73 Ill. 548; *Graham v. City of Greenville*, 67 Tex. 62; s. c. 2 S. W. 742;

Board &c. v. Board &c., 58 Miss. 619. See also, *United States v. Memphis*, 97 U. S. 284; *Warren v. Mayor &c.*, 2 Gray (Mass.) 84, as to the general power of the legislature to change corporate boundaries; and *Morris v. Mayor &c.*, 6 Lea (Tenn.) 337. For the construction of Pennsylvania statutes, see *Devore's Appeal*, 56 Pa. St. 163; *Borough of Blooming Valley*, 56 Pa. St. 66; *Borough of Little Meadows*, 35 Pa. St. 335. Of Indiana statutes, *Mayor &c. v. Weems*, 5 Ind. 547; *Huff v. City of Lafayette*, 108 Ind. 14; s. c. 8 N. E. 701; *Taylor v. City of Fort Wayne*, 47 Ind. 274. As to effect on homestead right, see *Taylor v. Boulware*, 17 Tex. 74; *Finley v. Dietrick*, 12 Iowa 516; *Truax v. Pool*, 46 Iowa 256.

⁹⁸ *City of Covington v. Southgate*, 15 B. Mon. (Ky.) 491; *Arbegust v. City of Louisville*, 2 Bush (Ky.) 271; *Swift v. City of Newport*, 7 Bush (Ky.) 37; *Morford v. Unger*, 8 Iowa 82; *Langworthy v. City of Dubuque*, 13 Iowa 86; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Fulton v. City of Davenport*, 17 Iowa 404; *Sharp v. Dunavan*, 17 B. Mon. (Ky.) 223; *Buell v. Ball*, 20 Iowa 282. See to the same purpose, *Bradshaw v. City of Omaha*, 1 Neb. 16; *Durant v. Kauffman*, 34 Iowa 194. *Contra*, *Giboney v. City of Cape*

§ 1465. **Effect of change of corporate limits.**—When corporate limits are extended the annexed territory will become, in the absence of legislation to the contrary, subject to taxation for all municipal indebtedness then existing.⁹⁹ And it is immaterial that the addition is effected by the consolidation of two municipalities.¹⁰⁰ The case of

Girardeau, 58 Mo. 141; *Martin v. Dix*, 52 Miss. 53; *Stilz v. City of Indianapolis*, 55 Ind. 515. Cf. *Kelley v. City of Pittsburg*, 85 Pa. St. 170; *Weeks v. City of Milwaukee*, 10 Wis. 242; *Hewitt's Appeal*, 88 Pa. St. 55; *Norris v. City of Waco*, 57 Tex. 635; *Stoner v. Flournoy*, 28 La. An. 850; *Washburn v. City of Oshkosh*, 60 Wis. 453. The legislature can not annex to a village territory not contiguous for the purpose of increasing its revenues: *Smith v. Sherry*, 50 Wis. 210. Under the code of Iowa providing for annexation of territory to a municipality, the inhabitants of the territory so annexed can not complain of the levy of municipal taxes or assessments on their property, on the ground that it is situated in a river bottom which is sometimes subject to overflow: *Ford v. Town of North Des Moines*, 80 Iowa 626; s. c. 45 N. W. 1031. An Iowa statute authorizing municipal extension of limits, and providing that "no lands within said extended limits" not laid off into lots, etc., shall be taxed for city purposes, does not apply to extensions made before the passage of the act: *Perkins v. City of Burlington*, 77 Iowa 553; s. c. 42 N. W. 441.

⁹⁹ *Madry v. Cox*, 73 Tex. 538; s. c. 11 S. W. 541. Municipal taxation of new territory not dependent upon benefits: *Davis v. Point Pleasant*, 32 W. Va. 289; s. c. 9 S. E. 228.

¹⁰⁰ *Smith v. Mayor &c.*, 81 Mich. 123; s. c. 45 N. W. 964. Contracts designed to operate through the city at large extend to and operate throughout the limits of the mu-

nicipality subsequently enlarged: *St. Louis Gas Co. v. City of St. Louis*, 46 Mo. 121. After paving contracts had been made wards were added to a municipality, it being provided that the residents should not be liable for previous municipal debts, and it was held that there were no contract obligations between the contractors and the newly added residents: *United States v. Memphis*, 97 U. S. 284. See also, *City of Cleveland v. Heisley*, 41 Ohio St. 670. The subject of narrowing the corporate limits, as related to previous debts, has also been a matter of discussion in various cases. In *State v. Board &c.*, 41 Kan. 630, it was held that the liability for the debt attaches to the real estate of the county as soon as the bonds are legally issued, and the fact that the proceeds of the bonds had been expended when the change of boundary lines was made did not exempt the detached property from bearing its share of the debt; holding, also, that the fact that some of the territory was government land and not taxable when it was detached will not relieve it when it is no longer exempt. The new township formed from part of an old one is entitled to its share of the taxes assessed for the use of the original township: *Towle v. State*, 110 Ind. 120; s. c. 10 N. E. 941. When territory is detached from a county and formed into a new county, the treasurer of the old county can not be required to collect from the inhabitants of the new county taxes levied prior to the division: *State v. Clevenger*, 27 Neb.

changes in municipal boundaries, by enlarging or contracting the limits or otherwise, is one which usually requires legislation for the adjustment of rights, for injustice might result from a failure of the legislature to provide for the changed condition. Therefore the legislature apportions property and debts to do justice, as nearly as possible, to the inhabitants of the territory affected.¹⁰¹

§ 1466. Equality and uniformity.—All taxation upon property must be apportioned with absolute uniformity within specific taxing districts, and to render taxation uniform in any case two things are essential:—First, each taxing district must confine itself to the objects of taxation within its limits. Otherwise there may be double taxation. The second essential is that there should be uniformity in

422; s. c. 43 N. W. 243. *Contra*, *Fender v. Neosho Falls Tp.*, 22 Kan. 305.

¹⁰¹ *School Dist. v. Board &c.*, 73 Mo. 627; *Whitney v. Inhabitants &c.*, 111 Mass. 368; *Inhabitants &c. v. Inhabitants &c.*, 16 Mass. 16; *Salem Tp. &c. v. Essex Co.*, 100 Mass. 282; *Stone v. City of Charlestown*, 114 Mass. 214; *Bristol v. New Chester*, 3 N. H. 524; *Portwood v. Board &c.*, 52 Miss. 523; *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 93. As to the effect of detaching territory from a municipality previously indebted, see *City of Galesburg v. Hawkinson*, 75 Ill. 152, where it is held that it is unjust to the remaining taxpayers to withdraw real estate. This case also holds that the legislature can not delegate its power to change boundaries to the courts. Territory brought in is liable to be taxed for existing municipal debts: *City of Olney v. Harvey*, 50 Ill. 453; *Watson v. Commissioners &c.*, 82 N. C. 17; *Stilz v. City of Indianapolis*, 81 Ind. 582. But so long as a corporation retains its legal identity, it will be entitled to retain its property and be liable for its debts: *Milner v. City of Pensacola*, 2 Woods 632; *Wade v. City of Richmond*, 18 Gratt. (Va.) 583; *Town of North Hempstead v. Town of Hempstead*, 2

Wend. (N. Y.) 109, 135; *Hartford Bridge Co. v. Town of East Hartford*, 16 Conn. 149, 171; *Inhabitants &c. v. Inhabitants &c.*, 4 Mass. 384; *Inhabitants &c. v. Inhabitants &c.*, 16 Mass. 76, 85; *Town of Montpelier v. Town of East Montpelier*, 29 Vt. 12; *City of Olney v. Harvey*, 50 Ill. 453. The case of the division of towns and counties usually requires state apportionment. When one municipality is set off from another, the old one will, in the absence of statutory provisions, retain the public property and be liable for the corporate debts. It will also retain the right to collect the taxes previously voted, and such taxes will belong to it, though collected in part from the detached territory: *Board &c. v. Board &c.*, 32 Ind. 234; *Devor v. McClinton*, 9 W. & S. (Pa.) 80; *Waldron v. Lee*, 5 Pick. (Mass.) 323; *Harmon v. Inhabitants &c.*, 9 Cush. (Mass.) 525; *Moss v. Shear*, 25 Cal. 38. See also, *Alvis v. Whitney*, 43 Ind. 83. And even though the tax be for a local work, the whole benefit of which will be received by the old municipality, the case will be the same: *Board &c. v. Board &c.*, 26 Kan. 181. Cf. *Chandler v. Reynolds*, 19 Kan. 249; *Lamb v. Burlington &c. R. Co.*, 39 Iowa 333.

the manner of assessment, and approximate equality in the amount of exactions within the district; and all objects of taxation within the district should be embraced.¹⁰² Perfect equality in taxation is, however, unattainable, and there are many difficulties in all attempts at equal taxation.¹⁰³ If a tax reaches all of a class of persons or things, and there is no discrimination between the individuals of the class taxed, the element of uniformity is satisfied.¹⁰⁴ The legislature has the power to prescribe not only the property to be taxed, but the rule by which it must be taxed, and the only limitation of that power is that the rule shall be uniform.¹⁰⁵ The rule of uniformity extends to cities, towns and counties as well as to state taxation; but local taxes may be levied on different systems in different districts.¹⁰⁶ A state constitutional provision as to equality and uniformity does not preclude the imposition by a municipality of a tax on business, nor a tax on one class of business and not on another.¹⁰⁷ The provisions of a constitu-

¹⁰² Cooley Const. Lim. (6th ed.), 610, 633.

¹⁰³ See, for elaborate discussions of this subject, Gibson, C. J., in Kirby v. Shaw, 19 Pa. St. 258, 260; Bigelow, C. J., in Commonwealth v. People's &c. Bank, 5 Allen (Mass.) 428, 436; Williams' Case, 3 Bland Ch. (Md.) 186, 220.

¹⁰⁴ Ould v. City of Richmond, 23 Gratt. (Va.) 464; City of St. Louis v. Sternberg, 69 Mo. 289; Merriam v. City of New Orleans, 14 La. An. 318; City of New Orleans v. Kaufman, 29 La. An. 283; City of New Orleans v. Staiger, 11 La. An. 68; American Union Ex. Co. v. City of St. Joseph, 66 Mo. 675; Glasgow v. Rowse, 43 Mo. 479; Ottawa Com'rs v. Nelson, 19 Kan. 234. Taxation must be equal, uniform, and ad valorem, except as to incomes, licenses and capitation: Peters v. City of Lynchburg, 76 Va. 927; s. c. 3 Am. & Eng. Corp. Cas. 475; Schooffield's Ex'r v. City of Lynchburg, 78 Va. 366; s. c. 8 Am. & Eng. Corp. Cas. 488.

¹⁰⁵ Wisconsin &c. R. Co. v. Taylor Co., 52 Wis. 37, 43; s. c. 8 N. W. 833.

¹⁰⁶ State v. Hannibal &c. R. Co., 75 Mo. 208, 212; Hale v. City of Kenosha, 29 Wis. 599; Knowlton v.

Board &c., 9 Wis. 410; People v. Central Pac. R. Co., 43 Cal. 398. See also, Gilman v. City of Sheboygan, 2 Black 510. In Indiana and Louisiana a constitutional requirement of uniformity has no reference to municipal taxes: City of Richmond v. Scott, 48 Ind. 568; Loftin v. Citizens' Bank, 85 Ind. 341, 346; Louisiana v. Pilsbury, 105 U. S. 278, 291; Municipality v. Duncan, 2 La. An. 182; City of Lafayette v. Cummins, 3 La. An. 673; Selby v. Levee Com'rs, 14 La. An. 434; Bishop v. Marks, 15 La. An. 147; Yeatman v. Crandall, 11 La. An. 220; Surgi v. Snetchman, 11 La. An. 387. Cf. Douglas v. Town of Harrisville, 9 W. Va. 162. But the constitution of Texas, which contains the same provision as the constitution of Louisiana, is held to control municipal as well as state taxation: City of Austin v. Austin Gas-light Co., 69 Tex. 180; s. c. 7 S. W. 200. See also, City of New Orleans v. Elliott, 10 La. An. 59.

¹⁰⁷ Cutliff v. Mayor &c., 60 Ga. 597; Davis v. Mayor &c., 64 Ga. 128, 133; Johnston v. Mayor &c., 62 Ga. 645. See also, Frommer v. City of Richmond, 31 Gratt. (Va.) 646; Trustees v. McConnell, 12 Ill. 138; Western

tion as to equality and uniformity apply to property alone and not to taxes on privileges and occupations.¹⁰⁸

§ 1467. **Taxation to pay debts.**—A municipal debt is often the first step in taxation, the levy of taxes being the only means of paying the debt. If a municipality refuses to pay a debt, the state may, so far as such refusal is a public wrong, levy a tax, by state agencies if necessary, upon the property of the municipality, or compel the municipality to levy it, sufficient to meet the obligation.¹⁰⁹ But the power may

U. Tel. Co. v. State, 55 Tex. 314; Texas &c. Co. v. State, 42 Tex. 636, 639; Carter v. Dow, 16 Wis. 298; Baker v. City of Cincinnati, 11 Ohio St. 534.

¹⁰⁸ Gatlin v. Town of Tarboro, 78 N. C. 119; Washington v. State, 13 Ark. 753; Egyptian Levee Co. v. Hardin, 27 Mo. 495; McGehee v. Mathis, 21 Ark. 40; People v. Coleman, 4 Cal. 46; Bohler v. Schneider, 49 Ga. 195; Glasgow v. Rowse, 43 Mo. 479; Western U. Tel. Co. v. Thayer, 28 Ohio St. 521; Walters v. Duke, 31 La. An. 668; Boye v. Girardey, 28 La. An. 717; Ex parte Robinson, 12 Nev. 263; Howe Ins. Co. v. City Council, 50 Ga. 530; Slaughter v. Commonwealth, 13 Gratt. (Va.) 767; Eyre v. Jacob, 14 Gratt. (Va.) 422; Adams v. Mayor &c., 2 Head (Tenn.) 363; Texas Ins. Co. v. State, 42 Tex. 636; Wiggins Ferry Co. v. City of East St. Louis, 102 Ill. 560; Walker v. City of Springfield, 94 Ill. 364; City of St. Louis v. Green, 7 Mo. App. 468. See also, Young v. Town of Henderson, 76 N. C. 420. An exemption clause in a constitution renders it imperative that all private property not exempt shall be taxed, whether the tax is for municipal or state purposes: Hill v. Higdon, 5 Ohio St. 243; City of Zanesville v. Richards, 5 Ohio St. 589. A levy by a municipality of two per cent. on real estate, excluding from valuation and taxation the stocks of goods of merchants, is not

uniform: London v. City of Wilmington, 78 N. C. 109. Where taxable property in a city is exempted from taxation, with the design of benefiting the city by increasing its business and population, and the taxes on other property in the city are thereby increased, such taxes are illegal and uncollectible: Weeks v. City of Milwaukee, 10 Wis. 242; Kittle v. Sherwin, 11 Neb. 65; s. c. 7 N. W. 863. Where a merchant's privilege is taxed, no discrimination can be made between those living within and those residing without the city: Mayor &c. v. Althrop, 5 Coldw. (Tenn.) 554. Cf. Robinson v. City Council &c., 2 Rich. (S. C.) 317. An exemption of the property of non-residents is unconstitutional as violating the rule of equality and uniformity: Marion &c. R. Co. v. Champlin, 37 Kan. 682; s. c. 16 Pac. 222. On the general subject see Commonwealth v. Delaware Canal Co., 123 Pa. St. 594; s. c. 16 Atl. 584; 25 Am. & Eng. Corp. Cas. 348; Verdery v. Village of Summerville, 82 Ga. 138; s. c. 8 S. E. 213; 23 Am. & Eng. Corp. Cas. 358; Daly v. Morgan, 69 Md. 460; s. c. 16 Atl. 287; 23 Am. & Eng. Corp. Cas. 454; Livingston v. Paducah, 80 Ky. 656; s. c. 3 Am. & Eng. Corp. Cas. 573; Danville v. Shelton, 76 Va. 325; s. c. 3 Am. & Eng. Corp. Cas. 458.

¹⁰⁹ Dunnovan v. Green, 57 Ill. 63; Town of Guilford v. Board &c., 18 Barb. (N. Y.) 615; s. c. 13 N. Y. 143;

be limited, "and there is much good reason for assenting also to what several respectable authorities have held, that when a demand is asserted against a municipality, though of a nature that the legislature would have a right to require it to receive and discharge, yet if its legal and equitable obligation is disputed, the corporation has the right to have the dispute settled by the courts, and can not be bound by a legislative allowance of the claim."¹¹⁰ The power of the municipality to make contracts and create liabilities imposes the duty to provide for the payment of obligations and liabilities. If no special mode of payment is prescribed by law a tax must be collected to satisfy the claims of creditors;¹¹¹ and if the existing law or any law

New Orleans v. Clark, 95 U. S. 644; Sinton v. Asbury, 41 Cal. 525, 530; Beals v. Board &c., 35 Cal. 624; Sharp v. Contra Costa Co., 34 Cal. 284; People v. McCreery, 34 Cal. 432; People v. Board &c., 26 Cal. 641; People v. Board &c., 11 Cal. 206; Borough of Dunmore's Appeal, 52 Pa. St. 374; Layton v. City of New Orleans, 12 La. An. 515; Burns v. Clarion Co., 62 Pa. St. 422; People v. Flagg, 46 N. Y. 401; People v. Power, 25 Ill. 169; Town of Waterville v. County Com'rs, 59 Maine 80. The legislature may validate an unauthorized issue of bonds: Read v. Plattsmouth, 107 U. S. 568. An act can not create a liability, but may provide for enforcing a pre-existing liability: Board &c. v. Cowan, 60 Miss. 876. Nor bestow a gratuity: Fuller v. Morrison Co., 36 Minn. 309; s. c. 30 N. W. 824. See Caldwell Co. v. Harbert, 68 Tex. 321; s. c. 4 S. W. 607; State v. Foley, 30 Minn. 350; s. c. 15 N. W. 375; Creighton v. Board &c., 42 Cal. 446; Youngblood v. Sexton, 32 Mich. 406; Meriwether v. Garrett, 102 U. S. 472; Meyer v. Brown, 65 Cal. 583; s. c. 26 Pac. 281; Shelley v. St. Charles Co., 30 Fed. 603; State v. Assessors &c., 43 N. J. L. 338; Lilly v. Taylor, 88 N. C. 489; Bloomfield v. Charter Oak Bank, 121 U. S. 121; s. c. 7 S. Ct. 865.

has been held that the legislature has no right to direct a municipality to pay a claim for damages for breach of contract out of the corporate funds or property: People v. Haws, 37 Barb. (N. Y.) 440. The court cited Town of Guilford v. Board &c., 13 N. Y. 143; People v. Supervisors, 11 Abb. Pr. (N. Y.) 114, and People v. Mayor &c., 4 N. Y. 419, which hold that the state may compel the levy of taxes to pay claims against municipalities, but draws a distinction between taxing to pay such debts and paying the claims out of the corporate funds or property. This decision (People v. Haws, 37 Barb. (N. Y.) 440) seems opposed to the decision in the Borough of Dunmore's Appeal, 52 Pa. St. 374. Cf. Baldwin v. Mayor &c., 42 Barb. (N. Y.) 549; In re Pennsylvania Hall, 5 Pa. St. 204; Layton v. City of New Orleans, 12 La. An. 515; People v. Power, 25 Ill. 189; Portwood v. Board &c., 52 Miss. 523.

¹¹¹ Commonwealth v. Commissioners &c., 37 Pa. St. 277; Commonwealth v. Select &c. Council, 34 Pa. St. 496; United States v. New Orleans, 98 U. S. 381. When the power to levy taxes for general purposes was expressly limited, an authority to contract debts beyond that amount for special purposes was held not to imply an authority to

¹¹⁰ Cooley Const. Lim., p. 286. It

adopted for the purpose requires the municipality itself to levy the tax, the officers may be compelled by mandamus to make the levy.¹¹² In contracting a debt a municipality impliedly contracts to employ its taxing powers to ratify the obligation.¹¹³ This principle does not apply where there are other means than taxation provided for paying the debt;¹¹⁴ nor to compel the levy of a tax to pay a judgment recovered against a town which had no express charter power of taxation.¹¹⁵

§ 1468. Limitation of state control.—The powers which a municipality had when the debt was contracted can not subsequently be lessened to the prejudice of the creditor.¹¹⁶ Even if the state sympathizes with the debtor municipality, and attempts to aid it by limiting its power to tax so that the corporate debts can not be paid by taxes raised within the legal limits, the courts will hold that such limitation of the taxing power is an impairment of the obligation of contracts. Where the state has conferred the power to create debts and to levy taxes for their satisfaction, it impliedly contracts with those who become creditors that the power so conferred shall not be restricted to their prejudice while their demands remain unpaid.¹¹⁷

levy taxes to pay such special debts: *State v. Town of Guttenberg*, 38 N. J. L. 419. See *United States v. Macon Co.*, 99 U. S. 582.

¹¹² *Commonwealth v. Select & Council*, 34 Pa. St. 496; *People v. Common Council &c.*, 27 Mich. 131; *Morgan v. Commonwealth*, 55 Pa. St. 456; *Robinson v. Supervisors*, 43 Cal. 353; *Louisiana v. Police Jury*, 111 U. S. 716; s. c. 4 S. Ct. 648.

¹¹³ *Sibley v. City of Mobile*, 3 Woods 535; *State v. Police Jury*, 34 La. An. 673; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Riggs v. Johnson Co.*, 6 Wall. 166; *United States v. New Orleans*, 98 U. S. 381, 391; *Kelley v. Milan*, 127 U. S. 139, 150; s. c. 8 S. Ct. 1101; *Norton v. Dyersburg*, 127 U. S. 160; s. c. 8 S. Ct. 1111; *City of Galena v. Amy*, 5 Wall. 705; *Loan Ass'n v. Topeka*, 20 Wall. 655; *Rees v. City of Watertown*, 19 Wall. 107; *United States v. Macon Co.*, 99 U. S. 582; *Wolff v. New Orleans*, 103 U. S. 358; *Ralls Co. Court v. United States*, 105 U. S. 733.

¹¹⁴ *United States v. Mayor &c.*, 2 Woods 230; *People v. Common Council &c.*, 33 Mich. 164.

¹¹⁵ *State v. Town of Maysville*, 12 S. C. 76.

¹¹⁶ *Brodie v. McCabe*, 33 Ark. 690; *Lilly v. Taylor*, 88 N. C. 489; *Goodale v. Fennell*, 27 Ohio St. 426. But the state may, by subsequent legislation, legalize a contract ultra vires when made, and enforce performance on the part of the municipality: *Cooley Const. Lim.* (6th ed.) 467. But see *Hashbrouck v. City of Milwaukee*, 13 Wis. 37.

¹¹⁷ *Von Hoffman v. City of Quincy*, 4 Wall. 535; *City of Galena v. Amy*, 5 Wall. 705; *Riggs v. Johnson Co.*, 6 Wall. 166; *Rees v. City of Watertown*, 19 Wall. 107; *United States v. Jefferson Co.*, 5 Dill. 310; *Sibley v. City of Mobile*, 3 Woods 535; *Brodie v. McCabe*, 33 Ark. 690. The Tennessee acts enacted with a view to compel the compromise of municipal indebtedness by the bondholders are, under the inhibition of the federal constitution against impairing the obligation of contracts, uncon-

Where contracts are made under a settled construction of the constitution by the judiciary, they can not afterwards be invalidated by a change in such construction,¹¹⁸ or by any change in the constitution itself.¹¹⁹

§ 1469. Other limitations of taxing power.—Where a bonded debt is authorized and the power of taxation is limited to the special tax designated in the act, there is no power to levy a greater tax than the one thus specially limited; and if there is no statute giving power to issue bonds, the municipality can not be compelled to raise a tax to pay them.¹²⁰ So, a municipality can not raise a tax to pay indebtedness, unless it has express or implied power to levy a tax for that pur-

stitutional and void, in so far as they repeal the corporate powers of taxation conferred as a part of the remedy of the creditors: *Devereaux v. City of Brownsville*, 29 Fed. 742. Any taxes levied by the legislature for municipal purposes, or grants of power to a municipality to make such levies, may be repealed, if they are subsequent to the contract involved, as there is no protection under the federal constitution except for such powers of taxation as enter into and become a part of the contract itself, and belong as a remedy to the creditor of the municipality: *Devereaux v. City of Brownsville*, supra.

¹¹⁸ *Douglass v. Pike Co.*, 101 U. S. 677; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Olcott v. Supervisors*, 16 Wall. 678.

¹¹⁹ *White v. Hart*, 13 Wall. 646; *Opinions of Court*, 58 N. H. 623. But where, at the time the contract is made, only realty is taxable for payment of the obligation, a subsequent extension to embrace personalty is a mere gratuity, and may be repealed: *Foot v. County Court &c.*, 1 McCrary 218. The power which has been conferred to contract a debt in aid of a railroad may be taken away at any time before the debt is contracted, even though the people have voted the aid; and a subscription made by the municipal

officers after the power has been taken away is void: *List v. City of Wheeling*, 7 W. Va. 501. See also, *Railroad Co. v. Gaines*, 97 U. S. 697. The statutory right to damages for injury from a mob is not founded on contract; and if after the recovery of the judgment the rate of taxation that may be levied for its payment is changed, the federal courts can not interfere: *Louisiana v. Mayor &c.*, 109 U. S. 285; s. c. 3 S. Ct. 211. Where a village, after a cause of action has accrued against it, reorganizes under a general act, thereby obtaining the right to levy taxes at a higher rate than before, and the cause of action is then reduced to judgment, the village may levy taxes at the higher rate to pay such judgment, where the statutes provide that the liabilities of corporations are not released by reorganization: *Carney v. Village of Marseilles*, 136 Ill. 401; s. c. 26 N. E. 491.

¹²⁰ *United States v. Clark Co.*, 96 U. S. 211; *United States v. Macón Co.*, 99 U. S. 582; *McPherson v. Foster*, 43 Iowa 48; *People v. Board &c.*, 92 Ill. 441; *Sykes v. Mayor &c.*, 55 Miss. 115; *Williamson v. City of Keokuk*, 44 Iowa 88; *State v. Macon Co. Court*, 68 Mo. 29; *Aspinwall v. Board &c.*, 22 How. 364; *Marsh v. Fulton Co.*, 10 Wall. 676; *Bissell v. City of Kankakee*, 64 Ill

pose.¹²¹ In *United States v. Macon County Court*,¹²² the court said:—"Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder can not require the municipal authorities to levy a tax for that purpose. * * * We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We can not create new rights or confer new powers."¹²³ But in *United States v. New Orleans*,¹²⁴ it was held that when a municipal corporation has been vested with authority to borrow money or incur an obligation in order to execute a public work, it has power to raise by taxation the money to discharge the obligation, without any special mention of the power to do so, unless the implication of such power is repelled by other provisions in the charter or other legislative enactments.¹²⁵

§ 1470. Effect of annulling the municipal charter.—No subsequent change in the municipal boundaries, or in the organization or powers of the municipality, short of the entire destruction of the corporation, can affect the right of creditors to proceed against the municipality or its officers.¹²⁶ But if the state should take away altogether the cor-

249; *Knox Co. Court v. United States*, 109 U. S. 229; s. c. 3 S. Ct. 131; *Chicot Co. v. Kruse*, 47 Ark. 80; s. c. 14 S. W. 469. See also, *East St. Louis v. United States*, 110 U. S. 321; s. c. 4 S. Ct. 21; *Clay Co. v. McAleer*, 115 U. S. 616; s. c. 6 S. Ct. 199. A subsequent constitutional provision was held to remove a prior charter limitation on the power of a council to levy a tax for the payment of bonded debt thereafter incurred: *East St. Louis v. Amy*, 120 U. S. 600; s. c. 7 S. Ct. 739.

¹²¹ *United States v. Macon Co. Court*, 99 U. S. 582; *State v. Board &c.*, 39 N. J. L. 660; *In re Methodist &c. Church*, 66 N. Y. 395.

¹²² 99 U. S. 582.

¹²³ See also, *Harshman v. Knox Co. Court*, 122 U. S. 306; s. c. 7 S. Ct. 1177; *Brownsville Com'rs v. Loague*, 129 U. S. 493; s. c. 9 S. Ct. 327.

¹²⁴ 98 U. S. 381, 391.

¹²⁵ See also, *United States v. Jus-*

tices &c., 5 Dill. 184. Mandamus has been employed to compel the levy of a tax to the full limit in force when the debt was created, notwithstanding a subsequent constitutional restriction on the amount of taxes which might be levied: *Fisk v. Jefferson &c. Jury*, 116 U. S. 131; s. c. 6 S. Ct. 329. Cf. *East St. Louis v. Amy*, 120 U. S. 600; s. c. 7 S. Ct. 739.

¹²⁶ *State v. City of New Orleans*, 34 La. An. 1149; *United States v. Port of Mobile*, 4 Woods 536; *Decatur Co. Board &c. v. State*, 86 Ind. 8. See also, *Robinson v. Supervisors &c.*, 43 Cal. 353. When a special tax is authorized for a particular demand, and it is inadequate to the purpose, payment from the general fund may be compelled: *United States v. Clark Co.*, 95 U. S. 769; *Knox Co. Court v. United States*, 109 U. S. 229; s. c. 3 S. Ct. 131. See also, *United States v. County Court*,

porate powers of the debtor municipality, and create instead one or more entirely new corporations, which should be, not successors to the old bodies under new names, but new and distinct creations, the creditors might be without remedy, as taxation could not be enforced under the old law after the corporations ceased to exist.¹²⁷ It has also been held that the property of the individuals of the defunct corporations could not by judicial proceedings be subjected to the payment of the old debts. Also that all corporate property held for public use would pass, when the corporation ceased to exist, under the immediate control of the state. Even taxes levied before the repeal of the charter could only be collected under legislative authority, and in the absence of such authority the remedy of the creditors would be an appeal to the legislature.¹²⁸

§ 1471. **Mandamus.**^{128a}—The duty of the municipality to provide for the payment of liabilities may, in all proper cases, be enforced by mandamus.¹²⁹ It has been generally held that if the creditor may bring suit against the corporation and obtain judgment, which may be enforced by ordinary execution, mandamus will not lie to compel payment in advance of judgment recovered.¹³⁰ In New Jersey man-

4 McCrary 218. Confederating to prevent the collection of a tax to pay a judgment may be actionable: Findlay v. McAllister, 113 U. S. 104; s. c. 5 S. Ct. 401.

¹²⁷ Meriwether v. Garrett, 102 U. S. 472. See also, Cooley Taxation 78.

¹²⁸ Meriwether v. Garrett, *supra*; Luehrman v. Taxing District, 2 Lea (Tenn.) 425. See also, Uhl v. Board &c., 6 Lea (Tenn.) 610.

^{128a} See ch. 37, post, on Mandamus.

¹²⁹ Commonwealth v. Select &c. Council, 34 Pa. St. 496, 510; Walkley v. City of Muscatine, 6 Wall. 481; Mayor &c. v. Lord, 9 Wall. 409; Heine v. Levee Com'rs, 19 Wall. 655; Rees v. City of Watertown, 19 Wall. 107; Young v. Clarendon Tp., 132 U. S. 340; s. c. 10 S. Ct. 1137; Commonwealth v. Perkins, 43 Pa. St. 400; Maddox v. Graham, 2 Met. (Ky.) 56; Inhabitants &c. v. Mulliken, 7 Gray (Mass.) 280; State v. Common Council &c., 20 Wis. 87; Pegram v. Commissioners &c., 64 N.

C. 557; State v. Common Council &c., 15 Wis. 30; Hawley v. Mayor &c., 82 N. C. 22; Kennedy v. City of Sacramento, 19 Fed. 580. In New England the remedy is not by mandamus but by execution against the private property of any individual member of the municipal corporation: Inhabitants &c. v. Wood, 13 Mass. 193; Beardsley v. Smith, 16 Conn. 375; Gaskill v. Dudley, 6 Met. (Mass.) 546; Eames v. Savage, 77 Maine 212; Hawkes v. Inhabitants &c., 7 Mass. 461; Chase v. President &c., 19 Pick. (Mass.) 564; Bloomfield v. Charter Oak Bank, 121 U. S. 129; s. c. 7 S. Ct. 865; Hill v. City of Boston, 122 Mass. 344; s. c. 23 Am. R. 332.

¹³⁰ State v. Floyd Co. Judge, 5 Iowa 380; Coy v. City Council, 17 Iowa 1; People v. Board &c., 50 Ill. 213; State v. City of Davenport, 12 Iowa 335; Knapp v. Mayor &c., 38 N. J. L. 371; State v. Clay Co., 46 Mo. 231; State v. City of New Orleans, 30 La. An. 129, 82; Marsh v. Town of

damus is the remedy where the ordinary process of execution is inadequate.¹³¹ In California when a money judgment is recovered against a county no execution can issue; but the board of supervisors can be compelled by mandamus to audit the claim;¹³² while in Iowa the remedy against a county and upon ordinary municipal indebtedness is by suit and not by mandamus, when the indebtedness is in the original form, as a simple contract debt.¹³³ Where a municipal corporation is authorized to create a specific debt and levy a tax to pay the principal and interest, a mandamus is the proper remedy of the creditor to compel the payment of the principal or interest;¹³⁴ and where there is a duty to levy a special tax to pay a specified class of debts, and there is no valid defense claimed, and there is no question as to the genuineness of the evidences of debt which are held by the relator, it has been held that a prior judgment was not essential to give the right to a mandamus to compel the collection of the tax. But if there is any doubt as to the validity of the debt, the court will only grant the writ of mandamus to enforce a judgment obtained;¹³⁵ and in the federal courts

Little Valley, 64 N. Y. 112; *People v. Board &c.*, 64 N. Y. 627; *Mansfield v. Fuller*, 50 Mo. 338. Cf. *Buck v. City of Lockport*, 6 Lans. (N. Y.) 251. See also, *Klein v. Board &c.*, 51 Miss. 878; *Klein v. Board &c.*, 54 Miss. 254; *Newman v. Justices &c.*, 1 Heisk. (Tenn.) 787; *Gunn's Adm'r v. Pulaski Co.*, 3 Ark. 427; *Vance v. City of Little Rock*, 30 Ark. 435.

¹³¹ *State v. Board &c.*, 39 N. J. L. 660. For the law in Wisconsin, see *Crane v. City of Fond du Lac*, 16 Wis. 196; *State v. Common Council &c.*, 20 Wis. 87; *State v. Supervisors &c.*, 20 Wis. 80; *State v. Common Council &c.*, 15 Wis. 30.

¹³² *Alden v. Alameda Co.*, 43 Cal. 270.

¹³³ *State v. County Judge*, 5 Iowa 330; *Coy v. City Council*, 17 Iowa 1; *State v. City of Davenport*, 12 Iowa 335. For the Alabama law, see *Milner v. McWilliams*, 50 Ala. 427; *Elmore Co. v. Long*, 52 Ala. 277; *Covington Co. v. Dunklin*, 52 Ala. 28. Also, *Shinbone v. Randolph Co.*, 56 Ala. 183. In Pennsylvania it is held that an ordinary execution can

not be issued against a municipal corporation, and that the proper remedy of the creditor is the mandamus execution provided by the statute: *Monaghan v. City of Philadelphia*, 28 Pa. St. 207; *Commonwealth v. Select &c. Council*, 88 Pa. St. 66. The remedy against a county in Pennsylvania is sometimes by action and sometimes by mandamus: *Commonwealth v. Commissioners &c.*, 16 Serg. & R. (Pa.) 317; *Lyon v. Adams*, 4 Serg. & R. (Pa.) 443; *Wilson v. Commissioners &c.*, 7 Watts & S. (Pa.) 197.

¹³⁴ *Walkley v. City of Muscatine*, 6 Wall. 481; *State v. Commissioners*, 6 Ohio St. 280; *Flagg v. Palmyra*, 33 Mo. 440; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Supervisors &c. v. United States*, 4 Wall. 435; *Riggs v. Johnson Co.*, 6 Wall. 166; *Mayor &c. v. Lord*, 9 Wall. 409; *Board &c. v. Aspinwall*, 24 How. 376; *Supervisors v. Durant*, 9 Wall. 415.

¹³⁵ *Commonwealth v. Commissioners*, 37 Pa. St. 277; *County Com'rs &c. v. King*, 13 Fla. 451; *Common-*

a municipal bondholder must resort to law and obtain judgment to establish the validity and amount of his debt. In such cases a federal court can not issue a mandamus as an original proceeding.¹³⁶ A mandamus thus issued by the federal court takes the place of a writ of execution issued by the state courts, and the state courts can not interfere with it.¹³⁷

§ 1472. When mandamus is improper.—When the public interest conflicts with private interests the latter must yield. So if the entire fund which can be raised by taxation is required to meet the necessary expenses of the municipal government, economically administered, and none can be diverted without serious detriment to the public, none ought to be appropriated to pay debts. The municipal officers can not be compelled to levy a tax in excess of the legal limitation.¹³⁸ It is always the duty of a prospective municipal creditor to ascertain the powers which the municipality has, and if he fails to do so, he can not by mandamus compel the municipal officers to exceed their power.¹³⁹

wealth v. Select &c. Council, 34 Pa. St. 496; Maddox v. Graham, 2 Met. (Ky.) 56; State v. Commissioners &c., 6 Ohio St. 280; State v. Mayor &c., 49 N. J. L. 384; s. c. 8 Atl. 106. Cf. State v. City of Davenport, 12 Iowa 335; People v. Brown, 55 N. Y. 180; Pegram v. Commissioners &c., 64 N. C. 557; Winslow v. Commissioners &c., 64 N. C. 218; Brown v. Crego, 32 Iowa 498; Stevenson v. District Tp., 35 Iowa 462; Shinbone v. Randolph Co., 56 Ala. 183; State v. Common Council &c., 20 Wis. 87; Newman v. Justices, 5 Sneed (Tenn.) 695; State v. Anderson Co., 8 Baxt. (Tenn.) 249.

¹³⁶ Bath Co. v. Amy, 13 Wall. 244; Heine v. Levee Com'rs, 19 Wall. 655; Queensbury v. Culver, 19 Wall. 83, 92; Davenport v. Dodge Co., 105 U. S. 237.

¹³⁷ Riggs v. Johnson Co., 6 Wall. 166; United States v. Keokuk, 6 Wall. 514; Mayor v. Lord, 9 Wall. 409; Clews v. Lee Co., 2 Woods 474; Hawley v. Fairbanks, 108 U. S. 543; s. c. 2 S. Ct. 846; United States v. Silverman, 4 Dill. 224. As to pro-

ceedings in the federal courts, see also, Dillon Munic. Corp. (4th ed.), § 856, and Cooley Taxation (2d ed.), 744.

¹³⁸ United States v. Macon Co., 99 U. S. 582; Ralls Co. Court v. United States, 105 U. S. 733; Sparland v. Barnes, 98 Ill. 595; East St. Louis v. United States, 110 U. S. 321; s. c. 4 S. Ct. 21; Cope v. Collins, 37 Ark. 649; Sibley v. City of Mobile, 3 Woods 535; Cromartie v. Commissioners &c., 87 N. C. 134; City of East St. Louis v. Board &c., 6 Ill. App. 130; Clifton v. Wynne, 80 N. C. 145. The legal limitation of a county tax is not a limitation of town taxes; Wabash &c. R. Co. v. McCleave, 108 Ill. 368.

¹³⁹ East St. Louis v. United States, 110 U. S. 321; s. c. 4 S. Ct. 21; United States v. Macon Co. Ct., 99 U. S. 582. A statute authorizing a court to order a levy to pay a judgment is not controlled by a statute limiting the municipal tax rate: Shields v. Chase, 32 La. An. 409. Where the statute authorizing a mandamus is repealed after the writ has issued,

§ 1473. **Proceedings in equity.**—In general, it is only necessary before proceeding by mandamus that the amount of the demand shall be conclusively fixed and determined, and that it is the present duty of the municipality to provide for it;¹⁴⁰ but the federal supreme court has decided that equity jurisdiction should not be exercised to compel the payment of a judgment in favor of a bondholder which the writ of mandamus had failed to enforce, since the court regarded mandamus as the regular and appropriate remedy.¹⁴¹

§ 1474. **Execution.**—Municipal corporations may sometimes own some kinds of property strictly private, or an interest in such property, or have debts of a strictly private nature due them; and when such property, owned for profit, is not charged with any public trust or use, it is in some states held to be subject to levy and sale on execution like the property of individuals.¹⁴² In other states, either by statutory

the writ must nevertheless be enforced: *Memphis v. United States*, 97 U. S. 293. The court may decide what objects shall be included in the levy under such writ: *Memphis v. Brown*, 97 U. S. 300. If there is a lack of evidence to prove contract obligations, as distinguished from mere acknowledgments of debt, mandamus will not lie to compel taxation in excess of the legal limit: *Favrot v. Parish of East Baton Rouge*, 34 La. An. 491. The writ will not be granted unless there appears to be no other adequate remedy: *Hitchcock v. City of Galveston*, 4 Woods 308. Where a municipality has been abolished by law and the state has assumed the winding up of its affairs, mandamus will not lie to enforce the payment by it of a pre-existing debt: *Meriwether v. Garrett*, 102 U. S. 472.

¹⁴⁰ *State v. City of New Orleans*, 34 La. An. 477; *Louisiana v. Police Jury*, 111 U. S. 716; s. c. 4 S. Ct. 648; *Dayton Tp. v. Rounds*, 27 Mich. 82; *Schoolbred v. Corporation of Charleston*, 2 Bay (S. C.) 63; *Wilkinson v. Cheatham*, 43 Ga. 258; *Justices &c. v. Paris &c. Tpk. Co.*, 11 B. Mon. (Ky.) 143; *Rodman v. Justices*, 3 Bush (Ky.) 144; *People v. Super-*

visors &c., 10 Wend. (N. Y.) 363; *Robinson v. Supervisors &c.*, 43 Cal. 353; *People v. Board &c.*, 51 N. Y. 401; *State v. Smith*, 11 Wis. 65; *People v. Bennett*, 54 Barb. (N. Y.) 480; *Trustees &c. v. Dillon*, 16 Ohio St. 38; *County Com'rs &c. v. King*, 13 Fla. 451; *State v. Harris*, 17 Ohio St. 608; *United States v. City of Sterling*, 2 Biss. 408; *United States v. Board &c.*, 20 Fed. 294; *Gardner v. Haney*, 86 Ind. 17; *Commonwealth v. Select &c. Council*, 88 Pa. St. 66; *State v. Board &c.*, 27 Ohio St. 96; *East St. Louis v. United States*, 110 U. S. 321; s. c. 4 S. Ct. 21.

¹⁴¹ *Walkley v. City of Muscatine*, 6 Wall. 481; *Rees v. City of Watertown*, 19 Wall. 107; *Heine v. Levee Com'rs*, 19 Wall. 655; *Barkley v. Levee Com'rs*, 93 U. S. 258; *Thompson v. Allen Co.*, 115 U. S. 550. Cf. *Mount Pleasant v. Beckwith*, 100 U. S. 514.

¹⁴² *Brown v. Gates*, 15 W. Va. 131; *Holladay v. Frisbie*, 15 Cal. 630; *City of Davenport v. Peoria &c. Co.*, 17 Iowa 276; *City of Louisville v. Commonwealth*, 1 Duvall (Ky.) 295; *Birmingham v. Rumsey*, 63 Ala. 352; *Hart v. City of New Orleans*, 12 Fed. 292. See also, *City of New Or-*

law or judicial decisions, it is declared that the remedy of creditors is by mandamus and not by execution. The question is, for the most part, settled by legislation.¹⁴³ In recovery by mandamus the plaintiff is not restricted to any particular property or revenues, or subject to any conditions, unless judgment or statute so provides.¹⁴⁴ In the absence of statute there can be no mechanic's lien against property used for public purposes. The mechanic's remedy is by mandamus to compel payment, or the levy of a tax for the purpose.¹⁴⁵

§ 1475. **Implied obligations to levy tax.**—Though a municipality can not exceed a limitation imposed by the legislature, and can only be compelled to exercise the powers conferred upon it by the laws of the state, yet a creditor is entitled to have the *whole power of the corporation* exerted for the payment of a judgment;¹⁴⁶ and where a city council has a discretion as to the amount of tax which it is authorized to levy for *ordinary purposes*, it must, if necessary, exercise all the power which it has to pay a judgment obtained against the municipality.¹⁴⁷ So, though a legislative act is merely permissive in its language, the United States supreme court has held that a power thus given is mandatory and imposes a positive and absolute duty, if its exercise is necessary in order to pay judgments rendered against the mu-

leans v. Morris, 3 Woods 103; City of New Orleans v. Home &c. Ins. Co., 23 La. An. 61; New Orleans v. Morris, 105 U. S. 600. Judgments against a county which has no private property must be enforced by mandamus: Gooch v. Gregory, 65 N. C. 142.

¹⁴³ Commonwealth v. Commissioners &c., 37 Pa. St. 277; Commonwealth v. Perkins, 43 Pa. St. 400; State v. Common Council &c., 20 Wis. 87; Crane v. City of Fond du Lac, 16 Wis. 196; City of Chicago v. Hasley, 25 Ill. 485; City of Olney v. Harvey, 50 Ill. 453; City of Bloomington v. Brokaw, 77 Ill. 194; City of Cairo v. Allen, 3 Ill. App. 398; City of Morrison v. Hinkson, 87 Ill. 587; Klein v. New Orleans, 99 U. S. 149; Curry v. Mayor &c., 64 Ga. 290.

¹⁴⁴ United States v. New Orleans, 98 U. S. 381.

¹⁴⁵ Gooch v. Gregory, 65 N. C. 142; Leonard v. City of Brooklyn, 71 N. Y. 498; Board &c. v. O'Conner, 86

Ind. 531; Foster v. Fowler, 60 Pa. St. 27; Winslow v. Commissioners, 64 N. C. 218; Elrod v. Bernadotte, 53 Ill. 368; City of Bloomington v. Brokaw, 77 Ill. 194; City of Morrison v. Hinkson, 87 Ill. 587; Curry v. Mayor &c., 64 Ga. 290; Charnock v. District Tp. &c., 51 Iowa 70; Board &c. v. Neidenberger, 78 Ill. 58; Klein v. New Orleans, 99 U. S. 149. In Louisiana it was held that a jail could be sold under a mechanic's lien, but not the ground on which it stood: McKnight v. Grant Parish, 30 La. An. 361. For a construction of the statutory law in New York, see Bell v. Mayor &c., 105 N. Y. 139; s. c. 11 N. E. 495.

¹⁴⁶ Butz v. City of Muscatine, 8 Wall. 575; Coy v. City Council &c., 17 Iowa 1; Commonwealth v. Select &c. Council, 34 Pa. St. 496.

¹⁴⁷ See cases cited in preceding note, and also Iowa Railroad &c. Co. v. Sac Co., 39 Iowa 124.

municipality.¹⁴⁸ In all cases the rights and remedies of municipal creditors must be considered with reference to the legislation under which the debts were created. If the legislature authorizes the creation of a debt and provides no special mode for its payment, it must be inferred that the debt is to be paid by taxation for that purpose, if there is nothing to rebut such intention.¹⁴⁹

§ 1476. **Legislative control.**—The legislature has no power to restrict the taxing power of a municipality so as to prevent it from fulfilling obligations into which it has already entered,¹⁵⁰ nor to compel a municipality against its will to contract debts for local purposes in which the state is not concerned, or to assume obligations not within the ordinary functions of municipal government. The corporators have the same right to determine such matters that the members of private corporations have to determine for themselves the questions which arise for their corporate action. The state may, in such cases, remove restrictions and permit action, but can not compel it.¹⁵¹

¹⁴⁸ *Supervisors v. United States*, 4 Wall. 435; *Robinson v. Supervisors &c.*, 43 Cal. 353; *State v. Mayor &c.*, 30 La. An. 129; *Memphis v. Brown*, 97 U. S. 300; *United States v. Memphis*, 97 U. S. 284; *Memphis v. United States*, 97 U. S. 293. See also, *People v. Albany Supervisors*, 12 Johns. (N. Y.) 415.

¹⁴⁹ *United States v. New Orleans*, 98 U. S. 381; *Kelley v. Milan*, 127 U. S. 139, 150; s. c. 8 S. Ct. 1101; *Norton v. Dyersberg*, 127 U. S. 160; s. c. 8 S. Ct. 1111.

¹⁵⁰ *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Wolff v. New Orleans*, 103 U. S. 358; *Gilman v. City of Sheboygan*, 2 Black 510; *Lansing v. County Treasurer*, 1 Dill. 522; *Goodale v. Fennell*, 27 Ohio St. 426; *State v. Common Council &c.*, 15 Wis. 30; *Smith v. City of Appleton*, 19 Wis. 468. See also, *Butz v. City of Muscatine*, 8 Wall. 575; *People v. Woods*, 7 Cal. 579; *People v. Bond*, 10 Cal. 563.

¹⁵¹ *Cooley Const. Lim.* (6th ed.) 284, and notes on pp. 285-6. The legislature can not ratify or authorize a municipal tax to cover an illegal expenditure: *Carlton v. New-*

man, 77 Maine 408; s. c. 1 Atl. 194; 9 Am. & Eng. Corp. Cas. 454. See also, *People v. Mayor &c.*, 51 Ill. 17, where this view of the law is supported in an able opinion; *People v. Common Council*, 28 Mich. 288; *Barnes v. Town of Lacon*, 84 Ill. 461; *Cairo &c. R. Co. v. City of Sparta*, 77 Ill. 505; *Marshall v. Silliman*, 61 Ill. 218; *People v. Common Council &c.*, 51 Ill. 58; *Livingston v. Wider*, 53 Ill. 302; *People v. Canty*, 55 Ill. 33; *Wider v. City of East St. Louis*, 55 Ill. 133; *Gage v. Graham*, 57 Ill. 144. The legislature may compel a municipality to levy a tax for a local road: *Wilcox v. Deer Lodge Co.*, 2 Mont. 574. The legislature can not impose taxation to pay what a county does not owe: *Board &c. v. Cowan*, 60 Miss. 876. Nor to bestow a gratuity: *Fuller v. Morrison Co.*, 36 Minn. 309; s. c. 30 N. W. 824. The text is further supported in *Mills v. Charleton*, 29 Wis. 400; *People v. Batchellor*, 53 N. Y. 128. *Contra*, *President &c. v. State*, 45 Ala. 399. The law in New York does not seem to be clearly settled: *Thomas v. Leland*, 24 Wend. (N. Y.) 65; *People v. Batchellor*, 53 N.

§ 1477. **Taxing powers.**—In the absence of constitutional restrictions the legislature may confer the taxing power upon municipal corporations to any extent which it deems expedient, with limitations according to its judgment, as to the objects of taxation, the purposes and the rate. The state often does little beyond prescribing rules of limitation, within which, for local purposes, the local authorities may levy taxes, “but with full reserved power, nevertheless, to limit or recall the delegation at pleasure.”¹⁵² The legislature can not authorize a municipality to impose a tax which she herself could not levy;¹⁵³ but cities and villages are often empowered to tax trades and occupations which the state abstains from taxing.¹⁵⁴ It is essential that local rates shall be locally imposed by those who have to bear the burden; and this power has been constantly delegated to municipalities.¹⁵⁵ Since a municipality has no inherent power to tax, no person can be compelled to pay a tax for levying which there can not be shown a legislative grant of power;¹⁵⁶ and this applies to the exaction of license fees as well as to any other form of taxation. Such power can not be taken by implication.¹⁵⁷ Since the power to tax is a delegated au-

Y. 128; *Town of Duanesburgh v. Jenkins*, 57 N. Y. 177; *New York & C. R. Co. v. Van Horn*, 57 N. Y. 473

¹⁵² See *Cooley Taxation* (2d ed.) 63, and cases cited. This power must be delegated to the corporation itself, and not to officers: *Cooley Taxation* (2d ed.) 64.

¹⁵³ *O'Donnell v. Bailey*, 24 Miss. 386; *Mayor & C. v. Thomas*, 5 Coldw. (Tenn.) 600; *Union Bank & C. v. State*, 9 Yerg. (Tenn.) 490; *City of Memphis v. Hernando Ins. Co.*, 6 Baxt. (Tenn.) 527.

¹⁵⁴ *Johnston v. Mayor & C.*, 62 Ga. 645; *Ex parte City Council*, 64 Ala. 463. But this power can be exercised only for the specified purpose: *Webster v. People*, 98 Ill. 343.

¹⁵⁵ *State v. Denny*, 118 Ind. 382; s. c. 21 N. E. 252; *City of Evansville v. State*, 118 Ind. 426; s. c. 21 N. E. 267; *Caldwell v. Justices & C.*, 4 Jones' Eq. (N. C.) 323; *Burgess v. Pue*, 2 Gill (Md.) 11; *Perry v. City of Rockdale*, 62 Tex. 451; *State v. Denny*, 118 Ind. 449; s. c. 21 N. E. 274.

¹⁵⁶ *Ryerson v. Laketon Tp.*, 52

Mich. 509; s. c. 18 N. W. 241; *Jones v. Kolb*, 56 Wis. 263; s. c. 14 N. W. 177; *Vance v. City of Little Rock*, 30 Ark. 435; *Commissioners v. Newell*, 80 Ill. 587; *Stetson v. Kempton*, 13 Mass. 272; *Commissioners & C. v. Commissioners & C.*, 92 U. S. 307; *Daily v. Swope*, 47 Miss. 367; *Langhorne v. Robinson*, 20 Gratt. (Va.) 661.

¹⁵⁷ *Delcambre v. Clere*, 34 La. An. 1050; *City of Burlington v. Baumgardner*, 42 Iowa 673. After the assessment of a tax by a city under its delegated authority, the legislature may repeal the authority and prohibit collection of the tax: *City of Augusta v. North*, 57 Maine 392. Cf. *City of Dubuque v. Illinois & C. R. Co.*, 39 Iowa 56. Under charter powers to impose taxes, municipalities may prescribe penalties for non-payment, and such penalties become a part of the debt created by the tax, and are collectible in the same manner: *City of Burlington v. Burlington & C. R. Co.*, 41 Iowa 134. Provisions of the constitution restricting the powers of the state to

thority, it is always assumed that the state has given all it intended to be exercised, and the grant must be strictly pursued.¹⁵⁸ The current of authority is strongly against the doctrine of implied powers of municipal taxation, and statutes increasing the burdens of taxation must be strictly construed.¹⁵⁹

contract debts for internal improvements do not apply to municipalities: *Pine Grove Tp. v. Talcott*, 19 Wall. 666. Provisions abolishing previous exemptions will not, of their own force, give municipal corporations the power to tax. They must show express authority: *City of Savannah v. Atlantic &c. R. Co.*, 3 Woods 432.

¹⁵⁸ *State v. Brewer*, 64 Ala. 287; *Tallman v. White*, 2 N. Y. 66; *Doughty v. Hope*, 3 Denio (N. Y.) 249; *Cruger v. Dougherty*, 43 N. Y. 107; *City of Chicago v. Wright*, 32 Ill. 192; *Scammon v. City of Chicago*, 40 Ill. 146; *City of Richmond v. Richmond &c. R. Co.*, 21 Gratt. (Va.) 604; *Tucker v. Justices*, 34 Ga. 370; *Henderson v. Mayor &c.*, 8 Md. 352; *Sharp v. Johnson*, 4 Hill (N. Y.) 92; *State v. City of Davenport*, 12 Iowa 335; *In re Turfler*, 44 Barb. (N. Y.) 46; *Howell v. City of Buffalo*, 15 N. Y. 512; *Bennett v. City of Buffalo*, 17 N. Y. 383; *Smith v. Davis*, 30 Cal. 536; *Smith v. Cofran*, 34 Cal. 310; *City Council &c. v. State*, 38 Ala. 162; *City of St. Joseph v. Anthony*, 30 Mo. 537; *McComb v. Bell*, 2 Minn. 295; *State v. Mayor &c.*, 26 N. J. L. 444; *Municipality v. Millaudon*, 12 La. An. 769; *Kyle v. Malin*, 8 Ind. 34. Express power to levy particular taxes is a negation to levy others, and the enumeration of particular subjects of taxation precludes the taxation of others: *Baldwin v. City Council*, 53 Ala. 437. Authority to levy a particular tax does not enlarge by implication an existing limitation upon the whole amount of municipal taxation: *Weber v. Traubel*, 95 Ill. 427. A municipal corporation has no power to

levy taxes except under express authority or necessary implication: *State v. Town of Maysville*, 12 S. C. 76; *Meriwether v. Garrett*, 102 U. S. 472; *Sharp v. Spier*, 4 Hill (N. Y.) 76; *Manice v. Mayor &c.*, 8 N. Y. 120; *Jeffers v. Lawrence*, 42 Iowa 498; *Cruger v. Dougherty*, 43 N. Y. 107; *Litchfield v. Vernon*, 41 N. Y. 123; *Mays v. City of Cincinnati*, 1 Ohio St. 268; *Jonas v. City of Cincinnati*, 18 Ohio 318; *City Council &c. v. Walton*, 37 Ga. 620; *Sanders v. Town Com'rs*, 30 Ga. 679; *Holland v. Mayor &c.*, 11 Md. 186. See also, *Cooley Taxation* (2d ed.) 275, and cases cited.

¹⁵⁹ *Chestnutwood v. Hood*, 68 Ill. 132. See also, *Fisher v. People*, 84 Ill. 491, where, in creating a school district, an implied power to tax was held to have been given, though not mentioned in terms. But see the following cases, where the construction precluded any implication: —*Taft v. Wood*, 14 Pick. (Mass.) 362; *Rawson v. School Dist.*, 100 Mass. 134; *Gustin v. Inhabitants &c.*, 10 Gray (Mass.) 85; *Holmes v. Baker*, 16 Gray (Mass.) 259. And where municipalities have been vested with authority to borrow money or incur an obligation to execute a public work, they have, unless the contrary appears, without any special grant of power, an implied authority to raise a tax to discharge the obligation: *United States v. New Orleans*, 98 U. S. 381. The power to borrow money and issue bonds implies the power to tax: *Ralls Co. Court v. United States*, 105 U. S. 733. See also, to the same purpose, *Peoria &c. R. Co. v. People*, 116 Ill. 401; s. c. 6 N. E. 297. The

§ 1478. **Implied powers.**—"There is and must be in every town an inherent power to bring the money necessary for the purposes of its creation into the treasury; and if the course is obstructed by the ignorance or mistakes of its agents, they may proceed to enforce the end and object by correcting the means;"¹⁶⁰ and the taxes they levy of their own authority and the moneys they expend must be for local purposes only.¹⁶¹ The general power to tax given to a city remains in full force under the original grant until abridged or taken away by a clearly expressed statute.¹⁶²

§ 1479. **Charter limitations.**—"It is not unusual in the organic acts of municipalities for the protection of the citizens *to limit the rate of taxation*, or the amount of taxes that may be raised during any one

implication can not be overcome except by express words excluding it: *United States v. New Orleans*, 98 U. S. 381; *Loan Ass'n v. Topeka*, 20 Wall. 655, 660; *Commonwealth v. Commissioners*, 37 Pa. St. 277; *Lowell v. City of Boston*, 111 Mass. 454; *Hasbrouck v. City of Milwaukee*, 25 Wis. 122; *Ex parte Parsons*, 1 Hughes 282. In such case the power is not merely an implied power but a contract duty: *Ralls Co. Court v. United States*, 105 U. S. 733, 735; *Wolff v. New Orleans*, 103 U. S. 358. See also, *United States v. Macon Co.*, 99 U. S. 582; *Lilly v. Taylor*, 88 N. C. 489. The authority to erect water-works carries with it the power to levy taxes for that purpose: *Taylor v. McFadden*, 84 Iowa 262; s. c. 50 N. W. 1070.

¹⁶⁰ *Parker, C. J.*, in *Nelson v. Inhabitants &c.*, 7 Pick. (Mass.) 18, 23. When municipal corporations are created the power of taxation is vested in them as an essential attribute for all the purposes of their existence, unless expressly prohibited: *United States v. New Orleans*, 98 U. S. 381. Such power is necessary to enable them to exercise the authority conferred: *City of Dubuque v. Chicago &c. R. Co.*, 47 Iowa 196; *Weeks v. City of Milwaukee*, 10 Wis. 242; *City of Zanesville v. Richards*, 5 Ohio St. 589.

¹⁶¹ See *Cooley Const. Lim.* (6th ed.) 263, and cases cited. But the legislature often authorizes taxation for other than local purposes when the municipality expects benefits therefrom: *Talbot v. Dent*, 9 B. Mon. (Ky.) 526. See also, *Hasbrouck v. City of Milwaukee*, 13 Wis. 37.

¹⁶² *State v. Woodruff*, 37 N. J. L. 139; *Maurin v. Smith*, 25 La. An. 445; *Orange &c. R. Co. v. City Council &c.*, 17 Gratt. (Va.) 176. When a city of the third class is, by proclamation, under a Kansas statute, declared to be a city of the second class, none of its ordinances regulating the levy of taxes are thereby repealed: *Ritchie v. City of South Topeka*, 38 Kan. 368; s. c. 16 Pac. 332. The Missouri laws authorizing counties to subscribe to certain railroad stock provide that the county may issue bonds "to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county," and they were held to confer authority to levy a tax sufficient to pay the interest on such bonds, though the general laws restrict the rate "for county purposes" to one-half of one per cent.: *Scotland Co. Court v. United States*, 140 U. S. 41; s. c. 11 S. Ct. 697.

year; and where the power is thus limited, it is not ordinarily enlarged by implication by other provisions of the charter, general in their nature, conferring the power to make contracts or to incur liabilities, or even giving authority to make improvements or to erect usual or ordinary buildings."¹⁶³ But "*special authority* to borrow money for a designated purpose may, and if such be the legislative intention will, impliedly repeal, *pro tanto*, existing charter limitations upon the rate of taxation."¹⁶⁴ The general restriction is the rule of law which requires all municipal organizations or boards to show the grant of any authority which they assume to exercise. They can not vote taxes upon inhabitants indiscriminately, but must be confined to the established powers of such bodies;¹⁶⁵ but most municipalities are also subject to express restrictions, either as to the amount that may be imposed in any one year or as to the objects for which the tax may be levied, and a municipal levy in disregard of the restriction is void.¹⁶⁶

§ 1480. Taxation to aid private enterprises.—Powers conferred upon municipalities must be construed as confined in their exercise to

¹⁶³ Dillon Munic. Corp. (4th ed.), § 769, citing the following cases:—*Benoist v. City of St. Louis*, 19 Mo. 179; *Clark v. City of Davenport*, 14 Iowa 494; *United States v. Mayor &c.* (cited sub nom. *Learned v. Burlington*), 2 Am. Law Reg. (N. S.) 394, and note; *City of Leavenworth v. Norton*, 1 Kan. 432; *Burnes v. Mayor &c.*, 2 Kan. 454. But see *Commonwealth v. Select &c. Council*, 34 Pa. St. 496; *Amey v. Mayor &c.*, 24 How. 364; *State v. Mayor &c.*, 14 Ohio St. 472; *Butz v. City of Muscatine*, 8 Wall. 575; *Quincy v. Jackson*, 113 U. S. 332; s. c. 5 S. Ct. 544.

¹⁶⁴ Dillon Munic. Corp. (4th ed.), § 769. The charter limit for municipal purposes may be exceeded under a special act authorizing the issue of bonds for railroad subscriptions: *Quincy v. Jackson*, 113 U. S. 332; s. c. 5 S. Ct. 544; *United States v. Macon Co.*, 99 U. S. 582. See also, *Parkersburgh v. Brown*, 106 U. S. 487, 501; s. c. 1 S. Ct. 442; *Ralls Co. Court v. United States*, 105 U. S. 733; *Werner v. City of Galveston*, 72 Tex. 22; s. c. 7 S. W. 726; 12 S. W. 159; 20 Am. & Eng. Corp. Cas. 30.

¹⁶⁵ Cooley Taxation (2d ed.), p. 348.

¹⁶⁶ *State v. Humphreys*, 25 Ohio St. 520; *State v. Strader*, 25 Ohio St. 527; *Dean v. Lufkin*, 54 Tex. 265; *Witkowski v. Bradley*, 35 La. An. 904. In Nebraska the submission to the people of the question whether a levy should be made in excess of the legal limit is void: *Burlington &c. R. Co. v. Clay Co.*, 13 Neb. 367; s. c. 13 N. W. 628. And the levy, if made, would be void, though the purpose was to pay previous indebtedness: *State v. Board &c.*, 14 Neb. 22; s. c. 14 N. W. 801. In Arkansas an excessive levy can not be sustained, even as to the amount legally allowed: *Worthen v. Badgett*, 32 Ark. 496. But when brought up on certiorari it will be quashed only as to the excess: *Vance v. City of Little Rock*, 30 Ark. 435. Taxes for support of the poor are current county expenses in estimating the amount of lawful levy: *Atchison &c. R. Co. v. Wilhelm*, 33 Kan. 206; s. c. 6 Pac. 273. Cf. *Kansas City &c. R. v. Albright*, 33 Kan. 211; s. c. 6 Pac. 276.

the municipal limits, whether the power be a general one or specially conferred.¹⁶⁷ But there is a question how far the legislature may authorize a municipality to extend its action to objects outside its jurisdiction, in aid of enterprises of a public nature which may be expected to benefit the citizens of the municipality, and, the legislative grant of power being given, various questions of construction arise, some of which will be noticed in the next section. In some states the constitution forbids the legislature to authorize municipalities to aid in works of public improvement, and many state constitutions forbid the state to aid private corporations. Judge Cooley believed that the latter provision is sometimes broad enough to prohibit aid by municipalities also.¹⁶⁸ When municipal aid to private enterprises is allowed, the object to be accomplished must be obviously and in a special manner conducive to the prosperity of the municipality.¹⁶⁹ Whether general or local, taxation must be for a public and not a mere private purpose; and, though sanctioned by state statutes, if it be not for a public use it is an unauthorized taking of private property.¹⁷⁰

¹⁶⁷ A general power to "purchase, hold and convey estate, real and personal, for the public use" of the municipality, was held not to authorize a purchase outside the corporation limits for that purpose: *Riley v. City of Rochester*, 9 N. Y. 64. But land may be purchased outside to supply the municipality with water: *Newman v. Ashe*, 9 Baxt. (Tenn.) 380. Or to provide drainage: *City of Coldwater v. Tucker*, 36 Mich. 474. See also *City of Rochester v. Town of Rush*, 80 N. Y. 302; *Common Council &c. v. Huron Copper Co.*, 57 Mich. 547; s. c. 24 N. W. 820. Without special provision municipalities possess no control or rights over lands outside their limits: *Chancellor Kent in Denton v. Jackson*, 2 Johns. Ch. (N. Y.) 320. But a city may be authorized to take land outside for a park: *In re Mayor*, 99 N. Y. 569. See also, on the general subject, *Bullock v. Curry*, 2 Met. (Ky.) 171; *Weaver v. Cherry*, 8 Ohio St. 564; *Town of North Hempstead v. Town of Hempstead*, Hopk. (N. Y.) 288; *Concord*

v. Boscawen, 17 N. H. 465; *City of Coldwater v. Tucker*, 36 Mich. 474.

¹⁶⁸ Cooley Const. Lim. (6th ed.) 268.

¹⁶⁹ *Talbot v. Dent*, 9 B. Mon. (Ky.) 526. A town can not at its own expense raise a fund, the income of which is to be devoted to keeping a private cemetery in repair and decorating the graves of certain individuals: *Luques v. Inhabitants &c.*, 77 Maine 186. Under legislation giving municipalities power to "aid" internal improvements, donations may be given: *State v. Babcock*, 19 Neb. 230; s. c. 27 N. W. 98.

¹⁷⁰ *People v. Township Board*, 20 Mich. 452; *Silsbee v. Stockle*, 44 Mich. 561; s. c. 7 N. W. 367; *Scammon v. City of Chicago*, 44 Ill. 269; *Town of Wauwatosa v. Gunyon*, 25 Wis. 271; *Hanson v. Vernon*, 27 Iowa 28; s. c. 1 Am. R. 215; *Sharpless v. Mayor &c.*, 21 Pa. St. 147; *Williams v. School District*, 33 Vt. 271; *Allen v. Inhabitants &c.*, 60 Maine 124; *Parkersburg v. Brown*, 106 U. S. 487; s. c. 1 S. Ct. 442; *Kelley v. Pittsburgh*, 104 U. S. 78; *Loan*

§ 1481. **Discrimination against non-residents.**—The legislature may, within the state constitution, authorize municipalities to tax transient traders or itinerant dealers, and such a tax is not in violation of the federal constitution, although the property taxed may be from another state; but there must be no discrimination between resident and non-resident citizens.¹⁷¹

§ 1482. **State control.**—We have, in a former section,¹⁷² discussed the question whence municipalities receive their authority to tax. This and the following sections have reference to the matter of state control, including local taxation by state compulsion. The state not only confers upon counties, towns, cities and villages the taxing powers which they possess, but it may, in a large measure, control and dispose of the funds collected.¹⁷³ But the state can not require its mu-

Ass'n v. Topeka, 20 Wall. 655; Mc-Millan v. Anderson, 95 U. S. 37. Whether the purpose is a public one is a question for the courts: Hooper v. Emery, 14 Maine 375; Hammett v. Philadelphia, 65 Pa. St. 146; Hanson v. Vernon, 27 Iowa 28; s. c. 1 Am. R. 215. The aid can only be for a public object, and not for a private manufacturing enterprise: Parkersburg v. Brown, 106 U. S. 487; s. c. 1 S. Ct. 442; 2 Am. & Eng. Corp. Cas. 263.

¹⁷¹ Keller v. State, 11 Md. 525; Ward v. Maryland, 12 Wall. 418; reversing s. c. 31 Md. 279; Oliver v. Washington Mills, 11 Allen (Mass.) 268; State v. North, 27 Mo. 464; Wiley v. Parmer, 14 Ala. 627; Wiggins v. City of Chicago, 68 Ill. 372; Morrill v. State, 38 Wis. 428; Ex parte Thomas, 71 Cal. 204; s. c. 12 Pac. 53; Warren Borough v. Geer, 117 Pa. St. 207; s. c. 11 Atl. 415; Burr v. Atlanta, 64 Ga. 225; Wynne v. Wright, 1 Dev. & B. L. (N. C.) 19; Wilmington Com'rs v. Roby, 8 Ired. L. (N. C.) 250; State v. City Council &c., 10 Rich. L. (S. C.) 240. An ordinance, void for discriminations against citizens of other states, is not valid by the fact of like discriminations against citizens of the

state outside the city: Fecheimer v. City of Louisville, 84 Ky. 306; s. c. 2 S. W. 65. See also, City of Marshalltown v. Blum, 58 Iowa 184; s. c. 12 N. W. 266. Foreign corporations may be taxed, under legislative authority, though domestic corporations are exempt from the same tax: 1 Desty Taxation 343. A municipal tax on vessels, estimated by "length over all," is void as a tonnage duty: Board &c. v. Pashley, 19 S. C. 315; s. c. 3 Am. & Eng. Corp. Cas. 495. But it is admitted that vessels may be taxed like other property: Peete v. Morgan, 19 Wall. 581; Transportation Co. v. Wheeling, 99 U. S. 273; Cannon v. New Orleans, 20 Wall. 577; Inman Co. v. Tinker, 94 U. S. 238; Lott v. Morgan, 41 Ala. 246. Wharfage charges are not forbidden by the federal constitution: Marshall v. Vicksburg, 15 Wall. 146; Packet Co. v. St. Louis, 100 U. S. 423; Vicksburg v. Tobin, 100 U. S. 430.

¹⁷² See § 1477, ante.

¹⁷³ Trustees v. Tatman, 13 Ill. 27; Richland Co. v. Lawrence Co., 12 Ill. 1; Inhabitants &c. v. Inhabitants &c., 16 Mass. 16; City of San Francisco v. Canavan, 42 Cal. 541; Payne v. Treadwell, 16 Cal. 220; In-

municipalities to tax themselves for purposes foreign to the objects for which they were created;¹⁷⁴ and there have been very many strong decisions to the effect that, while municipalities may be absolutely controlled as agencies of the state government and in their governmental capacity, they still have powers and rights for the benefit and convenience of their own citizens similar to those enjoyed by private corporations. The decisions on this question have been somewhat at variance, but when the legislatures have gone further than to *permit* taxation for purposes not strictly local, the courts have generally held that the legislative power has been exceeded.¹⁷⁵

§ 1483. **Execution of charter powers.**—The taxing power can not be delegated to any officer or committee, but must be exercised by the legislative department itself. This is a fundamental principle, and

habitants &c. v. Skillings, 45 Maine 133; *Palmer v. Fitts*, 51 Ala. 489; *State v. County Court &c.*, 34 Mo. 546; *Rawson v. Spencer*, 113 Mass. 40; *Weymouth &c. Dist. v. County Com'rs*, 108 Mass. 142.

¹⁷⁴ *People v. Trustees*, 78 Ill. 136; *People v. Dupuyt*, 71 Ill. 651; *Weightman v. Clark*, 103 U. S. 256; *Board &c. v. People*, 63 Ill. 299.

¹⁷⁵ In *Atkins v. Town of Randolph*, 31 Vt. 226, 236, Justice Barrett says that "courts that have gone farthest in sustaining laws of state legislatures against the restrictive provisions of state constitutions repudiate entirely the idea that a person, whether natural or artificial, can be compelled by legislative enactment to become a party to, or to be subjected to liability upon, a contract." See also, opinion of Chief Justice Black in *Sharpless v. Mayor &c.*, 21 Pa. St. 147, 165. In Wisconsin, Maine, Massachusetts and Michigan a strong stand has been taken to the same purpose: *Hasbrouck v. City of Milwaukee*, 13 Wis. 37; *Mills v. Charleton*, 29 Wis. 400; *Knapp v. Grant*, 27 Wis. 147; *State v. Haben*, 22 Wis. 660 (but see contra, *Jensen v. Board &c.*, 47 Wis. 298; s. c. 2 N. W. 320); *Inhabitants &c. v. Inhabitants &c.*, 2 Greenl. (Maine) 28, 32; *Bow-*

doinham v. Richmond, 6 Greenl. (Maine) 112; *Inhabitants &c. v. Inhabitants &c.*, 16 Mass. 76, 84. See also, *Richland Co. v. Lawrence Co.*, 12 Ill. 1, 8; *People v. Common Council*, 28 Mich. 228. In Kansas it was held that the legislature could not validate bonds bearing a higher rate of interest than was permitted by the law under which the bonds were issued, as this would be making a new contract to which the county had not assented: *Board &c. v. Carter*, 2 Kan. 115. See also, *People v. Mayor &c.*, 51 Ill. 17; *Livingston v. Wider*, 53 Ill. 302; *Wider v. City of East St. Louis*, 55 Ill. 133; *Sleight v. People*, 74 Ill. 47; *Cornell v. People*, 107 Ill. 372; *Pope v. Phifer*, 3 Heisk. (Tenn.) 682. New York and Alabama decisions are opposed: *President &c. v. State*, 45 Ala. 399; *People v. Flagg*, 46 N. Y. 401; *Gordon v. Cornes*, 47 N. Y. 608; *Thomas v. Leland*, 24 Wend. (N. Y.) 65, 67; *Town of Duanesburgh v. Jenkins*, 57 N. Y. 177, 187. But in *People v. Batchellor*, 53 N. Y. 128, it was held that a town could not be compelled to aid a railroad corporation. See, in this connection, opinions of justices in the following cases:—In *re Washington Avenue*, 69 Pa. St. 352; *Howell v. Bristol*, 8 Bush (Ky.) 493.

nothing but the most positive and explicit language could justify a decision that the legislature of the state intended to permit such a power to be conferred.¹⁷⁶ But this principle does not prevent a corporation from empowering its agents to make contracts.¹⁷⁷

§ 1484. Voting the tax.—Municipalities exercise the power conferred upon them by vote of the corporators at public meetings, or by agents or officers duly elected or chosen. Many taxes are required to be voted at meetings composed of all the voters of the municipality to be taxed, or of certain classes of the voters specially interested. But in large districts, such as counties and large cities, the taxes are voted by representatives of the people.¹⁷⁸ And, in general, it may be said that the question of local levies is left to the local boards, clothed with quasi-legislative authority. Such boards must act by majorities at regular meetings or their action is void.¹⁷⁹ In the voting and levy-

¹⁷⁶ *Thompson v. Schermerhorn*, 6 N. Y. 92; *Smith v. Morse*, 2 Cal. 524; *City of Oakland v. Carpentier*, 13 Cal. 540; *Whyte v. Mayor &c.*, 2 Swan (Tenn.) 364; *City of East St. Louis v. Wehrung*, 50 Ill. 28; *City of Kinmundy v. Mahan*, 72 Ill. 462; *State v. Fiske*, 9 R. I. 94; *State v. Mayor &c.*, 34 N. J. L. 163; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485; *Rugles v. Collier*, 43 Mo. 353; *State v. Mayor &c.*, 25 N. J. L. 309; *Davis v. Read*, 65 N. Y. 566; *Board &c. v. Brush*, 77 Ill. 59; *Thompson v. Mayor &c.*, 61 Mo. 282; *In re Quong Woo*, 13 Fed. 229; *Benjamin v. Webster*, 100 Ind. 15; *Minneapolis Gaslight Co. v. City of Minneapolis*, 36 Minn. 159; s. c. 30 N. W. 450. Cf. *In re Guerrero*, 69 Cal. 88; s. c. 10 Pac. 261. It has been held that the power to "alien, lease, farm and dispose of all and every kind of property," and "to lay and collect taxes in such manner as may be deemed expedient on all steamboats, etc., landing at the levee of the corporation," gave the power to lease to a private person the revenues of the port with the privilege of collecting them in his own name and for his own benefit: *Schwartz v. Thirty-two*

Flatboats, 14 La. An. 243. See also, *Dillon Munic. Corp.* (4th ed.), § 779, where numerous other cases are cited.

¹⁷⁷ *Hannibal &c. R. Co. v. Marion Co.*, 36 Mo. 294; *Schenley v. Commonwealth*, 36 Pa. St. 62.

¹⁷⁸ Sometimes the question is required to be submitted to taxpayers only: *Bullock v. Curry*, 2 Met. (Ky.) 171; *Gould v. Stirling*, 23 N. Y. 439; *Town of Duaneburgh v. Jenkins*, 57 N. Y. 177; *Town of Bennington v. Park*, 50 Vt. 178; *Town of Venice v. Murdoch*, 92 U. S. 494. But in Louisiana and Minnesota such a provision would be unconstitutional: *Harrington v. Town of Plainview*, 27 Minn. 224; s. c. 6 N. W. 777; *Bayard v. Klinge*, 16 Minn. 249; *Duperier v. Viator*, 35 La. An. 957.

¹⁷⁹ *Downing v. Rugar*, 21 Wend. (N. Y.) 178, 182; *Powell v. Tuttle*, 3 N. Y. 396; *People v. Supervisors &c.*, 11 N. Y. 563; *Columbus &c. R. Co. v. Board &c.*, 65 Ind. 427; *Bank of Chenango v. Brown*, 26 N. Y. 467; *Weymouth &c. Dist. v. County Com'rs*, 108 Mass. 142; *Petition of Merriam*, 84 N. Y. 596. See *Cooley Taxation* (2d ed.) 258-9, where numerous other cases are cited. If only two

ing of taxes strict constructions of the law are not the rule;¹⁸⁰ and when the intent to levy a tax is clear it amounts to a present levy, provided the intent is warranted by law.¹⁸¹ The right of a municipal corporation to sue for and collect taxes depends upon its authority

of a board of three are chosen or qualify and act, the action is void: *Schenck v. Peay*, 1 Dill. 267; *Inhabitants &c. v. Lord*, 51 Maine 599. Cf. *Howard v. Proctor*, 7 Gray (Mass.) 128. The presumption is in favor of legal action until the contrary is proved: *Doughty v. Hope*, 3 Denio (N. Y.) 249; *Ex parte Baltimore Turnpike Co.*, 5 Binn. (Pa.) 481. When a law provides that the commissioners shall "jointly view and assess," this requires the presence of all in both cases: *People v. Coghill*, 47 Cal. 361. Cf. *Palmer v. Doney*, 2 Johns. Cas. (N. Y.) 346. The action of the proper authorities in voting a tax can not be restrained on the ground of an excessive levy: *Wharton v. School Directors*, 42 Pa. St. 358. See also, *Moore v. School Directors*, 59 Pa. St. 232. Nor can the people of a township, or the proper board, be compelled by mandamus to vote needful taxes: See *County Court v. Robinson*, 27 Ark. 116; *Truesdell's Appeal*, 58 Pa. St. 148.

¹⁸⁰ *Irwin v. Lowe*, 89 Ind. 540; *Taymouth Tp. v. Koehler*, 35 Mich. 22; *Trustees &c. v. Garvey*, 80 Ky. 159.

¹⁸¹ *Davis v. Brace*, 82 Ill. 542; *Wright v. People*, 87 Ill. 582; *State v. Sickles*, 24 N. J. L. 125; *Adams v. Hyde*, 27 Vt. 221; *Shontz v. Evans*, 40 Iowa 139; *Blodgett v. Holbrook*, 39 Vt. 336; *Inhabitants &c. v. Searle*, 127 Mass. 502. In the absence of charter provisions the commissioners of a township may adopt the assessment made for state and county purposes as the basis of the levy made by them for township taxes: *Koontz v. Burgess &c.*, 64 Md. 134; s. c. 20 Atl. 1039. A law

authorizing the extension of a levy is a standing levy: *Davis v. Brace*, 82 Ill. 542. Every essential proceeding in the course of a levy must be in a written form: *Moser v. White*, 29 Mich. 59; *Appeal of Powers*, 29 Mich. 504; *Doe v. McQuilkin*, 8 Blackf. (Ind.) 335; *Hecht v. Boughton*, 2 Wy. 385. See also, opinion of Justice Richardson in *Proprietors &c. v. Page*, 6 N. H. 182, 191. In Pennsylvania there is an exception in case of a school tax: *Gearheart v. Dixon*, 1 Pa. St. 224, 228. Any modification of the vote of the people by the officers who execute the levy is ultra vires and void: *Town of Platteville v. Galena &c. R. Co.*, 43 Wis. 493; *Hodgman v. Chicago &c. R. Co.*, 20 Minn. 48; *Sullivan v. Walton*, 20 Fla. 552; *State v. County Court &c.*, 64 Mo. 30. Mandamus will not lie against a county court to compel the levy of a tax, but must be brought against the individual officers intrusted with the performance of that duty: *Montgomery Co. v. Menifee Co. Court*, 93 Ky. 33; s. c. 18 S. W. 1021. Under a charter power to "regulate, clean and keep in repair" streets out of a fund raised by taxes each year, a city can not, by resolution, expend money for graveling or macadamizing streets: *State v. City Council &c.*, 46 N. J. L. 124. A tax to be levied for the payment of a judgment, in addition to the regular taxes, must be assessed and collected at the same time and in the same manner as the general assessment, and not by a special assessment: *State v. Assessors &c.*, 51 N. J. L. 279; s. c. 17 Atl. 122.

under the statutes, or grant of power by the state, to levy and impose the same.¹⁸²

¹⁸² *Brown v. City of Cape Girardeau*, 90 Mo. 377; s. c. 2 S. W. 302. The city treasurer alone can enforce the payment of city taxes; a contract of the city with another person to collect them is void: *City of Fort Wayne v. Lehr*, 88 Ind. 62; s. c. 3 Am. & Eng. Corp. Cas. 600. Neither the statute of limitations nor the laches of officers will prevent the collection of municipal taxes. But these facts, with other circumstances, may afford presumption that the tax has been paid: *Elliott v. Williamson*, 11 Lea (Tenn.) 38; s. c. 3 Am. & Eng. Corp. Cas. 603. In a suit to collect a tax an averment that the same was duly levied is sufficient without setting out the ordinance levying it: *Johnson v. City of Kansas*, 78 Mo. 661; s. c. 6 Am. & Eng. Corp. Cas. 197, holding also (1) that a provision of the Missouri constitution that all taxes shall be levied by general laws does not repeal the special provisions in municipal charters authorizing taxes, and (2) that, in suits for taxes, the fact that the judgment, including interest and costs, amounts to more than is sued for, does not defeat the action. Under acts of Florida of 1885, ch. 3606, § 9, as amended by ch. 3607, which makes it the duty of the tax collector of the county in which a defunct city is situated to collect such taxes as may be assessed by the county tax assessor, the county tax collector can not collect back taxes levied by the city assessor of the defunct city: *City of Pensacola v. Sullivan*, 23 Fla. 1; s. c. 6 So. 922. Under revised laws of Vermont, § 2692, providing that "selectmen shall have the general supervision of the concerns of the town," they may instruct a tax collector not to enforce the collec-

tion of an illegal tax; and where the collector has paid to the town treasurer in advance of collection the full amount of such tax, and has followed the instructions given him as to enforcement, the selectmen may bind the town by their promise to repay such part of the tax as he can not collect by voluntary payments: *Miles v. Town of Albany*, 59 Vt. 79; s. c. 7 Atl. 601. A town collector of taxes who, by contract with the town, guarantees the collection of the taxes, and pays them to the town at the dates fixed, whether collected or not, is entitled to the interest on delinquent taxes: *Inhabitants &c. v. Morton*, 146 Mass. 476; s. c. 16 N. E. 40. The city of Buffalo being authorized by its charter to take, purchase and hold and convey real and personal property as its purposes may require has full power to accept a mortgage on real estate as security for taxes which had accrued thereon: *Clark v. Locke*, 9 N. Y. S. 918. Under probate laws of New Jersey, 1881, p. 256, the town committee may release a tax collector from his liability for not collecting an uncollectible tax, but not from his duty to collect taxes that may be collected by due process of law; and where he is released by such committee from the collection of a tax which the taxpayers refused to pay on account of its alleged illegality, but which is, in fact, legal, he is still liable if he fails to collect: *Painter v. Inhabitants &c.*, 43 N. J. Eq. 317; s. c. 12 Atl. 187. California act of February 27, 1850, abolishing "the mayor and common council of the city of Sacramento," and vesting its property and rights in a corporation named the "city and county of Sacramento," provided for the issuing of city of Sac-

§ 1485. **Purposes for which the tax may be levied.**—Municipal taxation must be for local purposes only,^{182a} and for a public use,^{182b} and the rule of strict construction should always be applied.^{182c} A levy

ramento bonds for funding and paying the city debts, and that a tax be levied on property within the city limits to pay the bonds. Subsequently the legislature created the "city of Sacramento," and made it the legal successor of the city and county of Sacramento. It was held that the new corporation was bound to levy and collect the tax: *Meyer v. Brown*, 65 Cal. 583; s. c. 26 Pac. 281. A tax collector has no authority, outside of the town in which he has his appointment, to seize the property of a resident of the town to enforce a collection of a tax: *Gage v. Dudley*, 64 N. H. 437; s. c. 13 Atl. 865. Where moneys have been raised by a municipality by means of a special tax to create a fund for a special purpose—for example, to pay off certain bonds—and that purpose has afterwards been judicially held to be unlawful by the bonds being declared void, the municipality can not thereupon devote the fund to other purposes; and such appropriation will be enjoined at the suit of any taxpayer: *Town of Aurora v. Chicago & C. R. Co.*, 119 Ill. 246; s. c. 10 N. E. 27. The levy and collection of a tax by a city in discharge of a contract made by it does not create any privity of interest between the contractor and the taxpayer: *Becker v. Keokuk Waterworks*, 79 Iowa 419; s. c. 44 N. W. 694; 18 Am. St. 377.

^{182a} *Parsons v. Inhabitants &c.*, 11 Pick. (Mass.) 396; *Concord v. Boscawen*, 17 N. H. 465; *Jeffries v. Lawrence*, 42 Iowa 498; *Supervisors v. United States*, 18 Wall. 71. See *Cooley Taxation* (2d ed.) 140.

^{182b} *Curtiss v. Whipple*, 24 Wis. 350; s. c. 1 Am. R. 187; *Tyson v. School Directors*, 51 Pa. St. 9; *People v.*

Batchellor, 53 N. Y. 128; *Lowell v. City of Boston*, 111 Mass. 454; *Hanson v. Vernon*, 27 Iowa 28, 47; *People v. Austin*, 47 Cal. 353, 360; *Opinion of Judges*, 58 Maine 591; *Loan Ass'n v. Topeka*, 20 Wall. 655. Very interesting cases on this subject are *Weismer v. Village of Douglas*, 64 N. Y. 91; *Brewer Brick Co. v. Inhabitants &c.*, 62 Maine 62; *Wilkinson v. Cheatham*, 43 Ga. 258; *Feldman v. City Council &c.*, 23 S. C. 57, where an act authorizing a city to issue bonds to aid individuals in replacing buildings destroyed by fire was held unconstitutional. Same point, *Boston fire*, *Lowell v. City of Boston*, 111 Mass. 454, 463.

^{182c} *Cooley Const. Lim.* (6th ed.), ch. 14. See also, *Stetson v. Kempton*, 13 Mass. 272; *Alley v. Inhabitants &c.*, 53 Maine 446; *Vanover v. Davis*, 27 Ga. 354; *City of Alton v. Ætna Ins. Co.*, 82 Ill. 45. In Maine a general power to tax for town purposes was held not to include the right to tax in order to make a toll-bridge free: *Bussey v. Gillmore*, 3 Maine 191. But see *Halcombe v. Commissioners*, 89 N. C. 346. If a municipal body is charged with the care of streets and sidewalks, the word "streets" as used in a section of the charter authorizing it to raise money by taxation for the support of "bridges, culverts, streets, lanes and alleys," includes sidewalks: *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459; s. c. 11 N. E. 43. "Necessary town charges" can not be construed to give a power to aid railroads or similar enterprises not strictly local in advantages: *Judges &c. v. Taylor*, 8 Bush (Ky.) 206; *State v. Macon Co. Court*, 68 Mo. 29; *Winston v. Tennessee &c. R. Co.*, 1 Baxt. (Tenn.) 61; *Frederick*

to pay interest on outstanding bonds does not include bonds unsold but issued.^{182d} Parish authorities in ordering an election for railroad aid purposes, announcing the result and levying taxes, are not representatives of the parishes but ministerial public agencies, and such taxes when collected, although by parish authorities, are not parish moneys.^{182e}

§ 1486. Proceedings to collect.—Where the law places the duty of collecting taxes and making sales in the hands of the marshal, the city clerk has no authority in the matter of granting indulgence or extending the time.¹⁸³ It will be presumed that the proceedings of the council were properly published where the tax bills are properly authenticated;¹⁸⁴ such tax bills duly authenticated by the assessor are prima facie evidence of the taxpayer's liability and he must show defects which will avoid the payment of the tax.¹⁸⁵ Where the order awarding a contract is ordered to be published in a specified newspaper, and authority exists to make the order, a publication in any other paper gives the council no authority to make the assessment.¹⁸⁶ Instalments due during the fiscal year should be placed upon the duplicate to be collected with other taxes, but not other instalments.¹⁸⁷

§ 1487. Application of taxes.—Taxes levied and collected for the erection of a permanent public building can not be transferred by the council to a general fund for current expenses.¹⁸⁸ In the absence of any special direction as to the application of an excise fund the com-

v. City Council &c., 5 Ga. 561. Taxation for water supplies is not disputed: *Mayor &c. v. Bailey*, 2 Denio (N. Y.) 433; *West v. Bancroft*, 32 Vt. 367; *Wells v. Mayor &c.*, 43 Ga. 67; *Dillon Munic. Corp.*, §§ 146, 443. A town may vote aid to fire companies: *Van Sicklen v. Town of Burlington*, 27 Vt. 70. Municipalities may contract with private parties for the supply of corporate needs: *Western &c. Society v. City of Philadelphia*, 31 Pa. St. 175, 185; *Nelson v. City of La Porte*, 33 Ind. 258. The supplying of cities and towns and their citizens with natural gas for public and private consumption is a public use or purpose, and hence the taxing power may be exercised to provide for the payment of the principal and interest of bonds issued to carry out the

purpose of such supply: *State v. City of Toledo*, 48 Ohio St. 112; s. c. 26 N. E. 1061. For other decisions on the subject of this section, see *Cooley Taxation* (2d ed.) 135.

^{182d} *City of Tampa v. Mugge*, 40 Fla. 326; s. c. 24 So. 489.

^{182e} *Fullilove v. Police Jury &c.*, 51 La. An. 359; s. c. 25 So. 302.

¹⁸³ *Montford v. Allen*, 111 Ga. 18; s. c. 36 S. E. 305.

¹⁸⁴ *Powell v. City of Louisville*, 21 Ky. L. 554; s. c. 52 S. W. 798.

¹⁸⁵ *Sherley v. City of Louisville*, 21 Ky. L. 945; s. c. 53 S. W. 530.

¹⁸⁶ *California Imp. Co. v. Moran*, 128 Cal. 373; s. c. 60 Pac. 969.

¹⁸⁷ *Makley v. Whitmore*, 61 Ohio St. 587; s. c. 56 N. E. 461.

¹⁸⁸ *State v. City of Emporia*, 57 Kan. 110; s. c. 47 Pac. 833.

mon council may apply it in any manner not inconsistent with the charter.¹⁸⁹

§ 1488. **Lien of taxes.**—Liens of municipal taxes are of the same rank as those of state taxes.¹⁹⁰ But no tax is a lien upon the property against which it is levied, unless made so by charter, or unless the municipality is authorized to declare them liens.¹⁹¹ A city may assert its tax lien against the property of an insolvent corporation in the hands of a purchaser under a decretal sale.¹⁹² Where a charter authorizes the rendition of a personal judgment against the owner, where a special assessment for any reason is invalid it must be construed as a lien on the premises only.¹⁹³

§ 1489. **Exemptions.**—Statutes exempting persons or property from taxation must be construed with strictness and most strongly against the person claiming the exemption.¹⁹⁴ A municipal cor-

¹⁸⁹ *Hunt v. City of New York*, 62 N. Y. S. 184; s. c. 47 App. Div. (N. Y.) 295.

¹⁹⁰ *Justice v. City of Logansport*, 101 Ind. 326; s. c. 9 Am. & Eng. Corp. Cas. 456.

¹⁹¹ *Alleghany City's Appeal*, 41 Pa. St. 60; *Howell v. City of Philadelphia*, 38 Pa. St. 471; *City of Philadelphia v. Greble*, 38 Pa. St. 339; *Heine v. Levee Com'rs*, 19 Wall. 655; *Meriwether v. Garrett*, 102 U. S. 472; *City of Jefferson v. Whipple*, 71 Mo. 519; *City of Kansas v. Payne*, 71 Mo. 159. Authority to provide for the prompt collection of taxes, and, to that end, to sell real as well as personal property, gives a city power to declare taxes a lien on realty: *Eschbach v. Pitts*, 6 Md. 71. Where the charter of a city declares that the taxes levied by the city council shall be a lien on property against which they are assessed, but does not fix the time when the lien shall attach, such taxes become a lien from the time when the assessment roll and the warrants for collection come into the hands of the receiver of taxes: *Eaton v. Chesebrough*, 82 Mich. 214; s. c. 46 N. W. 365. Under revised statutes of Illi-

nois, 1889, ch. 120, § 253, which provides that the lien of taxes on land may be foreclosed by suit in equity in the name of the people when the land has been forfeited to the state at tax sale for two years, the lien of special assessments for drainage purposes may be foreclosed by such suit: *Rickert v. Drainage Dist.* (Ill.), 27 N. E. 86. See further, as to liens, *Mix v. Ross*, 57 Ill. 121; *Hershberger v. City of Pittsburgh*, 115 Pa. St. 78; s. c. 8 Atl. 381; *Provident Institute v. Mayor &c.*, 113 U. S. 506; s. c. 5 S. Ct. 612. That a tax is not a debt and can not be set off against a debt, see *Cooley Taxation* (2d ed.) 16, 17. A claim of a municipal corporation against a citizen thereof for work done by the corporation for which the citizen is liable is not a tax: *Plaquemines Police Jury v. Mitchell*, 37 La. An. 44.

¹⁹² *City of Middleboro v. Coal & Iron Bank*, 22 Ky. L. 380; s. c. 57 S. W. 497.

¹⁹³ *Nottage v. City of Portland*, 35 Or. 539; s. c. 58 Pac. 883.

¹⁹⁴ *Dillon Munic. Corp.* (4th ed.), § 776; *Earl, J.*, in *People v. Commissioners*, 95 N. Y. 554. Cf. *State v. City of St. Paul*, 36 Minn. 529; s. c.

poration has no power to grant exemption from or commutation of taxes, and a contract which undertakes to do so is void; nor can municipalities discriminate in favor of any property. The power to exempt is not included in the power to tax, but must be specifically conferred.¹⁹⁵ The provisions of an act exempting the capital stock and personal property of specified corporations and companies apply only to state taxation, and do not affect the right of municipalities to tax such property for local purposes.¹⁹⁶ Property owned by a municipi-

32 N. W. 781; *City of New Orleans v. Carondelet &c. Co.*, 36 La. An. 396.

¹⁹⁵ *State v. Hannibal &c. R. Co.*, 75 Mo. 208, a leading case; *Mack v. Jones*, 21 N. H. 393; *Brewer Co. v. Inhabitants &c.*, 62 Maine 62; *State v. Gracey*, 11 Nev. 223; *Hayzlett v. City of Mt. Vernon*, 33 Iowa 229; *State v. Addison*, 2 S. C. 499; *Weeks v. City of Milwaukee*, 10 Wis. 242. A municipality may grant exemptions when authorized by the state: *Mayor &c. v. Long*, 54 Ga. 330; *Waring v. Mayor &c.*, 60 Ga. 93. A contract to exempt from taxation without such authority is void: *State v. Hannibal &c. R. Co.*, 75 Mo. 208. Exemptions from "public taxes" are not exemptions from municipal taxes: *Morgan v. Cree*, 46 Vt. 773. But see *City of New Orleans v. Carondelet &c. Co.*, 36 La. An. 396, where an unqualified exemption from taxation was held to imply immunity from municipal as well as state taxes. An exemption of a private corporation from municipal taxes is not affected by the dissolution of the municipal corporation and its replacement by another: *Mobile &c. R. Co. v. Kennerly*, 74 Ala. 566. That exemptions from "taxation" do not exempt from local "assessments," see ch. 28, ante. An exemption must be of a class and not of an individual of the class: *City of New Orleans v. New Orleans &c. Co.*, 32 La. An. 105; *Cooper v. Ash*, 76 Ill. 11. A provision exempting a corporation from all taxation applies not only to the state but to every pub-

lic corporation created by it: *State Bank v. City Council &c.*, 3 Rich. L. (S. C.) 342; *Mayor &c. v. Baltimore &c. R. Co.*, 6 Gill (Md.) 288; *City of Richmond v. Richmond &c. R. Co.*, 21 Gratt. (Va.) 604.

¹⁹⁶ *Orange &c. R. Co. v. City Council &c.*, 17 Gratt. (Va.) 176; *State v. Mayor &c.*, 35 N. J. L. 157; *People v. Davenport*, 91 N. Y. 574; *In re Mayor &c.*, 11 Johns. (N. Y.) 77; *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506. Cf. *City of Richmond v. Richmond &c. R. Co.*, 21 Gratt. (Va.) 604. A provision in the charter of a bank which provides that the payment of a specified sum on each hundred dollars of capital stock shall be "in full of all tax or bonus" exempts the bank from assessment for county or city taxation: *Franklin Co. Court v. Deposit Bank*, 87 Ky. 370; s. c. 9 S. W. 212; 25 Am. & Eng. Corp. Cas. 333. A municipal corporation, authorized by its charter to tax "all" the real and personal property therein, has no power to exempt any of such property from taxation: *Whiting v. Town of West Point*, 88 Va. 905; s. c. 14 S. E. 698; 15 L. R. A. 860. Under a Rhode Island statute permitting any town council to grant the right to lay water-pipes in a highway, and to erect and maintain reservoirs, including the power to exempt such pipes and reservoirs from taxation, the exemption can only be made as one of the terms of the grant, and can not be given to works already built: *Bowen v. New-*

pality for public use can not be taxed unless so provided by positive legislation.¹⁹⁷

§ 1490. Exemptions further considered—*Whiting v. West Point*.—In a recent case in Virginia¹⁹⁸ the supreme court of appeals formulated the point in issue as follows:—"The real question * * * is whether a municipal corporation has the inherent power to exempt from taxation any property which by its charter it is authorized to tax." The town of West Point was authorized by its charter to tax "all the real and personal property" in the town, and it was made the duty of the town council annually to appoint an assessor whose duty was to assess "all personal property and all improvements put upon real estate in the town since the last preceding assessment." The case arose upon a petition for a writ of mandamus to compel the assessor to assess for taxation the property of the West Point Terminal Railway & Warehouse Company, which had been exempted from taxation by ordinance, the exemption to continue so long as the company should keep its principal office in Virginia within the corporate limits of the defendant town. Nothing was said in the charter about making exemptions. Lewis, J., declared it to be a clear doctrine, both upon principle and authority, that the corporation had no power to make the exemption. "A municipal corporation has no element of

ell, 16 R. I. 238; s. c. 14 Atl. 873. See also, *Lancaster v. Clayton*, 86 Ky. 373; s. c. 5 S. W. 864; *Railway Co. v. Wilson Co.*, 89 Tenn. 597; s. c. 15 S. W. 446.

¹⁹⁷ *Stein v. Mayor &c.*, 24 Ala. 591; *Inhabitants &c. v. County Com'rs*, 4 Gray (Mass.) 500; *City of Louisville v. Commonwealth*, 1 Duvall (Ky.) 295; *State v. Gaffney*, 34 N. J. L. 133; *Piper v. Singer*, 4 Serg. & R. (Pa.) 354; *People v. Doe*, 36 Cal. 220; *Low v. Lewis*, 46 Cal. 549; *People v. Salomon*, 51 Ill. 37; *City of Fort Dodge v. Moore*, 37 Iowa 388; *Erie Co. v. City of Erie*, 113 Pa. St. 360; s. c. 6 Atl. 136; *City of Nashville v. Smith*, 86 Tenn. 213; s. c. 6 S. W. 273; *City of Rochester v. Town of Rush*, 80 N. Y. 302; *State v. Hotaling*, 44 N. J. L. 347. See also, *People v. Board &c.*, 111 N. Y. 505; s. c. 19 N. E. 90; *Galveston Wharf Co. v. City of Galveston*, 63 Tex. 14. In the latter case it was

held that city property in a wharf was exempt from taxation; that the charge of a reasonable fee for the use of such wharf did not change its public character; that municipal interest was exempt, though individual interests in the same wharf were taxed; and that, in the absence of statute or constitutional provision, municipal property was exempt. But property owned by the municipality merely for the convenience or profit of its citizens would be taxed under a general statute embracing like property owned by a private corporation: *Bailey v. Mayor &c.*, 3 Hill (N. Y.) 531; *Storrs v. City of Utica*, 17 N. Y. 104; *Western &c. Society v. City of Philadelphia*, 31 Pa. St. 175; *County Com'rs v. Duckett*, 20 Md. 468; *City of Detroit v. Corey*, 9 Mich. 165.

¹⁹⁸ *Whiting v. West Point*, 88 Va. 905; s. c. 14 S. E. 698; 15 L. R. A. 860, and valuable note.

sovereignty. It is a mere local agency of the state, having no other powers than such as are clearly and unmistakably granted by the law-making power. * * * The power of taxation is not only an attribute of sovereignty, but it is essential to the existence of government; and as all are protected by the government, so all should contribute to its support. * * * So, also, is the power to make exemptions sovereign in its nature and likewise resides in the legislature unless the constitution otherwise ordains. It is therefore a legal solecism to say that the power of exemption or any other sovereign power is inherent in a municipal corporation, which, though invested with certain governmental powers for local purposes, is in no particular sovereign." The court referred to some of the leading cases in point,¹⁹⁹ and proceeded:—"These authorities, which are only a few of many that might be cited to the same effect, show that the rule requiring all municipal powers to be construed strictly applies especially to a case like the present; and the reason, as already suggested, is this: that the power of taxation, being an attribute of sovereignty, can be exercised only by the sovereign. Hence, when delegated by the legislature to a municipal corporation, the latter is considered as pro hac vice the agent of the state, acting for the benefit of the municipality. In other words, the municipality, in the eye of the law, is the hand of the state by which the tax is laid and collected. Therefore the statutory authority must be strictly pursued; for as an agency to sell does not imply an agency to buy, so neither does a delegated power to tax imply a power to exempt. If this were not so, and if a municipal corporation could at pleasure exempt the property of one person, it could exempt the property of all, and thus deprive itself of the means of existence or of accomplishing the objects for which it was created."²⁰⁰ Property used for supplying electricity, exempt from

¹⁹⁹ *State v. Hannibal &c. R. Co.*, 75 Mo. 208, in which "the court rested its decision upon the ground that the power to make exemptions was not conferred by the city's charter, and that the delegated power to tax was in the nature of a public trust, which could not be surrendered in whole or in part. No argument, it was said, was necessary to show that the same principle which forbids the absolute cession by a municipality of this power likewise forbids that which approximates thereto, namely, the right to make exemptions. It was said, moreover,

that the idea of taxation imports equality of apportionment; that it is this which distinguishes taxation from arbitrary exaction; and that the exemption of the property of one person casts an inequitable burden upon others not thus graciously favored." The same principle was enforced in *City of Austin v. Austin Gas-light &c. Co.*, 69 Tex. 180; s. c. 7 S. W. 200, and *Wilson v. Sutter Co. Supervisors*, 47 Cal. 91.

²⁰⁰ *Whiting v. West Point*, 88 Va. 905; s. c. 14 S. E. 698; 15 L. R. A. 860. The court cited in support of its views, *Gilman v. City of She-*

taxation, includes property used in manufacturing it, and this though used only as a reserve plant in cases of emergency.²⁰¹ An agreement of a city to pay a water company a specified sum and in addition another sum equal in amount to the tax assessed on such water company's property for municipal purposes is not void as an attempt to exempt from taxation.²⁰² Where as an inducement to the location of manufacturing institutions exemption from taxation for a limited period is granted, it does not mean manufacturing institutions already established.²⁰³ Where a city granted a corporation exemption from taxes for a period of five years the state is powerless to withdraw that exemption (see Kentucky constitution).²⁰⁴

§ 1491. **Validity of taxes**—A mere informality does not invalidate a tax.²⁰⁵ Where the charter authorizes an improvement upon the written application of five or more freeholders, when the public health or convenience requires it, the question whether the public health or convenience requires it is a jurisdictional fact which must appear to have been found by the board before an assessment can be made.²⁰⁶ The levy of a tax to pay a judgment may be valid though the maximum amount of taxes authorized by the statute has been made.²⁰⁷ Under a statute giving cities power to license by ordinance the running of cars and impose fees for such license for revenue purposes a city can not impose license fees for revenue in the absence of an ordinance for that purpose which conforms to the statute.²⁰⁸ Where the statute requires an ordinance as a basis of taxation it is not sufficient to adopt a report of a finance committee as such basis.²⁰⁹ It is not an objection that vacant and remote property is not benefited by electric lighting and therefore not subject to taxation where the

boygan, 2 Black 510; Langhorne v. Robinson, 20 Gratt. (Va.) 661; City of Richmond v. Richmond &c. R. Co., 21 Gratt. (Va.) 604; pronouncing Williamson v. Massey, 33 Gratt. (Va.) 237, cited by defendant, not in point, and refusing to be bound by Town of Danville v. Shelton, 76 Va. 325, on the ground that the case was heard by only a part of the court and that it was also probably decided on another point.

⁴⁰¹ Southern Electric &c. Co. v. City of Philadelphia, 191 Pa. St. 170; s. c. 43 Atl. 123.

²⁰² Maine Water Co. v. City of Waterville, 93 Maine 586; s. c. 45 Atl. 830.

²⁰³ City of Middlesboro v. New South Brewing &c. Co., 21 Ky. L. 1782; s. c. 56 S. W. 427.

²⁰⁴ City of Middlesboro v. New South Brewing &c. Co., 21 Ky. L. 1782; s. c. 56 S. W. 427.

²⁰⁵ Spring Valley Coal Co. v. People, 157 Ill. 543; s. c. 41 N. E. 874.

²⁰⁶ Kent v. Village of Enosburg Falls, 71 Vt. 255; s. c. 44 Atl. 343.

²⁰⁷ Dawson Co. v. Clark, 58 Neb. 756; s. c. 79 N. W. 822.

²⁰⁸ City of Cape May v. Cape May Transp. Co., 64 N. J. L. 80; s. c. 44 Atl. 948; Bull v. City of Quincy, 9 Ill. App. 127.

²⁰⁹ People's Nat. Bank v. City of Ennis (Tex.), 50 S. W. 632.

fixing of city limits is within legislative discretion.²¹⁰ Where a charter requires that notice of the completion of an assessment shall be given by advertisement and a copy of the assessment left with the clerk a specified time it is jurisdictional.²¹¹ It is also essential to the validity of a tax that it shall be based on an appropriation.²¹² Where an act in relation to taxation is in part unconstitutional and the part unconstitutional is inseparable from the statute as a whole the whole act falls with it.²¹³ Where a levy is partly valid and partly invalid, no improper motives appearing, it will be upheld as to the part valid if the tax is capable of apportionment.²¹⁴ A taxpayer may test the validity of a compromise of delinquent taxes although he has not paid his taxes.²¹⁵

§ 1492. Invalidity of taxes.—A municipality can not levy and collect a tax on property or business where by reason of its situation it is not protected or benefited.²¹⁶ Taxes levied to assist the county in repairing its buildings in the city are invalid.²¹⁷ Money raised by taxation can not be used as a gratuity to a corporation engaged in a private enterprise although many persons are interested in it.²¹⁸ The cost of local improvements assessed against abutting owners is not taking private property for private use where the improvements consist of gas and water connections and the gas and water-works are owned by private corporations.²¹⁹ Where the constitution provides that except for necessary expenses a vote of the qualified voters shall be necessary to levy a tax the expense of erecting city water-works is not a necessary expense.²²⁰ An assessment without giving an opportunity for the owner to appear and contest it is illegal and void.²²¹

²¹⁰ *Mitchell v. City of Negaunee*, 113 Mich. 359; s. c. 71 N. W. 646. See *Frace v. City of Tacoma*, 16 Wash. 69; s. c. 47 Pac. 219.

²¹¹ *People v. Village of New Rochelle*, 45 N. Y. S. 836; s. c. 17 App. Div. (N. Y.) 603.

²¹² *Engstad v. Dinnie*, 8 N. D. 1; s. c. 76 N. W. 292.

²¹³ *State v. Wardell*, 153 Mo. 319; s. c. 54 S. W. 574; *Mowry v. Mowry*, 20 R. I. 74; s. c. 37 Atl. 306.

²¹⁴ *City of San Antonio v. Berry*, 92 Tex. 319; s. c. 48 S. W. 496. It seems that recovery may be had for taxes authorized, although the levy includes unauthorized taxes: *Wright v. City of San Antonio (Tex.)*, 50 S. W. 406.

²¹⁵ *City Item &c. Printing Co. v. City of New Orleans*, 51 La. An. 713; s. c. 25 So. 313.

²¹⁶ *Kaysville City v. Ellison*, 18 Utah 163; s. c. 55 Pac. 386; 43 L. R. A. 81.

²¹⁷ *Deady v. Village of Lyons*, 57 N. Y. S. 448; s. c. 39 App. Div. (N. Y.) 139.

²¹⁸ *Wisconsin Industrial School &c. v. Clark Co.*, 103 Wis. 651; s. c. 79 N. W. 422.

²¹⁹ *Gleason v. Waukesha Co.*, 103 Wis. 225; s. c. 79 N. W. 249.

²²⁰ *City of Charlotte v. Shepard*, 120 N. C. 411; s. c. 27 S. E. 109.

²²¹ *City of Norfolk v. Young*, 97 Va. 728; s. c. 34 S. E. 886.

An ordinance authorizing a tax on merchandise, meaning dealers, and also imposing taxes on persons engaged in selling articles included under the term "merchandise," will not be construed to authorize more than one tax.²²² The reincorporation of a city of the fifth class as a city of the fourth class after the date on which an assessment must be made, and an assessment made by it after the dates fixed by law for making and levying assessments, render the assessment and levy void.²²³ Where the contract specifies the time in which an improvement shall be completed and a general ordinance requires completion within the time agreed upon, a sidewalk can not be built after such time has expired and a tax based on such construction is void.²²⁴ A special assessment for watering a street is not a violation of a constitutional requirement that an assessment shall be reasonable and proportionate on all inhabitants and estates.²²⁵ Where the charter provides that the common council shall on or before a specified date levy the taxes sufficient for the different departments of the city government, the provision is peremptory and a levy after date is void.²²⁶ A sale for city taxes by boundaries which include another lot not owned by the person taxed is invalid.²²⁷

§ 1493. Recovery of tax illegally paid.—The general rule and weight of authority is that an illegal tax may be recovered from the municipality.²²⁸ The great weight of authority as well as reason is to the effect that where a person has paid taxes that have been assessed without authority of law he may recover them in an action against the city.²²⁹ In such case it is not necessary to recovery that the assessment shall first be set aside and vacated,²³⁰ and the recovery may

²²² *Wynne v. Mayor &c.*, 105 Ga. 614; s. c. 31 S. E. 737.

²²³ *Dranga v. Rowe*, 127 Cal. 506; s. c. 59 Pac. 944.

²²⁴ *City of Springfield v. Davis*, 80 Mo. App. 574.

²²⁵ *Trustees &c. v. Inhabitants &c.*, 175 Mass. 118; s. c. 55 N. E. 841.

²²⁶ *Board &c. v. Common Council &c.*, 128 Cal. 369; s. c. 60 Pac. 976; *Williams v. Supervisors &c.*, 122 U. S. 154; s. c. 7 S. Ct. 1244; *Chamberlain v. Taylor*, 36 Hun (N. Y.) 24.

²²⁷ *Erschler v. Lennox*, 42 N. Y. S. 805; s. c. 11 App. Div. (N. Y.) 511.

²²⁸ *State v. Nelson*, 41 Minn. 25; s. c. 42 N. W. 548; 4 L. R. A. 300.

²²⁹ *State v. Nelson*, 41 Minn. 25; s. c. 42 N. W. 548, in 4 L. R. A. 300,

where the following authorities are cited in support of the doctrine of the text: *Stephan v. Daniels*, 27 Ohio St. 527; *Welker v. Potter*, 18 Ohio St. 85; *Hersey v. Board &c.*, 37 Wis. 75; *Marsh v. Board &c.*, 42 Wis. 502; *Schettler v. City of Fort Howard*, 43 Wis. 48; *Plumer v. Board &c.*, 46 Wis. 163; s. c. 50 N. W. 416; *North Carolina R. Co. v. Commissioners &c.*, 77 N. C. 4; *Wilkey v. City of Pekin*, 19 Ill. 160; *City of New Albany v. Meekin*, 3 Ind. 481; *Sonoma Co. Tax Case*, 13 Fed. 789, 793; *Beecher v. Clay Co.*, 52 Iowa 140; s. c. 2 N. W. 1037; *Scott v. Chickasaw Co.*, 53 Iowa 47; s. c. 3 N. W. 820.

²³⁰ *Bruecher v. Village of Port*

be had though not paid under protest.²³¹ But the tax must have been paid over by the collector and recovered by the city.²³² The payment must have been made in money,²³³ and the payment not a voluntary payment.²³⁴ As to what is a voluntary and what is an involuntary payment the line of demarcation is not clearly defined. It has been held that payment after notice from the collector that unless paid a penalty would be imposed and a warrant issued is involuntary.²³⁵ And so where payment is made under protest under an assessment valid on its face, on a warrant valid on its face, it is involuntary,²³⁶ or under stress of legal process,²³⁷ or even where it is not shown that the collector had a warrant, if the levy would have followed in due course of law,²³⁸ or where the warrant is in the hands of a collector who threatens levy and sale.²³⁹ But a person is not bound to wait until his property is actually taken on process,²⁴⁰ or a demand by the officer for payment.²⁴¹ There are cases holding that mere threats are not coercion,²⁴² and the cases holding that the person pay-

Chester, 101 N. Y. 240; s. c. 4 N. E. 272; *Newman v. Board &c.*, 45 N. Y. 676; *Strusburgh v. Mayor &c.*, 87 N. Y. 452; *Horn v. Town of New Lots*, 83 N. Y. 100.

²³¹ *City of Galveston v. Sydnor*, 39 Tex. 236; *Corporation of Marshall v. Snediker*, 25 Tex. 460; *Baker v. Panola Co.*, 30 Tex. 86.

²³² *First Nat'l Bank v. Mayor &c.*, 68 Ga. 119; *Winter v. City Council &c.*, 65 Ala. 403; *Town of Lyons v. Cook*, 9 Ill. App. 543.

²³³ *Mayor &c. v. Feeley*, 66 Ga. 31; *Turnbull v. Alpena Tp.*, 74 Mich. 621; s. c. 42 N. W. 114; *Allen v. City of Burlington*, 45 Vt. 202; *Kansas Pac. R. Co. v. Commissioners &c.*, 16 Kan. 587, 598; *Bailey v. Buell*, 59 Barb. (N. Y.) 158; *Bank of Commerce v. Mayor &c.*, 43 N. Y. 188; *Boston &c. Glass Co. v. City of Boston*, 4 Met. (Mass.) 181; *Preston v. City of Boston*, 12 Pick. (Mass.) 7; *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433; *Henry v. Horstick*, 9 Watts (Pa.) 412; *Babcock v. Town of Granville*, 44 Vt. 325; *Henry v. Town of Chester*, 15 Vt. 460.

²³⁴ *Kimball v. Corn Exch. &c. Bank*, 1 Ill. App. 209; *Ruggles v. City of Fond du Lac*, 53 Wis. 436; s. c. 10 N. W. 565.

²³⁵ *Kansas Pac. R. Co. v. Commissioners &c.*, 16 Kan. 587, 598; and cases cited in last preceding note.

²³⁶ *Bruecher v. Village of Port Chester*, 101 N. Y. 240; s. c. 4 N. E. 272.

²³⁷ *People v. East Saginaw*, 40 Mich. 336; *First Nat'l Bank v. Watkins*, 21 Mich. 483. But see *Dunnell Mfg. Co. v. Newell*, 15 R. I. 233; s. c. 2 Atl. 766.

²³⁸ *Babcock v. Town of Granville*, 44 Vt. 325; *Peyser v. Mayor &c.*, 70 N. Y. 497; *Kansas Pac. R. Co. v. Commissioners &c.*, 16 Kan. 587.

²³⁹ *Kimball v. Corn Exch. &c. Bank*, 1 Ill. App. 209; *Ruggles v. City of Fond du Lac*, 53 Wis. 436; s. c. 10 N. W. 565; *Peyser v. Mayor &c.*, 70 N. Y. 497; *Raisler v. Mayor &c.*, 66 Ala. 194; *Erschine v. Van Arsdale*, 82 U. S. 75; *Gachet v. McCall*, 50 Ala. 307.

²⁴⁰ *Howard v. City of Augusta*, 74 Maine 79; *Ruggles v. City of Fond du Lac*, 53 Wis. 436; s. c. 10 N. W. 565; *Parcher v. Marathon Co.*, 52 Wis. 388; s. c. 9 N. W. 23.

²⁴¹ *Babcock v. Beaver Creek*, 64 Mich. 601; s. c. 31 N. W. 423.

²⁴² *Taylor v. Board of Health*, 31 Pa. St. 73; *De Fremery v. Austin*, 53 Cal. 380; *Lea v. City of Memphis*, 9

ing must do so under protest are numerous.²⁴³ As to what is protest it has been held: That notice by the taxpayer that he regarded the tax as illegal and would enforce his rights by an appropriate proceeding,²⁴⁴ or a writing that the tax is paid under protest,²⁴⁵ or a mere general protest, where the collector is undertaking to collect out of his district,—is sufficient.²⁴⁶ The grounds upon which the protest is based need not be stated.²⁴⁷ Taxes voluntarily paid are not recoverable. It has been held that where money is paid on an illegal demand with a full knowledge of all the facts which render the demand illegal, and where there is no urgent and immediate necessity therefor, it can not be recovered because of the payment being voluntary.²⁴⁸ And particularly if paid under a mistake of law.²⁴⁹ Where two counties assessed the same property and the taxes are paid to the wrong county a suit lies by the county entitled to the taxes against the other county to recover.²⁵⁰ Where the statute provides that the common council may at any time order the amounts erroneously assessed to be refunded it is mandatory.²⁵¹ The excess paid is not a public fund and

Baxt. (Tenn.) 103; Sonoma Co. Tax Case, 13 Fed. 789, 791; Detroit v. Martin, 34 Mich. 170, 173; Williams v. Corcoran, 46 Cal. 553, 556; City of Vicksburg v. Butler, 56 Miss. 72; City of Jackson v. Newman, 59 Miss. 385.

²⁴³ *Parcher v. Marathon Co.*, 52 Wis. 388; s. c. 9 N. W. 23; *Erschine v. Van Arsdale*, 15 Wall. 75; *Atwell v. Zeluff*, 26 Mich. 118; *Powell v. Board &c.*, 46 Wis. 210; s. c. 50 N. W. 1013; *Bundy v. Town of Wolcott*, 59 Vt. 665; s. c. 10 Atl. 756; *Stephan v. Daniels*, 27 Ohio St. 527; *Welker v. Potter*, 18 Ohio St. 85; *Marsh v. Board &c.*, 42 Wis. 502; *Thomas v. City of Burlington*, 69 Iowa 140; s. c. 28 N. W. 480; *Winzer v. City of Burlington*, 68 Iowa 279; s. c. 27 N. W. 241; *Turner v. Althaus*, 6 Neb. 54; *Hardesty v. Fleming*, 57 Tex. 395; *Galveston Gas Co. v. Galveston Co.*, 54 Tex. 287; *Louden v. East Saginaw*, 41 Mich. 18; s. c. 2 N. W. 182.

²⁴⁴ *Board &c. v. Cutter*, 3 Colo. 349.

²⁴⁵ *Carleton v. Inhabitants &c.*, 102 Mass. 348.

²⁴⁶ *Mason v. Johnson*, 51 Cal. 612.

²⁴⁷ *Babcock v. Beaver Creek Tp.*, 64 Mich. 601; s. c. 31 N. W. 423; *Smith v. Farrelly*, 52 Cal. 77; *Mason v. Johnson*, 51 Cal. 612; *Meek v. McClure*, 49 Cal. 623.

²⁴⁸ *Railroad Co. v. Commissioners*, 98 U. S. 543.

²⁴⁹ *Lamborn v. County Com'rs*, 97 U. S. 181; *Commissioners &c. v. Walker*, 8 Kan. 431; *Dunnell Mfg. Co. v. Newell*, 15 R. I. 233; s. c. 2 Atl. 766; *Sexton v. Pepper*, 28 Hun (N. Y.) 31; *Worley v. Town of Cicero*, 110 Ind. 208; s. c. 11 N. E. 227; *City of Indianapolis v. Vajen*, 111 Ind. 240; s. c. 12 N. E. 311; *Lester v. Mayor &c.*, 29 Md. 415; *George's Creek &c. Co. v. County Com'rs*, 59 Md. 255; *Mayor &c. v. Hussey*, 67 Md. 112; s. c. 9 Atl. 19; *Town of Tupelo v. Beard*, 56 Miss. 532; *Phelps v. Mayor &c.*, 112 N. Y. 216; s. c. 19 N. E. 408.

²⁵⁰ *Humboldt Co. v. Lander Co.*, 24 Nev. 461; s. c. 56 Pac. 228.

²⁵¹ *De Pauw Plate Glass Co. v. City of Alexandria*, 152 Ind. 443; s. c. 52 N. E. 608; *City of Indianapolis v. Ritzinger*, 24 Ind. App. 65; s. c. 56 N. E. 141.

no demand is necessary.²⁵² Where an ordinance provides that money paid on an illegal tax shall be refunded the money does not become the absolute property of the city and may be recovered.²⁵³ Invalid taxes paid to a city may be recovered in an action for money had and received.²⁵⁴ An action by a person to recover from a city the amount of an illegal assessment paid will not be sustained.²⁵⁵ Such action may be maintained only when the tax is void, and was paid under protest and to prevent an immediate seizure of goods or arrest, and was actually received by the city. A former owner may recover from a city a tax paid when the city has failed to complete the improvement.²⁵⁶ The amount recoverable in such case is plaintiff's share pro tanto of the sum unexpended, and the suit may be an action for money had and received.²⁵⁷ The payment of an invalid assessment under protest does not imply a contract to return it if wrongfully collected.²⁵⁸ A person whose land within the city limits is taxed beyond the rate permitted is entitled to recover from the city the excess thus paid.²⁵⁹ The failure of a street railroad to relay its tracks after taking them up for the purpose of putting in a sewer, does not amount to a forfeiture and does not relieve the company from paying its share of street improvements.²⁶⁰

§ 1494. **Miscellaneous.**—Current expenses are entitled to preference over a prior judgment.²⁶¹ Where a corporation makes a verified statement of its assets and liabilities for the purposes of reducing its assessment, in the absence of evidence discrediting the statement the taxing officers can not discredit the statement.²⁶² It may be shown in an application for judgment that the tax is unauthorized by law, or that the property is not subject to taxation, or that it has been fraudulently assessed too high.²⁶³ A statute requiring funds

²⁵² *Corbett v. Widber*, 123 Cal. 154; s. c. 55 Pac. 764.

²⁵³ *Phelps v. City of Tacoma*, 15 Wash. 367; s. c. 46 Pac. 400.

²⁵⁴ *Deady v. Village of Lyons*, 57 N. Y. S. 448; s. c. 39 App. Div. (N. Y.) 139.

²⁵⁵ *Hawk Eye &c. Co. v. City of Marion*, 110 Iowa 468; s. c. 81 N. W. 718.

²⁵⁶ *Rogers v. City of St. Paul*, 79 Minn. 5; s. c. 81 N. W. 539.

²⁵⁷ *Germania Bank v. City of St. Paul*, 79 Minn. 29; s. c. 81 N. W. 542.

²⁵⁸ *Nottage v. City of Portland*, 35 Or. 539; s. c. 58 Pac. 883.

²⁵⁹ *City of Indianapolis v. Ritzinger*, 24 Ind. App. 65; s. c. 56 N. E. 141.

²⁶⁰ *Sawyer v. City of Chicago*, 183 Ill. 57; s. c. 55 N. E. 645.

²⁶¹ *San Antonio St. R. Co. v. City of San Antonio*, 22 Tex. Civ. App. 341; s. c. 54 S. W. 907.

²⁶² *City of Denison v. Foster* (Tex. Civ. App.), 37 S. W. 167; *City of Sherman v. Smith* (Tex. Civ. App.), 35 S. W. 294.

²⁶³ *People v. Feitner*, 60 N. Y. S. 687; s. c. 44 App. Div. (N. Y.) 278.

to be deposited in a regularly organized bank does not include a private bank.²⁶⁴ Where a statute levies a state tax on each case in a recorder's court, provided it can be collected in money, the city is liable for all fines collected though such fines might have been paid in labor.²⁶⁵ Money collected for school purposes by way of compromise must be paid over to the board of education and can not be withheld on the ground that the tax was legally uncollectable.²⁶⁶ Non-user of the power of taxation is not a forfeiture of such power no matter how long continued.²⁶⁷

²⁶⁴ *Keokuk &c. Bridge Co. v. People*, 161 Ill. 132; s. c. 43 N. E. 691.

²⁶⁵ *City of Duquoin v. Kelly*, 176 Ill. 218; s. c. 52 N. E. 919.

²⁶⁶ *State v. Stong* (Tenn. Ch.), 47 S. W. 1103.

²⁶⁷ *City of Cynthiana v. Board of Education*, 21 Ky. L. 731; s. c. 52 S. W. 969; *Wells v. Mayor &c.*, 107 Ga. 1; s. c. 32 S. E. 669. The four per cent. limit on indebtedness of municipalities in Kansas can not be exceeded: *McIntire v. Williamson*, 8 Kan. App. 711; s. c. 54 Pac. 928. *Iowa St.*, 26 Gen. Assem., ch. 1, construed and held constitutional: *Youngerman v. Murphy*, 107 Iowa 686; s. c. 76 N. W. 648. Contract in reference to construction of water-works and electric light plant held to be in violation of constitution of S. C., in *Stehmeyer v. City Council &c.*, 53 S. C. 259; s. c. 31 S. E. 322. Illinois city and village act construed with reference to the rate of taxation: *Chicago &c. R. Co. v. Baldridge*, 177 Ill. 229; s. c. 52 N. E. 263. As to taxation of gift enterprises in cities, see *Humes v. City of Ft. Smith*, 93 Fed. 857. Construction of Neb. Comp. St. 1895, ch. 77, art. 6, §§ 1 and 2, in relation to power to

tax to pay judgments: *Dawson Co. v. Clark*, 58 Neb. 756; s. c. 79 N. W. 822. Construction of Tex. Rev. St., art. 5198, in regard to lien of taxes: *People's Nat'l Bank v. City of Ennis* (Tex.), 50 S. W. 632. Construction of Wis. Rev. St. 1898, ch. 40a, in *Adams v. City of Beloit*, 105 Wis. 363; s. c. 81 N. W. 869. Laws of Wis., 1879, ch. 211, do not violate const., art. 11, § 3: *Oconto City Water &c. Co. v. City of Oconto*, 105 Wis. 76; s. c. 80 N. W. 1113. The existing constitution of Ky. (1899) subjects all property within the city limits to taxation: *Shuck v. City of Lebanon*, 21 Ky. L. 969; s. c. 53 S. W. 655; *Ryan v. City of Central City*, 21 Ky. L. 1070; s. c. 54 S. W. 2; *Louisville &c. R. Co. v. Orr*, 91 Ky. 109; s. c. 15 S. W. 8; *Stickley v. Chesapeake &c. R. Co.*, 93 Ky. 323; s. c. 20 S. W. 261; *Onions v. Covington &c. R. Co.*, 21 Ky. L. 820; s. c. 53 S. W. 8. Construction of city ordinance of City of Middleboro, Ky., —see *City of Middleboro v. Coal & Iron Bank*, 22 Ky. L. 380; s. c. 57 S. W. 497. Persons and property taxable in cities, etc.: *Board &c. v. Stone*, 22 Ky. L. 25, 502; s. c. 56 S. W. 679.

CHAPTER XXXVI.

HIGHWAYS.¹

SECTION	SECTION
1495. Highways defined—Different kinds.	1518. Bridges in towns, townships and boroughs.
1496. Modes of creating highways.	1519. General duty to repair bridges.
1497. Dedication of highways—Nature and requisites.	1520. Abutting owners' rights and easements.
1498. Dedication continued — Evidence and presumptions.	1521. Liability for defective construction.
1499. Conditional or qualified dedication—Revocation.	1522. Defective highway plan—Liability for.
1500. Acceptance of highway—Nature of.	1523. Same subject continued.
1501. Dedication by state—By cities.	1524. Duty to keep streets reasonably safe.
1502. Dedication continued.	1525. Primary municipal duty to repair—Abutting owners' liability.
1503. Acquiring streets by prescription.	1526. Municipal and abutting owners—Statutory liability.
1504. Same subject continued—Prescription in various states.	1527. Limited liability for acts, etc., of independent contractor.
1505. Appropriating lands for highways—Damages.	1528. Municipal duty of supervision over others.
1506. Laying out highways.	1529. General municipal liability for neglect of streets.
1507. Property exempt from.	1530. Municipal liability in Michigan.
1508. Private owners' rights.	1531. Same subject continued—Rule in other states.
1509. Proceedings to establish highways—Parties—Notice.	1532. Liability for ways which public is invited to use.
1510. Petition—Jurisdictional facts.	1533. Municipal recourse against third persons.
1511. Abandonment of highway by non-user.	1534. Liability when defects concur with other causes.
1512. Discontinuing or vacating highways.	1535. Plaintiff's concurring act in cases of danger and exigency.
1513. Bridges—Part of highway, etc.	
1514. Bridges over navigable rivers and waters.	
1515. Bridges between states—Between counties.	
1516. County bridges.	
1517. City bridges.	

¹ There are many of the legal principles involved in the discussion of highways that have been considered heretofore in the chapter concerning streets, alleys, etc. (ch. 29, ante), and will not be repeated in this chapter, except in so far as they may be supplemental.

SECTION

- 1536. Limited liability in grading streets.
- 1537. Liability in respect to latent defects.
- 1538. Municipal liability for snow and ice.
- 1539. Same subject continued—Notice.
- 1540. Obstructions—Liability for.
- 1541. Obstructions for private convenience.
- 1542. Liability for structures over the street.
- 1543. Municipal liability for fright of horses.
- 1544. Notice of defect in highway.
- 1545. Notice when a question for the jury.
- 1546. When notice is not necessary.
- 1547. To whom notice may be given.

SECTION

- 1548. Notice of injury.
- 1548a. The same subject continued—Requisites of notice.
- 1549. Illustrations of sufficient notice.
- 1550. Pleading of notice—Evidence of.
- 1551. Evidence in personal injury cases.
- 1552. Instructions to jury.
- 1553. Exercise of care by person injured.
- 1553a. Duty to look and listen.
- 1554. Pedestrians' duty to use crossings and sidewalks.
- 1555. Infirm persons—Duty of caution.
- 1556. Violation of ordinance, etc., as contributory negligence.

§ 1495. **Highway defined—Different kinds.**—If a way is used for passing and repassing and is common to all, it is a highway, whether called a road, street or public square.^{1a} It is not essential to a highway, at common law, that it be a thoroughfare—it may be a cul de sac.² Piers and wharves at the end of city streets are usually mere

^{1a} *State v. Eastman*, 109 N. C. 785; s. c. 13 S. E. 1019; *Trustees &c. v. Cowen*, 4 Paige (N. Y.) 510; *State v. Wilkinson*, 2 Vt. 480; *Thomas v. Town of Brooklyn*, 58 Iowa 438; s. c. 10 N. W. 849; *Macomber v. Nichols*, 34 Mich. 212; *State v. Long*, 94 N. C. 896; *State v. Smith*, 100 N. C. 550; s. c. 6 S. E. 251.

² *People v. Kingman*, 24 N. Y. 559; *Saunders v. Townsend*, 26 Hun (N. Y.) 308; *Peckham v. Town of Lebanon*, 39 Conn. 231, 235; *Trustees &c. v. Merryweather*, 11 East 376, n. In the *Kingman* case just cited *Denio, J.*, said:—"Highways and streets having no issue at one extremity are quite common and indeed indispensable in many parts of the country. Take the case of roads leading into the northern wilderness of this state. They extend as far as the country is settled, where

they stop and remain in that condition until the progress of the settlements warrants their further extension. If it were held they could not be laid out unless they should run quite across the mountains to the northern slope, it would be impossible that they should ever be established. The same is true of roads laid out and extending into the original forests. . . . For similar reasons, in many cities and villages there are short streets leading to ravines and cliffs, whence there can be no outlet and where they must necessarily stop. The same is true of streets running to unnavigable waters or to points on the sea shore where there can not be a harbor or landing place." But see *Holdane v. Trustees &c.*, 23 Barb. (N. Y.) 103; s. c. affirmed 21 N. Y. 474.

extensions of them, which may belong to the city for the public benefit;³ and the city is as liable for their safe condition as for any other part of the street.⁴ The part of a navigable river lying within a city boundary is not a highway the city is bound to keep safe for public use,⁵ unless made so by statute.⁶ The seashore, between high and low water mark, is not a highway for travel on foot or in vehicles, and no one is entitled to damages for any defect therein;⁷ and the public have no highway along the margin of navigable rivers and lakes without express grant or prescription.⁸ At common law the term "highway" includes a footway,⁹ but where it occurs in a statute it must be construed in the light of its context; as, for instance, in some of the Massachusetts statutes a highway is a public way within the jurisdiction of the county, in distinction from a town-way, of which a town or city has jurisdiction.¹⁰ No such distinction, however, prevails in the city of Boston, where under the statute all ways are to be laid in a uniform manner by the street commissioners.¹¹ It is sometimes evident from the language of a statute that the word "highway" or "road" therein does not include city streets.¹² A public alley is not a highway under the Michigan statute of 1887 giving a remedy for injuries sustained on defective streets and highways.¹³ Ordinarily bridges are merely parts of highways.¹⁴

§ 1496. **Modes of creating highways.**—Public highways may be created in four ways:—(1) By proceedings under the statute; (2)

³ In *Matter of New York & c. R. Co.*, 77 N. Y. 248, 257; *Radway v. Briggs*, 37 N. Y. 256.

⁴ *Macaulay v. Mayor &c.*, 67 N. Y. 602.

⁵ *Coonley v. City of Albany*, 132 N. Y. 145; s. c. 30 N. E. 382; *Seaman v. Mayor &c.*, 80 N. Y. 239.

⁶ *Mobile Co. v. Kimball*, 102 U. S. 691.

⁷ *Murphy v. City of Brooklyn*, 98 N. Y. 642.

⁸ *Ledyard v. Ten Eyck*, 36 Barb. (N. Y.) 102.

⁹ *Tyler v. Sturdy*, 108 Mass. 106; *Orman v. Cheworth*, 6 Mad. 163; *Rex v. Burgess*, 2 Burr. 908; *Mercer v. Woodgate*, L. R. 5 Q. B. 26.

¹⁰ *Boston &c. R. Co. v. City of Boston*, 140 Mass. 87; s. c. 2 N. E. 943; *Inhabitants &c. v. County Com'rs*, 108 Mass. 68; *Butchers' Ass'n v.*

City of Boston, 139 Mass. 290; s. c. 30 N. E. 94; *Denham v. County Com'rs*, 108 Mass. 202; *Valentine v. City of Boston*, 22 Pick. (Mass.) 75.

¹¹ *Commonwealth v. City of Boston*, 16 Pick. (Mass.) 442.

¹² Act of Pennsylvania of May 8, 1889, entitled "An act fixing the number of road and bridge viewers," does not apply to the city of Philadelphia. It is apparent, for various reasons, that it was not intended that the term "road" should embrace city streets: *Sewer Street*, 8 Pa. Co. Ct. 226.

¹³ *Face v. City of Ionia*, 90 Mich. 104; s. c. 51 N. W. 184.

¹⁴ *Huggans v. Riley*, 125 N. Y. 88, 92; s. c. 25 N. E. 993; *Westfield Borough v. Tioga Co.*, 150 Pa. St. 152; s. c. 24 Atl. 700.

by prescription which creates the presumption of a grant of the right of way for public use; (3) by dedication through offer and implied acceptance, where the principle of estoppel prevents the owner of the land from revoking his offer after the public have acted on it so long that such revocation would be a fraud on the public; (4) by dedication through offer and actual acceptance.¹⁵

¹⁵ In *City of Cohoes v. President &c.*, 47 N. Y. St. 612, it appeared that in 1835 the Cohoes Company, owner of the locus in quo, kept at its office a map upon which the land in question was designated as Van Rensselaer street, and filed a copy in the Albany county clerk's office. It sold lots and bounded them on the street, which was mapped as eighty feet wide, and for nearly its whole length and on its west side an open canal thirty feet wide. In 1853 a railroad company of which the defendant is successor, having agreed with the Cohoes Company as to location and damages, filed a map designating the street in the same manner. From 1845 persons drove along the part of the street not occupied by the railroad tracks. The city of Cohoes was incorporated in 1869, and in 1874 its common council passed a resolution declaring Van Rensselaer street a public highway, and that the same be graded, but only a small portion of it was ever worked. In 1883 the Cohoes Company conveyed to defendant all its interest in the street. In an action between the city and the defendant canal company the court of appeals, reversing the courts below, held that Van Rensselaer street became a public highway by dedication in 1853, and had never ceased to be such. Vann, J., speaking for the court, said:—"Public highways may be created in four ways:—1. By proceeding under the statute: 2 R. S., 8th ed., p. 1372 et seq.; also p. 1383, § 100. 2. By prescription, or when land is used by the public

for a highway for twenty years, with the knowledge but without the consent of the owner. The presumption of a grant of the right of way springs from the mere lapse of said period of time in connection with the adverse user by the public. 3. By dedication through offer and implied acceptance, or where the owner throws open his land, intending to dedicate it for a highway, and the public use it for such a length of time that they would be seriously inconvenienced by an interruption of the enjoyment. This rests upon the principle that the owner is estopped from revoking his offer after the public have acted on it for so long a period that it would be a fraud upon them if he were permitted to do so. No particular length of time is required to effect such a dedication, as every case of an estoppel in pais necessarily depends upon its own facts. 4. By dedication through offer and actual acceptance, or where the owner throws open his land and by acts or words invites acceptance of the same for a highway, and the public authorities in charge of the subject formally or in terms accept it as a highway. In the absence of an actual conveyance the owner does not part with his title to the land, but only with the right to possession for the purpose of a highway. Though there has been some conflict of opinion upon the subject, we understand this to be the law as established by the weight of authority in this state: *Flack v. Green Island Village*, 122 N. Y. 107, 113; s. c. 25

§ 1497. **Dedication of highways—Nature and requisites.**—The dedication of land for a highway is essentially of the nature of a gift, and there can be no gift without surrender by the donor and acceptance by the donee.¹⁶ A most satisfactory mode of dedication is effected by the owner's deed, and such a deed is not affected by subsequent condemnation proceedings.¹⁷ It is not essential that the dedication be in writing;¹⁸ but if not, the owner's acts and declarations must be clear and decisive showing his intent to dedicate the land absolutely to the public use.¹⁹ The gift or dedication by the landowner may be proved by a map made or referred to by him laying out the street for the public use,²⁰ or by his bond binding him to convey the land for a highway,²¹ or by his fencing it off as a street and

N. E. 267; 33 N. Y. St. 339; *Driggs v. Phillips*, 103 N. Y. 77; s. c. 8 N. E. 514; 3 N. Y. St. 69; *People v. Loehfelm*, 102 N. Y. 1; s. c. 5 N. E. 783; *Cook v. Harris*, 61 N. Y. 448, 454; *Holdane v. Trustees &c.*, 21 N. Y. 474; *McMannis v. Butler*, 51 Barb. (N. Y.) 436; *Carpenter v. Gwynn*, 35 Barb. (N. Y.) 395; *Wiggins v. Tallmadge*, 11 Barb. (N. Y.) 457; *Clements v. Village of West Troy*, 10 How. Pr. (N. Y.) 199; *Ward v. Davis*, 3 Sandf. (N. Y.) 502; *Hunter v. Trustees &c.*, 6 Hill (N. Y.) 407; *Denning v. Roome*, 6 Wend. (N. Y.) 651; *Colden v. Thurbur*, 2 Johns. (N. Y.) 424. The same rule prevails in the supreme court of the United States, in the courts of most of the states, and in England: *President &c. v. White's Lessee*, 6 Pet. 431; *Barclay v. Howell*, 6 Pet. 498; *Buchanan v. Curtis*, 25 Wis. 99; *Marcy v. Taylor*, 19 Ill. 633; *Greene v. Town of Canaan*, 29 Conn. 157; *Kennedy v. Le Van*, 23 Minn. 513; *City of Waterloo v. Union Mill Co.*, 72 Iowa 437; s. c. 34 N. W. 197; *State v. Trask*, 6 Vt. 355; *Abbott v. Mills*, 3 Vt. 521, 526; *Hobbs v. Lowell*, 19 Pick. (Mass.) 405; *State v. Hill*, 10 Ind. 219; *Price v. Inhabitants &c.*, 92 Mo. 378; s. c. 5 S. W. 20; *Wolf v. Brass*, 72 Tex. 133; s. c. 12 S. W. 159; *Commonwealth v. McDonald*, 16 S. & R. (Pa.) 390; *Doe*

v. Jones, 11 Ala. 63, 84; [note to] *Dovaston v. Payne* [2 H. Bl. 527, in] 2 Sm. L. Cas. [(9th ed.) 1388]; *Rugby Charity v. Merriwether*, 11 East 376, n.; *King v. Inhabitants &c.*, 5 B. & Ad. 469; *Lade v. Shepherd*, 2 Str. 1004; *Jarvis v. Dean*, 3 Bing. 447; *Woodyer v. Hadden*, 5 Taunt. 125; *Regina v. Petrie*, 30 Eng. L. & Eq. 207. There are some cases holding otherwise and others that have been supposed to hold otherwise, but upon examination it will be found that they depended on local statutes or special circumstances: *Underwood v. Stuyvesant*, 19 Johns. (N. Y.) 181; *Laws 1787*, ch. 61, 88; *Laws 1797*, ch. 43; *Laws 1799*, ch. 70; *City of Oswego v. Oswego Canal Co.*, 6 N. Y. 257, 266; *Laws 1811*, ch. 231."

¹⁶ *Flack v. Village of Green Island*, 122 N. Y. 107; s. c. 25 N. E. 267; *Cook v. Harris*, 61 N. Y. 448.

¹⁷ *Parker v. City of St. Paul*, 47 Minn. 317; s. c. 50 N. W. 247.

¹⁸ *Vandemark v. Porter*, 40 Hun (N. Y.) 397; *Marble v. Whitney*, 28 N. Y. 297.

¹⁹ *Niagara &c. Bridge Co. v. Bachman*, 66 N. Y. 261.

²⁰ *People v. Loehfelm*, 102 N. Y. 1; s. c. 5 N. E. 783; *Bissell v. New York &c. R. Co.*, 23 N. Y. 61; *Story v. New York El. R. Co.*, 90 N. Y. 122.

²¹ *Cook v. Harris*, 61 N. Y. 448.

consenting to its designation as such on the village map,²² though his title to the land may not have been formally divested.²³

§ 1498. **Dedication continued—Evidence and presumptions.**—The mere reference by a grantor of land to an official map, whereon the land in question is designated as a street, does not amount to a dedication of it.²⁴ The mere making of a map which is not filed of record is not an offer to dedicate. Persons who buy on faith of the representation of the street upon the map may compel the opening of the street, but if they do not the public can not complain.²⁵ Where, for more than five years, an owner does not object to the use of his

²² *Holdane v. Trustees &c.*, 21 N. Y. 474.

²³ Where a street in New York city was widened from forty to sixty feet and accordingly used by the public for nineteen years, though no legal measures had been taken to divest the owner's title, it was held that his non-claim for so long, together with the payment by him of an assessment for paving the street to the full width and the recognition of the appropriation of the twenty feet, were sufficient to establish the public right to use the street to the full width of sixty feet: *Denning v. Roome*, 6 Wend. (N. Y.) 651.

²⁴ *Cook v. Sudden*, 94 Cal. 443; s. c. 29 Pac. 949. In *Cerf v. Pfleging*, 94 Cal. 131; s. c. 29 Pac. 417, the mere adoption by the town authorities of an official map of the town, which showed a street laid out through land in the occupation of a private person, was held not to affect his right to the land so designated as a street; and the fact that his grantees also described the land by reference to the map did not have the effect of a dedication. A street officially mapped may be as good a landmark as a street legally established, but a mere reference to it by the owner of land does not dedicate his land as a street: In re *Brooklyn Street*, 118 Pa. St. 640; s. c. 12 Atl. 664, where the court said:

—"Where a municipality lays out streets upon the land of a citizen, it is not the act of the owner in any sense, and hence there is no necessity for an implication of a covenant against the owner to give his land to the public without compensation, nor even to dedicate to public use. Why, then, shall these implications be made where the street is laid out by municipal action and the owner does nothing as to the public and nothing as to his private grantee except to refer as matter of description to a street laid out but not opened by public authority."

²⁵ *People v. Reed*, 81 Cal. 70; s. c. 22 Pac. 474; *Cook v. Sudden*, 94 Cal. 443; s. c. 29 Pac. 949. The mere making of a map of one's land, on which streets and squares are denoted, followed by no dealing with the land by the owner or the public in reference thereto, is not sufficient to show a dedication: *Berry v. McComb City*, 69 Miss. 882; s. c. 12 So. 146; *Sanford v. Mayor &c.*, 52 Miss. 383. But where in his deeds to purchasers he describes according to a plat into lots and streets, and according to a survey which has been incorporated into the city maps, a dedication is made out: *Witherspoon v. City of Meridian*, 69 Miss. 288; s. c. 13 So. 843. See also, *State v. Litus*, 47 N. J. L. 89, 91.

land as a public road, the presumption is that he has dedicated the strip so used for a road;²⁶ and this presumption is confirmed by the fact of his assisting in laying out the road;²⁷ and the fencing off, so as to have it outside, of a strip of land the public are accustomed to use for travel, creates such a presumption;²⁸ but his consent that his land be used in order to reach a public road does not amount to a dedication;²⁹ nor user of the public without his knowledge, where he has continued to pay taxes upon the locus in quo.³⁰ At common law in England public footways might be created by dedication or prescription,³¹ and this is the rule in several of the states.³²

§ 1499. Conditional or qualified dedication—Revocation.—A conditional dedication by deed may be revoked at any time before the conditions are complied with.³³ A presumption of revocation of a dedication from the fact of fencing up a road may be overcome by the fact that the dedication is recognized by the owner in contemporaneous deeds.³⁴ An offer to dedicate land for the purpose of a highway may be qualified or made subject to a burden, and if so accepted the land becomes a highway subject to the burden; but after acceptance the dedicator can not revoke the dedication or increase the burden except according to the terms of the reservation.³⁵ A deed to a town for a public road is not invalid because the use of the road is limited

²⁶ *Plummer v. Sheldon*, 94 Cal. 533; s. c. 29 Pac. 947; *Patterson v. Munyan*, 93 Cal. 128; s. c. 29 Pac. 250.

²⁷ *Witter v. Damitz*, 81 Wis. 385; s. c. 51 N. W. 575; *Gerberling v. Wunnenberg*, 51 Iowa 125; s. c. 49 N. W. 861.

²⁸ *Moffett v. South Park*, 138 Ill. 620; s. c. 28 N. E. 975.

²⁹ *Worthington v. Wade*, 82 Tex. 26; s. c. 17 S. W. 520; *Ramthun v. Halfman*, 58 Tex. 551.

³⁰ *City of Topeka v. Cowee*, 48 Kan. 345; s. c. 29 Pac. 560.

³¹ *Co. Litt.* 56a; *Thrower's Case*, 1 Ventr. 208; *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Queen v. Saintiff*, 6 Mod. 255; *Rex v. Burgess*, 2 Burr. 908.

³² *Tyler v. Sturdy*, 108 Mass. 196; *Hemphill v. City of Boston*, 8 Cush. (Mass.) 195; *Danforth v. Durrell*, 8

Allen (Mass.) 242; *Chadwick v. McCausland*, 47 Maine 342; *Nudd v. Hobbs*, 17 N. H. 524; *Gowen v. Philadelphia Exchange Co.*, 5 W. & S. (Pa.) 141.

³³ *Forsyth v. Dunnagan*, 94 Cal. 438; s. c. 29 Pac. 770.

³⁴ *Bridges v. Wyckoff*, 67 N. Y. 130, 132.

³⁵ *City of Cohoes v. President &c.*, 47 N. Y. St. 612; *People v. Kingman*, 24 N. Y. 559; *Ayres v. Pennsylvania R. Co.*, 52 N. J. L. 405; s. c. 20 Atl. 54; 48 N. J. L. 44; 3 Atl. 885; *Cornwell v. Metropolitan &c. Com'rs*, 10 Exch. 771; *Le Neve v. Vestry &c.*, 8 El. & Bl. 1054; *Fisher v. Prowse*, 2 B. & S. 770; *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Arnold v. Blaker*, L. R. 6 Q. B. 433; *Vestry &c. v. Jacobs*, L. R. 7 Q. B. 47; *Arnold v. Holbrook*, L. R. 8 Q. B. 96.

to certain winter months in each year, and at other times is to be closed.³⁶

§ 1500. **Acceptance of highway—Nature of.**—A public record of a judgment establishing the acceptance is not necessary to prove acceptance by the public, but it may be proved by the acts and conduct of the authorities adopting it as a highway,³⁷ though such acts occur on a single day,³⁸ or it may be proved by appropriation and long public use.³⁹ However clear and decided the dedication may be, it may be revoked at any time before acceptance.⁴⁰ An acceptance more than twenty years after offer of dedication, the owner having meanwhile resumed possession, is too late.⁴¹ Dedication and acceptance create a

³⁶ In *Hughes v. Bingham*, 135 N. Y. 347; s. c. 32 N. E. 78; 46 Alb. L. J. 517, the court of appeals said:—"To say that while the town or the commissioner has capacity to take a grant of land for general highway purposes, it is utterly without capacity to take a limited or qualified grant to supply such a public necessity as may, and probably in many cases does, exist during the winter months, is to fix a limit upon power conferred for the public good that would be quite unreasonable if not absurd. There were seven months of the year in which the public had no use for this road, and it was provided that during these months the gates should be kept closed. This was the season of the year, however, when it is possible to make repairs on roads, and it was stipulated that the highway commissioner might then make such repairs or do such work on the road as he thought the public interest required. The capacity to take a grant in fee for highway purposes must, upon every just principle of construction, as well as upon reasons growing out of the necessity of the case, be deemed to include the power and capacity to take an interest less than a fee, or upon conditions such as were inserted in this deed."

³⁷ *People v. Loehfelm*, 102 N. Y. 1; s. c. 5 N. E. 783.

³⁸ *Hunter v. Trustees &c.*, 6 Hill (N. Y.) 407.

³⁹ *Cook v. Harris*, 61 N. Y. 448; *McMannis v. Butler*, 51 Barb. (N. Y.) 436; *Hunter v. Trustees &c.*, 6 Hill (N. Y.) 407; *Porter v. Village of Attica*, 33 Hun (N. Y.) 605. In *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459; s. c. 11 N. E. 43, it was held the evidence justified the finding that the street in question had been dedicated to and accepted by the public, where it appeared that the street had been open forty years as a principal street, water mains laid through it and curbstones placed along the sidewalks at the village expense. Twenty years of continuous use will create the presumption of dedication, but a much shorter period will be sufficient where the act of the owner is clear and followed by immediate public use: *Denning v. Roome*, 6 Wend. (N. Y.) 651.

⁴⁰ *Holdane v. Trustees &c.*, 21 N. Y. 474. But whether the dedicator's acts in a given case amount to revocation is a question for the jury: *McMannis v. Butler*, 51 Barb. (N. Y.) 436.

⁴¹ *People v. Reed*, 81 Cal. 70; s. c. 22 Pac. 474.

highway without regard to the length of time it may have been used.⁴²

§ 1501. Dedication by state—By cities.—The state may dedicate its land for a highway and is as much bound thereby as an individual.⁴³ Where the state by authority of law makes a city plat of its own land and thereby dedicates to the public use the streets and other public grounds marked thereon, that act is itself an acceptance by the public.⁴⁴ The city of New York may dedicate its land for streets so as to be irrevocably bound thereby.⁴⁵ While legislative authority to individuals or corporations to fill up and enjoy land under water fronting lands owned by them does not extinguish the public right of access to navigable waters by a street on the lands of such owners which by dedication terminated at high-water line,⁴⁶ yet the federal supreme court has decided that a grant in fee by the state of New Jersey, under her general riparian act of 1869, wholly excluded the public from such access, and that in face of such a grant a highway running to the original water line will not be continued to the new water line formed by filling in the granted area.⁴⁷ A town in its corporate capacity may take lands for a highway by a conveyance;⁴⁸ and such a conveyance to a town is not invalid because the use of the road is limited to certain winter months.⁴⁹

§ 1502. Dedication continued.—It is a well-settled rule⁵⁰ that when the owner of a tract of land lays it out into city or village lots intersected with streets, alleys and public squares, and makes a map thereof, and conveys the lots with reference to their designation on the map, the map becomes an essential part of the conveyance, and the use of the streets, alleys and squares becomes an easement an-

⁴² *Chapman v. Swan*, 65 Barb. (N. Y.) 210.

⁴³ *City of Oswego v. Oswego Canal Co.*, 6 N. Y. 257, where the court said:—"In laying out the village plat and in selling the building lots the state acted as the owner of the land, and the effect of the survey and sale in reference to the streets laid down on the maps was the same as if the sale and survey had been made by an individual."

⁴⁴ *Reilly v. City of Racine*, 51 Wis. 526; s. c. 8 N. W. 417.

⁴⁵ A city having power to lay out and open streets and to acquire land for that purpose has power to

dedicate its own lands to such a use and to bind itself to grantees of abutting lands that lands so dedicated shall be forever kept as a public street: *Story v. New York El. R. Co.*, 90 N. Y. 122.

⁴⁶ *Hoboken Land &c. Co. v. Mayor &c.*, 36 N. J. L. 540.

⁴⁷ *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656; s. c. 8 S. Ct. 643.

⁴⁸ *Vail v. Long Island R. Co.*, 106 N. Y. 283; s. c. 12 N. E. 607.

⁴⁹ *Hughes v. Bingham*, 135 N. Y. 347; s. c. 32 N. E. 78; 46 Alb. L. J. 517; cited in n. 36, *supra*.

⁵⁰ §§ 1497, 1498, *ante*.

nexed to the estate granted.⁵¹ In such cases, as between the grantor and grantee, the dedication is complete on the delivery of the conveyance, and as to the public it is complete on adoption and user by the public authorities.⁵² This whole subject has been so clearly treated by the superior court of the city of New York in a recent case in connection with the use of an alley appurtenant to lots granted by the late Alexander T. Stewart, that, although this is not a court of last resort, it seems proper to quote at length from the opinion.⁵³ The country is now so old as to furnish instances of im-

⁵¹ *Post v. Pearsall*, 22 Wend. (N. Y.) 425, 435; *Taylor v. Hopper*, 62 N. Y. 649.

⁵² *De Witt v. Village of Ithaca*, 15 Hun (N. Y.) 568; *Matter of Ingraham*, 4 Hun (N. Y.) 495; *Strong v. City of Brooklyn*, 68 N. Y. 1; *Niagara &c. Bridge Co. v. Bachman*, 66 N. Y. 261.

⁵³ *Knabe v. Levelle*, 23 N. Y. S. 818, where the court said:—"It appears that Stewart, the common source of title, devoted the alley to the use of the abutting lots, the right to continue forever. He laid the alley out on his map, and marked out the lots abutting on it, and sold them in conformity to that map, and in this way dedicated the alley to the use of the adjoining land: 5 Am. & Eng. Encyc. of Law 395 et seq. Indeed, where lots are sold according to a plat, with streets and alleys laid for the use of the owners of such lots, such streets and alleys are, as between grantor and grantee, dedicated to the use of such owners and to the public when it desires them for public use; and the fact that they have not been accepted as public highways renders them none the less dedicated to the use of such owners: *Trustees &c. v. Cowen*, 4 Paige (N. Y.) 510; *Livingston v. Mayor &c.*, 8 Wend. (N. Y.) 85; *Matter of Eleventh Ave.*, 81 N. Y. 436; 3 Washburn Real Prop. 451; *Rummel v. New York &c. R. Co.*, 30 N. Y. St. 235; s. c. 9 N. Y. S. 404; *Story v. New York &c. R. Co.*, 90 N. Y. 122; s. c. with

note, 11 Abb. N. C. (N. Y.) 236; *Coe v. Bearup*, 14 Week. Dig. (N. Y.) 246; *De Witt v. Village of Ithaca*, 15 Hun (N. Y.) 568. As between the parties the dedication is complete upon the delivery of the deed; as to the public, upon an acceptance by the public authorities, which may be shown by use of the lands so dedicated: *De Witt v. Village of Ithaca*, supra. The principle on which the dedication is held irrevocable is that to allow it to be recalled to the injury of one who purchased adjoining land on the faith of it would operate as a fraud: *Herman Estop.*, § 521. At common law (and in the absence of a statutory dedication) the highway is an easement merely, and the landowner has all the rights of property in the soil of the highway, but subject to the easement. He may mine under it, carry pipes beneath it or run a drain under it. He may also have an action of trespass against any one cutting trees or digging up the soil: 9 Am. & Eng. Encyc. of Law 374, 375, and cases cited. Where an easement in land is dedicated to public use, the public have no right in the land inconsistent with such use and can not convey it away: 9 Am. & Eng. Encyc. of Law 412. Substantially the same rules apply to private alleys: *Cihak v. Klekr*, 17 Ill. App. 124; *Cox v. James*, 59 Barb. (N. Y.) 144; *Cox v. James*, 45 N. Y. 557; *Perry v. Cumberson*, 39 Hun (N. Y.) 436; *Child v. Chap-*

memorial public user of highways running back to colonial times, though in many of such instances the highway may have had its

pell, 9 N. Y. 246; *Hargro v. Hodgdon*, 89 Cal. 623; s. c. 26 Pac. 1106; *Wiggins v. Tallmage*, 11 Barb. (N. Y.) 457. While it is an established principle that nothing passes as an incident to the grant of an easement but what is requisite to its fair enjoyment, the plaintiffs seek to maintain a recovery on the theory that the plaintiffs have some estate in the alley acquired by the dedication of the alley. They claim:—(1) That when Stewart, by the terms of his deeds to the abutting owners, set apart this alley for the use of said lots 'forever,' he intended to dedicate it for that purpose, and did not intend to retain the ownership of the soil: *Welsh v. Taylor*, 134 N. Y. 450; s. c. 31 N. E. 896. That not having reserved any fee in the alley, the doctrine of dedication concludes him from asserting his former title (*Gerard Titles* (3d ed.) 736) on the equitable principle of estoppel: *Gerard Titles* (3d ed.) 736; *Wiggins v. McCleary*, 49 N. Y. 346; *Taylor v. Hepper*, 2 Hun (N. Y.) 646; s. c. affirmed, 62 N. Y. 649. The trend of argument leads to the conclusion that the fee in the alley (subject to the easements) remained in Stewart until all the adjoining lots were sold and conveyed, and was then held in abeyance, or in *gremio legis* or else in *nubibus*, subject to any formal abandonment of the alley as such, when the fee would rest in the abutting owners at the time as tenants in common: *Adams v. Saratoga &c. R. Co.*, 11 Barb. (N. Y.) 414, 453; s. c. reversed, but on other grounds, 10 N. Y. 328; *Kelsey v. King*, 1 Trans. App. (N. Y.) 133. Owners of land bounded on an alley who have free use thereof have substantially the same rights therein that the public has in its highways; and if

the alleyway is abandoned, the soil belongs to them as tenants in common: *Ellis v. Academy &c.*, 120 Pa. St. 608; s. c. 15 Atl. 494; 6 Am. St. 739; and until such formal abandonment the interest of the abutting owners is of an incorporeal nature, only passing as appurtenant to any grant of the fee of the abutting property to which it is an incident. Where the title of the owner of the fee extends to the middle of the public highway, his grant of an abutting lot may carry title to the center of the street (*Dunham v. Williams*, 37 N. Y. 251), depending on the intention of the parties as evidenced by the words of the grant. Thus, a grant bounding 'by,' 'on' or 'along' a highway carries the fee to the middle if the grantor owned to the middle, but one bounding 'by the side of,' 'by the margin of' or 'by the line of' does not carry beyond the edge of the road: 9 Am. & Eng. Encyc. of Law 375; *Gerard Titles* (3d ed.) 518; *Holloway v. Delano*, 64 Hun (N. Y.) 27, 34; *In re Sixty-seventh St.*, 60 How. Pr. (N. Y.) 264; *In re Ladue*, 118 N. Y. 213; s. c. 23 N. E. 465. So in regard to a lane between two closes used as a way, the presumption is that the soil *ad medium filum viæ* belongs to the owner on each side. But in this, as in the case of a highway, the intention as evidenced by the words, boundaries and terms of the grant controls. Dedication is the act of devoting or giving property for some object or purpose and in such a manner as concludes the owner, but he is never concluded beyond the object or purposes specified. Implied covenants are always confined within the limits of express covenants, for '*expressio unius est exclusio alterius*:' *Broom's Maxims*."

origin in a statute or a deed of gift.⁵⁴ As to such user a witness may testify from common reputation or tradition, for the easement of a highway is a public easement and provable as such by reputation.⁵⁵

§ 1503. Acquiring streets by prescription.—User to create a title by prescription to a public street must be under a claim of right by the public adverse to the owner's right, and continued substantially for a period equal to the statutory limitation in respect to actions for the recovery of real estate.⁵⁶ Though the use of a road was begun by permission, if the use continues under a claim of right for a term equal to the period of the statute of limitations, a prescriptive right to the road is acquired.⁵⁷ Where adjoining landowners agree upon their division line and establish a road supposed to be on the land of one of them, the subsequent public prescriptive right to it acquired by sufficient user will not be affected though a resurvey show that the road was taken from the land of another of the adjoining owners.⁵⁸

§ 1504. The same subject continued—Prescription in various states.—The user required within the meaning of the provision of the New York Revised Statutes declaring that "all roads not recorded which have been or shall have been used *as public highways* for twenty

⁵⁴ According to the colonial act of June 20, 1765, there existed a public highway six rods wide, extending through the Elizabethtown Point tract to the waters of Arthur's Hill: *City of Elizabeth v. New Jersey &c. R. Co.*, 53 N. J. L. 491; s. c. 22 Atl. 47. See also, *Hampson v. Taylor*, 15 R. I. 83; s. c. 8 Atl. 331; 23 Atl. 732.

⁵⁵ A witness for the plaintiff, in an action against a city to recover damages for personal injuries resulting from a defective sidewalk, may testify that the street where the accident occurred was a highway; that, according to common reputation and tradition, it had been such for nearly two hundred years; and that it was formerly the main street of the city: *Hampson v. Taylor*, 15 R. I. 83, 87; s. c. 8 Atl. 331; 23 Atl. 732. In this case the witness also testified that the land comprising the town was originally bought by four proprietors, and that they deeded to the town certain highways as main

streets, of which the street where the injury occurred was one. See also, *Village of Grandville v. Jenison*, 84 Mich. 54; s. c. 47 N. W. 600.

⁵⁶ *Moore v. City of Waco*, 85 Tex. 206; s. c. 20 S. W. 61; *City of Topeka v. Cowee*, 48 Kan. 345; s. c. 29 Pac. 560; *Shellhouse v. State*, 110 Ind. 509; s. c. 11 N. E. 484; *Wallace v. Fletcher*, 30 N. H. 434; *State v. Mitchell*, 58 Iowa 567; s. c. 12 N. W. 598; *Graham v. Hartnett*, 10 Neb. 517; s. c. 7 N. W. 280. See *Herhold v. City of Chicago*, 108 Ill. 467; *Jones v. Davis*, 35 Wis. 376. A lane traveled continuously by the public for forty years comes within the Indiana statute: *Louisville &c. R. Co. v. Etzler*, 3 Ind. App. 562; s. c. 30 N. E. 32; and within the Iowa statute: *McAllister v. Pickup*, 84 Iowa 65; s. c. 50 N. W. 556.

⁵⁷ *McAllister v. Pickup*, 84 Iowa 65; s. c. 50 N. W. 556.

⁵⁸ *Bales v. Pidgeon*, 129 Ind. 548; s. c. 29 N. E. 34.

years or more shall be deemed public highways" does not need to be adverse or such as is required to give an individual a right of way by prescription, but it must be like that of highways generally; the fact that a portion of the public have traveled over it for more than twenty years is not enough; it must in addition be kept in repair or taken in charge or adopted by the public authorities.⁵⁹ If the owner permits such complete public user as that above described to continue twenty years, he will not be permitted to question the public right to the highway, but by force of the statute it will be a public highway though he may not have intended it to become so;⁶⁰ and the rule is the same where successive owners have permitted such user for twenty years.⁶¹ But an owner will not be deemed to invite and permit such user by merely removing his fence and leaving a strip of land open.⁶² Nor can he by throwing his land open, or by a simple act of dedication, impose on a town or city the duty of treating it as a highway or a liability for neglecting to do so.⁶³ By the statute of 1864 the highway laws before specially applicable to the counties of Suffolk and Queens were repealed, and by the statute of 1865 the general statute above referred to was applied to those counties, so that a road there which had then been used as such for twenty years at once became a public highway.⁶⁴ Under the Indiana statute, also, twenty years' public user of a way makes it a public highway, whether the owner consents or objects to the user,⁶⁵ and regardless of any public utility.⁶⁶

⁵⁹ *Spir v. Town of New Utrecht*, 121 N. Y. 420; s. c. 24 N. E. 692; *In re Bridge*, 100 N. Y. 642; s. c. 3 N. E. 679; *Rozell v. Andrews*, 103 N. Y. 150; s. c. 8 N. E. 513. See also, *Lewis v. New York & C. R. Co.*, 123 N. Y. 496, 502; s. c. 26 N. E. 357; *Vandemark v. Porter*, 40 Hun (N. Y.) 397.

⁶⁰ *Spir v. Town of New Utrecht*, 121 N. Y. 420, 430; s. c. 24 N. E. 692; *Galatian v. Gardner*, 7 Johns. (N. Y.) 106; *Chapman v. Swan*, 65 Barb. (N. Y.) 210.

⁶¹ *Devenpeck v. Lambert*, 44 Barb. (N. Y.) 596.

⁶² *Rozell v. Andrews*, 103 N. Y. 150; s. c. 8 N. E. 513.

⁶³ *Rozell v. Andrews*, *supra*; *Trustees & C. v. Otis*, 37 Barb. (N. Y.) 50, 56. In *City of Oswego v. Oswego Canal Co.*, 6 N. Y. 257, *Ruggles, C. J.*, said:—"The whole structure of the

highway acts forbids that the town is bound to accept and keep in repair any road which an individual may think proper to open through his land, although he may dedicate it to public use in such a manner as to preclude him from shutting it up. Streets and roads dedicated by individuals to public use, but not adopted by the local public authorities, are not highways within the meaning of the highway acts, and there is no law by which any one can be compelled to keep them in repair."

⁶⁴ *James v. Sammis*, 132 N. Y. 239; s. c. 30 N. E. 502.

⁶⁵ *Strong v. Makeever*, 102 Ind. 578; s. c. 1 N. E. 502; 4 N. E. 11; *disapproving Board & C. v. Huff*, 91 Ind. 333.

⁶⁶ *Washington Ice Co. v. Lay*, 103 Ind. 48; s. c. 2 N. E. 222.

In Missouri ten years' user with the owner's consent makes a way a public road.⁶⁷ By user of twelve to fifteen years a road is acquired by prescription so as to bar an owner's claim for damages.⁶⁸

§ 1505. **Appropriating land for highway—Damages.**—The taking of property for a public street is a taking for public use.⁶⁹ Where the mayor and city council have charter power to determine the necessity of proposed streets, an ordinance providing for the opening of a street is conclusive of its public necessity.⁷⁰ If the benefits which will accrue to a landowner from the opening of a road through his land are sufficient to counterbalance the injury to him, damages therefor should be denied to him.⁷¹

§ 1506. **Laying out highways.**—An order laying out a road which gives the center line accurately and specifies the width on each side of such line is sufficient.⁷² The mode prescribed by statute for awarding damages for laying out a road must be carefully followed.⁷³ The proceedings of a highway commissioner in laying out a highway over petitioner's lands, without making him a party, are invalid and will be quashed.⁷⁴ Where a new highway is laid out to take the place of an old one the public can not be deprived of the old until the new is made fit for travel.⁷⁵ Under the Wisconsin statute a committee of the county board can not make an order laying out a highway, but must report to the board, which thereupon makes the order.⁷⁶ In Texas the county commissioners have no jurisdiction to open a high-

⁶⁷ *State v. Proctor*, 90 Mo. 334; s. c. 2 S. W. 472.

⁶⁸ *Click v. Lamar Co.*, 79 Tex. 121; s. c. 14 S. W. 1048.

⁶⁹ *State v. Engelmann*, 106 Mo. 628; s. c. 17 S. W. 759; *City of Savannah v. Hancock*, 91 Mo. 54; s. c. 3 S. W. 215; *City of Kansas City v. Baird*, 98 Mo. 215, 218; s. c. 11 S. W. 243, 562.

⁷⁰ *State v. Engelmann*, 106 Mo. 628; s. c. 17 S. W. 759; *City of Kansas City v. Baird*, 98 Mo. 218; s. c. 11 S. W. 243, 562.

⁷¹ *Lingo v. Burford*, 112 Mo. 149; s. c. 20 S. W. 459; *Daugherty v. Brown*, 91 Mo. 26; s. c. 3 S. W. 210; *Jackson Co. v. Waldo*, 85 Mo. 637, 640; *Ragan v. Kansas City & C. R. Co.*, 111 Mo. 456; s. c. 20 S. W. 234.

⁷² *People v. Board & C.*, 47 N. Y. St.

891; *Van Bergen v. Bradley*, 36 N. Y. 316; *Herrick v. Stover*, 5 Wend. (N. Y.) 581; *Tucker v. Rankin*, 15 Barb. (N. Y.) 471. An order laying out a highway through cultivated land, signed by two of the highway commissioners and not reciting that the third participated in the proceedings or was notified to do so, is void: *People v. Hynds*, 30 N. Y. 470; *Chapman v. Swan*, 65 Barb. (N. Y.) 210.

⁷³ *People v. Board & C.*, 47 N. Y. St. 891; *State v. Varnum*, 81 Wis. 593; s. c. 51 N. W. 958.

⁷⁴ *Sherman v. Peterson*, 91 Mich. 480; s. c. 51 N. W. 1122.

⁷⁵ *Witter v. Damitz*, 81 Wis. 385; s. c. 51 N. W. 575.

⁷⁶ *Gillett v. McGonigal*, 80 Wis. 158; s. c. 49 N. W. 814.

way within the corporate limits of a city, and the city council's ratification of such an opening does not affect the title of an owner of land which is appropriated for such highway.⁷⁷ The incorporated boroughs of New Jersey have exclusive power to lay out highways within their respective limits, and the general road law is not operative within them.⁷⁸ No appeal lies to the township board from a highway commissioner's refusal to lay out a highway.⁷⁹ A town sued by reason of a defective highway may deny its existence if not established in accordance with the statute.⁸⁰ But the fact that the selectmen did not conform to such merely directory requirements as filing and recording will not avail the town.⁸¹

§ 1507. Property exempt from.—In many states certain designated property is exempt by statute from appropriation for highways, as, for example, gardens and orchards and manufacturing establish-

⁷⁷ *Norwood v. Gonzales Co.*, 79 Tex. 218; s. c. 14 S. W. 1057; *State v. Jones*, 18 Tex. 874.

⁷⁸ *In re Piscataway Tp.* (N. J. L.), 24 Atl. 759.

⁷⁹ *Wilson v. Township Board &c.*, 87 Mich. 240; s. c. 49 N. W. 572.

⁸⁰ In an action against a town on the New Hampshire statute of highways, by a traveler injured, the town is not estopped to deny the existence of the way if it was not established in a statutory method: *Wentworth v. Rochester*, 63 N. H. 244. A dedication to the county by the landowners on each side of land sufficient for the purposes of a road, and an acceptance thereof by the board of county commissioners, accompanied by their declaration that the land dedicated shall constitute a county road, is in disregard of the proceedings prescribed by statute concerning roads and highways, and does not make the strip of land dedicated a county road, or a regularly laid out road: *Oliphant v. Commissioners*, 18 Kan. 386; cited and followed in *Barker v. Board &c.*, 45 Kan. 681; s. c. 26 Pac. 585.

⁸¹ In an action against a town for injuries on a highway, the fact that

the selectmen's certificate of the laying out was not recorded and returned within the thirty days required by statute, was held not to avail the town as showing that there was no legal highway: *Randall v. Conway*, 63 N. H. 513; s. c. 3 Atl. 635; *Hayes v. Hanson*, 12 N. H. 284, 290; *Smith v. Bradley*, 20 N. H. 117; *Converse v. Porter*, 45 N. H. 385; *Pond v. Negus*, 3 Mass. 230; *Williams v. Inhabitants &c.*, 21 Pick. (Mass.) 75; *Jackson v. Young*, 5 Cow. (N. Y.) 269. Although the revised statutes of Ind. 1881, § 5028 (*Burns R. S. Ind.* 1901, § 6755), provide that "no county road shall be less than thirty feet wide," the enforcement of an order establishing a road will not be enjoined because the proposed road is to be only twenty feet wide where it borders the boundary of a city, since the order can not be collaterally attacked; and it will be presumed, in the absence of allegations to the contrary, that it was intended to make a road of the proper width by co-operating with the city authorities: *Chicago &c. R. Co. v. Sutton*, 130 Ind. 405; s. c. 30 N. E. 291.

ments.⁸² Such statutes will be liberally construed in favor of the highway and highway officers,⁸³ and the burden is on him who objects to the appropriation of his property to show that it is exempt.⁸⁴ An order laying out a highway can not be attacked collaterally, though it depart from the line described in the petition.⁸⁵ An owner may waive his objections to the taking of his property by acquiescence and accepting damages therefor.⁸⁶

§ 1508. Private owners' rights.—In laying out a highway reasonable care should be exercised to avoid injury to private property, but the road officers are not trespassers if they give owners a sufficient opportunity to remove their property from the locus in quo.⁸⁷ An officer will be a trespasser if he removes private fences without the express authority of the statute.⁸⁸ Where the statute requires notice to be given to owners to remove their fences, the officer who proceeds to lay out the highway without giving such notice will be a trespasser, but the order establishing the road will not be invalidated.⁸⁹ The width of a highway acquired by adverse user for the statutory period is not necessarily confined to the track made by passing vehicles, but may include such adjacent land as may be needed for ordinary repairs and improvements.⁹⁰ A person may so purchase a lot in reference to a surveyor's plat of a street as to be estopped from denying the existence and width of the street.⁹¹ An individual will not be

⁸² *People v. Commissioners &c.*, 57 N. Y. 549; *Snyder v. Plass*, 28 N. Y. 465; *Snyder v. Trumpbour*, 38 N. Y. 355; *People v. Judges &c.*, 23 Wend. (N. Y.) 360; *Clark v. Phelps*, 4 Cow. (N. Y.) 190; *People v. Kingman*, 24 N. Y. 559. See *Bass v. City of Fort Wayne*, 121 Ind. 389; s. c. 23 N. E. 259.

⁸³ *Bass v. City of Fort Wayne*, 121 Ind. 389; s. c. 23 N. E. 259.

⁸⁴ *People v. Kingman*, 24 N. Y. 559; *Lansing v. Caswell*, 4 Paige (N. Y.) 519.

⁸⁵ *Davenport &c. Ass'n v. Schmidt*, 15 Iowa 213; *Humboldt Co. v. Dinsmore*, 75 Cal. 604; s. c. 17 Pac. 710.

⁸⁶ *Hitchcock v. Danbury &c. R. Co.*, 25 Conn. 516; *Chatterton v. Parrott*, 46 Mich. 432; s. c. 9 N. W. 482; *Felch v. Gilman*, 22 Vt. 38; *Hatch v. Hawkes*, 126 Mass. 177.

⁸⁷ *Wight v. Phillips*, 36 Maine 551.

⁸⁸ *Campbell v. Kennedy*, 34 Iowa 494. See also, *Cool v. Crommet*, 13 Maine 250; *Stackpole v. Healy*, 16 Mass. 33.

⁸⁹ *Rutherford v. Davis*, 95 Ind. 245; *Ruston v. Grimwood*, 30 Ind. 364.

⁹⁰ *Marchand v. Town of Maple Grove*, 48 Minn. 276; s. c. 51 N. W. 606.

⁹¹ Where a land company has its land surveyed and a plat thereof made, fully setting forth the width, location and course of the streets, avenues, alleys and lots into which the lands were divided, and then sells a part of such land, describing it as "beginning at the center of intersection of Twentieth street and Seventh avenue south; thence westward along said avenue . . . to the center of Eighteenth street; thence southward along said street;

allowed to interfere with the opening of a highway on the ground of some inconvenience to him.⁹²

§ 1509. Proceedings to establish highways—Parties—Notice.—

Interested landowners must be parties to proceedings to establish and open highways in order that they may have an opportunity to be heard.⁹³ The general rule is that only those who have title of record need be parties, but others having a proprietary claim or color of title should also be parties.⁹⁴ As between vendor and vendee, whichever holds the legal title should be made the party.⁹⁵ The owner of a vested estate, whether present, or in remainder or reversion, should be a party.⁹⁶ The trustee, and not the beneficiary, should be a party;⁹⁷ and the mortgagees of the owner,⁹⁸ and both lessor and lessee,⁹⁹ and heirs of a deceased owner rather than the administrator;¹⁰⁰ but not judgment creditors of the owner unless the statute so requires,¹⁰¹ nor a wife having a mere inchoate interest in her husband's land.¹⁰² All owners in interest should have notice,¹⁰³ but the

. . . thence eastward at right angles thereto; . . . thence northward along Twentieth street . . . to the beginning,"—the purchaser is estopped from disputing the existence and width of the streets as surveyed; and, though he is the first lot purchaser in that part of the survey, by entering into his purchase with reference to the surveyor's plat, he perfects the offered dedication and establishes the streets, at least those contiguous to his purchase, as public highways: *Reed v. Mayor &c.*, 92 Ala. 339; s. c. 9 So. 161.

⁹² *Randall v. Christiansen*, 76 Iowa 169; s. c. 40 N. W. 703.

⁹³ *East Kingston v. Towle*, 48 N. H. 57; *Duncan v. City of Terre Haute*, 85 Ind. 104.

⁹⁴ *Anderson v. Pemberton*, 89 Mo. 61; s. c. 1 S. W. 216; *Sherwood v. St. Paul &c. R. Co.*, 21 Minn. 127; *Stoneham v. London &c. R. Co.*, L. R. 7 Q. B. 1.

⁹⁵ *Smith v. Ferris*, 6 Hun (N. Y.) 553; *Curran v. Shattuck*, 24 Cal. 427.

⁹⁶ *Shelton v. Town of Derby*, 27

Conn. 414; *State v. Easton &c. R. Co.*, 36 N. J. L. 181.

⁹⁷ *State v. Mayor &c.*, 32 N. J. L. 49; *State v. Easton &c. R. Co.*, 36 N. J. L. 181; *Hawkins v. County Com'rs*, 2 Allen (Mass.) 254.

⁹⁸ *Hagar v. Brainerd*, 44 Vt. 294; *Sherwood v. City of Lafayette*, 109 Ind. 411; s. c. 10 N. E. 89; *Parks v. City of Boston*, 15 Pick. (Mass.) 198.

⁹⁹ *Parks v. City of Boston*, supra; *Brown v. Powell*, 25 Pa. St. 229; *Schaff v. Upper Connecticut &c. Co.*, 57 N. H. 110; *Astor v. Miller*, 2 Paige 68.

¹⁰⁰ *City of Booneville v. Ormrod*, 26 Mo. 193; *Todemier v. Aspinwall*, 43 Ill. 401.

¹⁰¹ *Gimbel v. Stolte*, 59 Ind. 446; *Houston v. Houston*, 67 Ind. 276; *Evansville &c. Co. v. State*, 73 Ind. 219; *Duke v. Beeson*, 79 Ind. 24; *Blair v. Hanna*, 87 Ind. 298.

¹⁰² *Duncan v. City of Terre Haute*, 85 Ind. 104.

¹⁰³ *Whitcher v. Town of Benton*, 48 N. H. 157; *Norton v. Walkill &c. R. Co.*, 63 Barb. (N. Y.) 77.

form of notice is not important unless the statute prescribes a particular form.¹⁰⁴

§ 1510. **Petition—Jurisdictional facts.**—A written petition is the proper mode of commencing proceedings for the establishment of a highway in the absence of some inconsistent statutory provision.¹⁰⁵ If the statute requires a petition and none is filed no jurisdiction is obtained to lay out a highway.¹⁰⁶ In order to give jurisdiction to establish a highway the statute must be carefully conformed to in drawing up the petition or it may be directly attacked.¹⁰⁷ Thus a petition that a highway be “opened for travel as provided by law” confers no jurisdiction to establish a highway, for that is not its language.¹⁰⁸ If the jurisdictional facts appear in the petition it will not be void by reason of mere irregularities.¹⁰⁹ If the petition is attacked collaterally no defect or irregularity will be fatal unless it affects the jurisdiction;¹¹⁰ thus a defective notice is not a fatal irregularity.¹¹¹ If the required number of qualified persons sign a petition the fact of an unqualified person’s signing will not vitiate it.¹¹² The material facts must be alleged directly and not by way of recital,¹¹³ and must inform the parties interested of the lands and rights affected.¹¹⁴ All non-jurisdictional objections to a petition will be deemed waived if not promptly made.¹¹⁵ Objections to the form of

¹⁰⁴ *Nichols v. City of Bridgeport*, 23 Conn. 189; *Mayor &c. v. Bouldin*, 23 Md. 328.

¹⁰⁵ *Vail v. Morris &c. R. Co.*, 21 N. J. L. 189; *Khroop v. Forman*, 31 Mich. 144; *Commonwealth v. Peters*, 3 Mass. 229.

¹⁰⁶ *State v. Morse*, 50 N. H. 9; *Clement v. Burns*, 43 N. H. 609, 613; *Haywood v. Charlestown*, 34 N. H. 23; *Pritchard v. Atkinson*, 3 N. H. 335; *People v. Judge &c.*, 40 Mich. 64.

¹⁰⁷ *Humboldt Co. v. Dinsmore*, 75 Cal. 604; s. c. 17 Pac. 710; *Cavanaugh v. Smith*, 84 Ind. 380; *Packard v. Mendenhall*, 42 Ind. 598; *Willman v. Willman*, 57 Ind. 500; *In re Board &c.*, 52 N. Y. 131.

¹⁰⁸ *Curtis v. Pocahontas Co.*, 72 Iowa 151; s. c. 33 N. W. 616.

¹⁰⁹ *Jackson v. Rankin*, 67 Wis. 285; s. c. 30 N. W. 301; *Winham v. Commissioners*, 26 Mo. 406; *Board &c. v. Hagan*, 39 Kan. 606; s. c. 18 Pac.

611; *Dorman v. City Council &c.*, 81 Maine 411; s. c. 17 Atl. 316.

¹¹⁰ *City of Terre Haute v. Beach*, 96 Ind. 143; *Town of Cicero v. Williamson*, 91 Ind. 541.

¹¹¹ *Town of Cicero v. Williamson*, supra; *Muncey v. Joest*, 74 Ind. 409; *Hume v. Conduitt*, 76 Ind. 598; *McAlpine v. Sweetser*, 76 Ind. 78; *Stout v. Woods*, 79 Ind. 108; *Kyle v. Kyle*, 55 Ind. 387.

¹¹² *Inhabitants &c. v. County Com’rs*, 117 Mass. 416.

¹¹³ *Lake Shore R. Co. v. Cincinnati R. Co.*, 116 Ind. 578; s. c. 19 N. E. 440.

¹¹⁴ *Heick v. Voight*, 110 Ind. 279; s. c. 11 N. E. 306; *Wolsey v. Board*, 32 Iowa 130; *State v. Lane*, 26 Iowa 223; *Inhabitants &c. v. County Com’rs*, 7 Cush. (Mass.) 394.

¹¹⁵ *Bachelor v. New Hampton*, 60 N. H. 207; *Wells v. Rhoades*, 114 Ind. 467; s. c. 16 N. E. 830; *Palmer v. Highway Com’rs*, 49 Mich. 45;

a petition should be specific.¹¹⁶ If the objection does not appear on the face of the petition or complaint the grounds should be set forth in an answer.¹¹⁷ If it does so appear the objection may be made by demurrer, or by exceptions, or a motion to dismiss.¹¹⁸

§ 1511. **Abandonment of highway by non-user.**—Under the New York statute the requirement that a highway which has been laid out shall be opened and worked within six years or cease to be a highway does not require it to be finished or to be a first-class road, but it must be sufficient to enable the public to pass over it.¹¹⁹ And so a part of a road which is not used or traveled for six years, and becomes impassable for vehicles, ceases as to such part to be a highway, and the village or city is not liable for injuries thereon received.¹²⁰ But this non-user by the public must be distinguished from such an occupation by a trespasser of a part of a highway as amounts to an obstruction or nuisance; and he can not acquire a prescriptive right to the highway by a continued occupation of twenty years.¹²¹ A highway can be lost in whole or in part by non-user, but the portion used will not be affected by the non-user of the remainder.¹²² In Ohio, in order that non-user may amount to abandonment, it must be shown to have continued for twenty-one years;¹²³ and in Kentucky must continue

s. c. 12 N. W. 903; *Hardy v. Keene*, 54 N. H. 449; *Steele's Petition*, 44 N. H. 220; *State v. Richmond*, 26 N. H. 232.

¹¹⁶ *Updegraff v. Palmer*, 107 Ind. 181; s. c. 6 N. E. 353; *Carr v. State*, 103 Ind. 548; s. c. 3 N. E. 375; *Me-*

¹¹⁷ *Terry v. Town of Waterbury*, 35 *randa v. Spurlin*, 100 Ind. 380; *Anderson v. Baker*, 98 Ind. 587; *Higbee v. Peed*, 98 Ind. 420.

Conn. 526; *Hadley v. Citizens' Sav. Inst.*, 123 *Mass.* 301; *Crawford v. Town of Rutland*, 52 *Vt.* 412. But see *Matter of New York Central R. Co.*, 66 N. Y. 407; *Corbin v. Wisconsin R. Co.*, 66 *Iowa* 269; s. c. 23 N. W. 662.

¹¹⁸ *Elliott Roads & Streets* (2d ed.), § 342.

¹¹⁹ *Beckwith v. Whalen*, 70 N. Y. 430; 1 R. S. 520, § 99, as amended by act of 1861, ch. 311.

¹²⁰ *Horey v. Village of Haverstraw*, 124 N. Y. 273; s. c. 26 N. E. 532;

Christy v. Newton, 60 *Barb.* (N. Y.) 332; *Lyon v. Munson*, 2 *Cow.* (N. Y.) 426.

¹²¹ *Driggs v. Phillips*, 103 N. Y. 77; s. c. 8 N. E. 514. See *Parker v. City of St. Paul*, 47 *Minn.* 317; s. c. 50 N. W. 247.

¹²² *Wayne Co. Savings Bank v. Stockwell*, 84 *Mich.* 587; s. c. 48 N. W. 174.

¹²³ *In Nail & Iron Co. v. Furnace Co.*, 46 *Ohio St.* 544; s. c. 22 N. E. 639, it was held that proof that no work had been done on a road for fifteen years, that it was at times impassable, that it passed over a steep hill, that a new road had been established to take its place, to which travel had been greatly diverted, and that portions of the old road had been fenced in by individuals, was not enough to establish an abandonment by the public. *Spears, J.*, said:—"It appears to be well settled by the authorities that in or-

for such period as would create a prescriptive right.¹²⁴ An abutting owner's private rights in a street may be lost where their existence is denied and they are exclusively possessed for twenty years by one who claims to own the fee of the street.¹²⁵ The Mississippi statute under which ten years' adverse possession of land confers title does not apply against the right of a municipality to its streets.¹²⁶ An abutting owner who is permitted to inclose and use a street can not acquire title thereto by prescription, as his possession is not adverse.¹²⁷

§ 1512. Discontinuing or vacating highways.—Discontinuance of a highway can be effected only by the proper municipal authorities and according to the statutory procedure.¹²⁸ A town in its corporate character can neither lay out nor discontinue a highway.¹²⁹ A highway once created continues to exist until vacated by the county supervisors or by operation of law or the judgment of a competent court.¹³⁰ The Missouri rule is that the vacating of a street under charter powers is wholly a question of expediency for the municipal council acting fairly and without fraud.¹³¹ Application for appeal to a justice from laying out or discontinuing a highway under the Minnesota statutes need not show a right to appeal.¹³² When a street

der to work abandonment by simple non-user of an easement, all acts of enjoyment must have totally ceased for the same length of time necessary to create the original prescription; and we hold that where non-user by the public of a street within a city is relied upon as proving an abandonment of it, such non-user must be shown to have continued for a period of twenty-one years." See also, *State v. Culver*, 65 Mo. 607; s. c. 27 Am. R. 295; *Ward v. Ward*, 7 Exch. 838; *Corning v. Gould*, 16 Wend. (N. Y.) 531.

¹²⁴ *Curran v. City of Louisville*, 83 Ky. 628.

¹²⁵ *Woodruff v. Paddock*, 130 N. Y. 618; s. c. 29 N. E. 1021.

¹²⁶ *Witherspoon v. City of Meridian*, 69 Miss. 288; s. c. 13 So. 843; *Vicksburg v. Marshall*, 59 Miss. 563.

¹²⁷ *Taylor v. Phillippi*, 35 W. Va. 554; s. c. 14 S. E. 130.

¹²⁸ *Hughes v. Bingham*, 135 N. Y. 347; s. c. 32 N. E. 78; 46 Alb. L. J. 517. In *Driggs v. Phillips*, 103 N.

Y. 77, 83; s. c. 8 N. E. 514, *Danforth, J.*, said:—"Once established a highway does not cease to be such until it has been discontinued by the proper authorities. . . . The jurisdiction of defendants in the performance of their duty extended over the whole width of the highway as established. The plaintiff takes his title subject to the easement, and no act of obstruction on his part could deprive them of their jurisdiction." See also, *Bridges v. Wyckoff*, 67 N. Y. 130.

¹²⁹ *Monk v. Town of New Utrecht*, 104 N. Y. 552, 557; s. c. 11 N. E. 268.

¹³⁰ *Plummer v. Sheldon*, 94 Cal. 533; s. c. 29 Pac. 947; *Babcock v. Welsh*, 71 Cal. 400; s. c. 12 Pac. 337; *Bolger v. Foss*, 65 Cal. 250; s. c. 3 Pac. 871.

¹³¹ *Glasgow v. St. Louis*, 107 Mo. 198; s. c. 17 S. W. 743; *State v. Clarke*, 54 Mo. 17; *Springfield R. Co. v. City of Springfield*, 85 Mo. 676; *Kittle v. Freemont*, 1 Neb. 328.

¹³² *State v. St. John*, 47 Minn. 315;

is lawfully vacated the abutting owner holds the fee presumably to the center of the street discharged from all easements of the public or of other abutting owners.¹³³ An abutting owner on a street is entitled to damages if the street is so closed as to deprive him of reasonable access to other streets theretofore accessible to him.¹³⁴

§ 1513. **Bridges—Part of highway, etc.**—At common law a bridge is a part of the highway which it serves to make more serviceable to the public,¹³⁵ and this is the general rule in this country.¹³⁶ The word “bridge” as used in the Indiana statute of 1881 does not apply to a culvert or structure over a ravine made simply to drain surface water off the highway, but is used in its common-law meaning, as a structure over water flowing in a channel between banks more or less defined, although such channel may be occasionally dry, in order to facilitate public passage over the same.¹³⁷ The Vermont highway laws provide that the word “highway” shall include bridges thereon, and a bridge may be declared on in pleadings as a highway.¹³⁸ In this country a “bridge” means any structure by which a highway is carried over a place, unless the term is limited by a statute¹³⁹ or by some local usage, or by agreement.¹⁴⁰ Whether an approach to a bridge, or a wing wall or other arrangement connecting it to the banks, is to be deemed a part of the bridge or of the highway, must be determined by the particular facts of each case.¹⁴¹

§ 1514. **Bridges over navigable rivers and waters.**—Until congress acts respecting the bridging of navigable streams within a state, the

s. c. 50 N. W. 200; *Anderson v. Meeker Co.*, 46 Minn. 237; s. c. 48 N. W. 1022.

¹³³ *Lamm v. Chicago &c. R. Co.*, 45 Minn. 71; s. c. 47 N. W. 455.

¹³⁴ *Gargan v. Louisville &c. R. Co.*, 89 Ky. 212; s. c. 12 S. W. 259; *Smith v. City of Boston*, 7 Cush. (Mass.) 254. See *Felton v. Short Route &c. Co.*, 85 Ky. 640; s. c. 4 S. W. 332.

¹³⁵ *Regina v. Sainthill*, 2 Ld. Raym. 1174.

¹³⁶ *Westfield Borough v. Tioga Co.*, 150 Pa. St. 152; s. c. 24 Atl. 700; *Rapho Tp. v. Moore*, 68 Pa. St. 404; *Pennsylvania Tp. v. Perry Co.*, 78 Pa. St. 457; *Commonwealth v. Central Bridge Corporation*, 12 Cush. (Mass.) 243.

¹³⁷ *Board v. Bailey*, 122 Ind. 46; s.

c. 23 N. E. 672; *Board v. Brown*, 89 Ind. 48; *Board v. Legg*, 110 Ind. 479; s. c. 11 N. E. 612.

¹³⁸ *Cook v. Town of Barton*, 63 Vt. 566; s. c. 22 Atl. 663.

¹³⁹ *State v. Board &c.*, 40 N. J. L. 302, 305, 306.

¹⁴⁰ In *Inhabitants &c. v. Inhabitants &c.*, 132 Mass. 312, the word “bridge,” as used in a statute, was held to apply only to the structure which crossed a river, and its approaches, in the absence of any usage or agreement between the two towns which fixed the construction; and not to include the cross-ways.

¹⁴¹ Compare *Tyler v. Williston*, 62 Vt. 269; s. c. 20 Atl. 304, with *Powers v. Town of Woodstock*, 38 Vt. 44.

state has full power to bridge such streams, subject, however, to the power of congress at any time to abate a bridge as a nuisance to navigation and to assume entire control.¹⁴² It seems that a state may bridge a river and in order to meet the expense impose a general toll or tax those who use it, provided free navigation is not thereby impaired.¹⁴³ Congress has power to authorize a bridge over a navigable river and thereby obstruct free navigation to some extent.¹⁴⁴ No compact that the states of Georgia and South Carolina may make concerning the free navigation of the Savannah river can affect the power of congress to close one of the channels of that river and to declare that an actual obstruction thereof is not legal.¹⁴⁵ Congress may withdraw its assent to a bridge, and such a withdrawal is equivalent to a positive enactment that, notwithstanding any state legislation, the first plan of the bridge was unlawful.¹⁴⁶

§ 1515. Bridges between states—Between counties.—A state may authorize the building of a bridge over a boundary river, though a part of it will be in another state;¹⁴⁷ and, in the absence of anything to the contrary, the required consent of the other state will be presumed under the rules of comity which prevail between states.¹⁴⁸ In the absence of statute one county can not compel another to join in building a bridge over a river between them.¹⁴⁹ In Nebraska the statute authorizes the county boards to enter into a joint contract to build such bridges, but in the absence of such a contract one county

¹⁴² *Hatch v. Willamette &c. Bridge Co.*, 7 Saw. 127; *Hamilton v. Vicksburg &c. R. Co.*, 119 U. S. 280; s. c. 7 S. Ct. 206; *Cardwell v. American Bridge Co.*, 113 U. S. 205; s. c. 5 S. Ct. 423; *Pound v. Turek*, 95 U. S. 459; *South Carolina v. Georgia*, 93 U. S. 4; *Transportation Co. v. Parkersburg*, 107 U. S. 691; s. c. 2 S. Ct. 732; *Welton v. State*, 91 U. S. 275; *Bridge Co. v. United States*, 105 U. S. 470; *Gilman v. Philadelphia*, 3 Wall. 713.

¹⁴³ *Sands v. Manistee &c. Co.*, 123 U. S. 288; s. c. 8 S. Ct. 113; *Huse v. Glover*, 119 U. S. 543; s. c. 7 S. Ct. 313; *Mobile Co. v. Kimball*, 102 U. S. 691.

¹⁴⁴ *People v. Kelly*, 76 N. Y. 475.

¹⁴⁵ *South Carolina v. Georgia*, 93 U. S. 4.

¹⁴⁶ *Bridge Company v. United States*, 105 U. S. 470.

¹⁴⁷ It was held in *Hunt v. Kansas & Missouri Bridge Co.*, 11 Kan. 412, that the Kansas legislature had power to authorize the forming of a company to build a bridge over the Missouri river at a place where the river formed the boundary between Kansas and Missouri.

¹⁴⁸ *Land Grant &c. Co. v. Board &c.*, 6 Kan. 245, 254; *Runyan v. Coster*, 14 Pet. 122; *Bard v. Poole*, 12 N. Y. 495.

¹⁴⁹ In Kentucky where two counties differ as to the expediency of such a bridge and one county court refuses to act, the statute makes the circuit court of the county the arbiter between them: *Garrard Co. Court v. Bayle Co. Court*, 10 Bush (Ky.) 208.

board can not compel the other to join in the erection or to contribute.¹⁵⁰ The legislature may authorize or require one county to build, at its sole expense, a bridge across the boundary line between it and another county.¹⁵¹ Under the Indiana statute of 1869 a bridge could be erected only by the mutual concurrence and agreement of the commissioners of the two counties interested and bounded by the stream to be bridged.¹⁵² In Indiana, under the amending statute of 1881,^{152a} providing that where one county refused to join the other might proceed to build the bridge as if it were wholly within its territory, no action could be maintained by the county so building to recover a proportionate share of the cost from the other.¹⁵³

§ 1516. **County bridges.**—The burden of building and repairing bridges on highways in a county rests upon the county.¹⁵⁴ Whether the highway is necessary or not, if the bridge is necessary to its use the board of freeholders will be indictable for neglecting to keep it in safe condition.¹⁵⁵ The New Jersey statute of 1860, giving a remedy where a county or township wrongfully neglects to erect, rebuild or repair a bridge, applies only in favor of those who of right depend upon the bridge for the full and safe performance of its appropriate functions,¹⁵⁶ and does not apply, for instance, in favor of a mill owner who has no right to depend on the bridge abutments to maintain his dam so that it will retain water.¹⁵⁷ In Georgia, if a county owns a bridge within a town, it alone is responsible for neglect to repair.¹⁵⁸ Where a bridge has been built by the county the expense of the approaches must also be borne by the county.¹⁵⁹ At common law a county was required to repair only such bridges as crossed a stream or watercourse.¹⁶⁰ Under the Indiana statute of

¹⁵⁰ *Brown v. County Com'rs*, 18 Neb. 355; s. c. 25 N. W. 356.

¹⁵¹ *Washer v. Bullitt Co.*, 110 U. S. 558, 565; s. c. 4 S. Ct. 249; *Inhabitants &c. v. Hampden*, 130 Mass. 528; *Inhabitants &c. v. Inhabitants &c.*, 108 Mass. 128. See also, *Mobile Co. v. Kimball*, 102 U. S. 691.

¹⁵² *Browning v. Board*, 44 Ind. 11.

^{152a} *Burns' R. S.* 1901, § 3251.

¹⁵³ *Board &c. v. Board &c.*, 128 Ind. 295; s. c. 27 N. E. 133.

¹⁵⁴ *State v. Titus*, 47 N. J. L. 89; *Ripley v. Board &c.*, 40 N. J. L. 45; *Board v. Legg*, 93 Ind. 523; *Board v. Brown*, 89 Ind. 48.

¹⁵⁵ *Board &c. v. State*, 42 N. J. L. 263.

¹⁵⁶ *Ripley v. Board &c.*, 40 N. J. L. 45.

¹⁵⁷ *Jernee v. Board &c.*, 52 N. J. L. 553; s. c. 21 Atl. 295. See also, *Livermore v. Board &c.*, 31 N. J. L. 507; s. c. 29 N. J. L. 245, where the owner of property on which the bridge fell had no remedy.

¹⁵⁸ *Daniels v. Intendant*, 55 Ga. 609.

¹⁵⁹ *Westfield Borough v. Tioga Co.*, 150 Pa. St. 152; s. c. 24 Atl. 700.

¹⁶⁰ *State v. Board &c.*, 40 N. J. L. 302, 305. See *Washer v. Bullitt Co.*, 110 U. S. 564; s. c. 4 S. Ct. 249; *Board v. Bailey*, 122 Ind. 46, 48; s. c. 23 N. E. 672; *State v. Inhabitants &c.*, 37 Maine 451; *State v. Inhabitants &c.*, 30 N. J. L. 137; *Rex v. Oxfordshire*, 20 Eng. C. L. 289.

1885^{160a} a county must build any bridge within the cities of the county the estimated cost of which exceeds \$500,¹⁶¹ but is not liable for the repairs of a bridge constructed by it if the bridge has passed under the exclusive control of a city within the county.¹⁶² Contrary to the policy which prevails in some other states, bridges and highways in Indiana are treated as distinct subjects of legislation. The duty of erecting and repairing bridges over watercourses is imposed on the county commissioners, while the general duty of keeping highways and bridges in repair is imposed upon township trustees and road supervisors.¹⁶³

§ 1517. **City bridges.**—The cities of New York and Brooklyn jointly own and manage the bridge which connects them and which they have made, and are liable for the negligent acts of the bridge trustees and of their employes;¹⁶⁴ but the trustees as public agents are not liable for the negligence of their employes while employed on the bridge.¹⁶⁵ Under the Massachusetts statutes of 1882 and 1887 providing for the construction of a bridge across Charles river between Boston and Cambridge, by the joint action and at the joint expense of those cities, the city of Boston has no voice or control as to the bridge avenue on the Cambridge side.¹⁶⁶ A bridge located on a highway within the limits of a city is a part thereof, and if the city has taken charge of the highway it is liable for the bridge defects.¹⁶⁷ It is held in a recent case in Indiana, overruling a long line of prior decisions, that a county is not liable by implication for damages

^{160a} Burns' R. S. 1901, § 3283.

¹⁶¹ City of Wabash v. Carver, 129 Ind. 552; s. c. 29 N. E. 25.

¹⁶² Spicer v. Board &c., 126 Ind. 369; s. c. 26 N. E. 58.

¹⁶³ Board v. Bailey, 122 Ind. 46; s. c. 23 N. E. 672.

¹⁶⁴ Walsh v. Mayor &c., 107 N. Y. 220; s. c. 13 N. E. 911; People v. Kelly, 76 N. Y. 475.

¹⁶⁵ Walsh v. Trustees &c., 96 N. Y. 427.

¹⁶⁶ Cambridge v. Railroad Com'rs, 153 Mass. 161; s. c. 26 N. E. 241.

¹⁶⁷ Under Revised Statutes of Indiana of 1881, § 3161 (Burns' R. S. 1901, § 3623), giving common councils of cities exclusive control and power over streets, alleys, highways and bridges within the limits of the cities, a public bridge within the limits of and located upon

a public highway of a city constitutes a part of such highway; and where the city has taken charge of the same it is liable to a person suffering injury or loss without fault or negligence, through the neglect to keep such bridge in repair; and a finding that the city had taken charge of and graded the highway upon which the bridge was built is sufficient to sustain the conclusion that the city was liable for defects in the bridge: City of Goshen v. Myers, 119 Ind. 196; s. c. 21 N. E. 657; Lowrey v. City of Delphi, 55 Ind. 250; s. c. sub nom. City of Delphi v. Lowery, 74 Ind. 520. See also, People v. President &c., 23 Wend. (N. Y.) 254; People v. Commissioners, 4 Neb. 150; City of Chicago v. Powers, 42 Ill. 169; State v. Board &c., 40 N. J. L. 302, 305.

caused by negligence of its officers in respect to keeping bridges in repair, such right of action not being given by statute.¹⁶⁸ But this decision is held not to affect the rule of liability of cities and towns.¹⁶⁹ Where a city has adopted a private bridge and by resolution of its common council declared it open for public travel, it can not claim that it has no right to maintain the bridge and would be a trespasser in going upon it to make repairs.¹⁷¹ The fact that a city is permitted to use a state bridge and its approaches does not render it liable for defects therein.¹⁷² The city council of Augusta being a corporation chartered by the state of Georgia and owning a toll-bridge over the Savannah river between that state and South Carolina is liable for neglecting to keep the abutment on the South Carolina shore safe for customers, though by the law of South Carolina it would not be liable for such negligence.¹⁷³

§ 1518. Bridges in towns, townships and boroughs.—Under the New York statute a town is primarily bound for the maintenance and repair of the bridges within it, but may recover the expense thereof from any person, or the state even, who has injured a bridge and made repairs necessary.¹⁷⁴ Where a bridge as built is longitudinally divided by the town line the expense of rebuilding is to be borne equally by both towns;¹⁷⁵ in so rebuilding a town must proceed strictly according to the statute or it may not be able to compel the other town to contribute.¹⁷⁶ Though the New York legislature can not under the state constitution pass any private or local bridge law it may confer the power of such local legislation upon boards of county supervisors, and such a board of a county having within it two towns separated by a stream, may, on proper application by one of them, enact a law compelling the erection of a bridge over such stream to connect highways in said towns, though the officers of the other town and a majority of its taxpayers have voted against the bridge at a regular

¹⁶⁸ *Board &c. v. Allman*, 142 Ind. 573; s. c. 42 N. E. 206; 39 L. R. A. 58; followed in *Board &c. v. Hemphill*, 14 Ind. App. 219; s. c. 41 N. E. 965; 42 N. E. 760.

¹⁶⁹ *Town of Boswell v. Wakley*, 149 Ind. 64; s. c. 48 N. E. 637; *Town of Worthington v. Morgan*, 17 Ind. App. 603; s. c. 47 N. E. 235.

¹⁷¹ *Langlois v. City of Cohoes*, 58 Hun (N. Y.) 226; s. c. 11 N. Y. S. 908.

¹⁷² *Carpenter v. City of Cohoes*, 81

N. Y. 21; *Verder v. Village of Little Falls*, 100 N. Y. 343.

¹⁷³ *Augusta City Council v. Hudson*, 88 Ga. 599; s. c. 15 S. E. 678.

¹⁷⁴ *Bidelman v. State*, 110 N. Y. 232; s. c. 18 N. E. 115.

¹⁷⁵ *Day v. Day*, 94 N. Y. 153; *Lapham v. Rice*, 55 N. Y. 472, 479.

¹⁷⁶ *Flynn v. Hurd*, 118 N. Y. 19; s. c. 22 N. E. 1109; *People v. Board &c.*, 93 N. Y. 397; *Board &c. v. Thompson*, 106 Ind. 534; s. c. 7 N. E. 248.

town meeting.¹⁷⁷ But when a town has voted money for a bridge its highway commissioner may proceed to erect it, though the county supervisors have not located it and refuse to do so,¹⁷⁸ for his power to repair a highway may include the power to build a new bridge.¹⁷⁹ At first in Pennsylvania the building of bridges was cast on the townships and boroughs, but as the expense was often too burdensome it was sometimes shifted by statute on the counties; but unless lawful proceedings be taken thus to charge the county this duty still rests upon the local municipality.¹⁸⁰ The Michigan statute authorizing county supervisors to order the construction of a bridge by differing townships, etc., and to fix the respective portions of the cost which each township shall contribute, applies only to townships in which a portion of the bridge is located.¹⁸¹ In New Hampshire to entitle a town which has rebuilt a bridge to contribution from another town it is not necessary that the latter should have been made a party to any legal proceeding before the bridge was rebuilt.¹⁸²

§ 1519. General duty to repair bridges.—If a bridge is opened for public travel the whole of it must be kept in a reasonably safe condition for such use,¹⁸³ and travelers have the right to assume that it is safe for use in the ordinary way and with ordinary vehicles and loads.¹⁸⁴ The Illinois rule is that a municipality ought to close an unsafe bridge if unable to repair it by reason of want of funds.¹⁸⁵ A

¹⁷⁷ *Town of Kirkwood v. Newbury*, 122 N. Y. 571; s. c. 26 N. E. 10; *People v. Board &c.*, 51 N. Y. 401; *People &c. v. Flagg*, 46 N. Y. 401; *People &c. v. Kilman*, 69 N. Y. 32.

¹⁷⁸ *Huggans v. Riley*, 125 N. Y. 88; s. c. 25 N. E. 993. See *Berlin Iron Bridge Co. v. Wagner*, 57 Hun (N. Y.) 346; s. c. 10 N. Y. S. 840.

¹⁷⁹ *Mather v. Crawford*, 36 Barb. (N. Y.) 564.

¹⁸⁰ *Westfield Borough v. Tioga Co.*, 150 Pa. St. 152; s. c. 24 Atl. 700; *Road in Milton*, 40 Pa. St. 300.

¹⁸¹ *Frenchtown Tp. v. Board &c.*, 89 Mich. 204; s. c. 50 N. W. 757; *Ecorse Tp. Board &c. v. Board &c.*, 75 Mich. 264, 270; s. c. 42 N. W. 831.

¹⁸² *Pittsberg v. Clarksville*, 58 N. H. 291.

¹⁸³ A city which opens a bridge for public travel is liable for injuries caused by the defective condition of

one side of the bridge, though the other side is perfectly safe for travel: *Walker v. City of Kansas City*, 99 Mo. 647; s. c. 12 S. W. 894; overruling *Tritz v. City of Kansas*, 84 Mo. 632. See also, *Bassett v. City of St. Joseph*, 53 Mo. 290; *Brown v. Mayor &c.*, 57 Mo. 156; *Craig v. City of Sedalia*, 63 Mo. 417; *Staples v. Town of Canton*, 69 Mo. 592; *Brennan v. City of St. Louis*, 92 Mo. 482; s. c. 2 S. W. 481.

¹⁸⁴ *Apple v. Board &c.*, 127 Ind. 553; s. c. 27 N. E. 166. See also, *House v. Board &c.*, 60 Ind. 580; *City of Indianapolis v. Gaston*, 58 Ind. 224; *Town of Elkhart v. Ritter*, 66 Ind. 136; *Patton v. Board &c.*, 96 Ind. 131; *Vaught v. Board &c.*, 101 Ind. 123; *Board &c. v. Dombke*, 94 Ind. 72.

¹⁸⁵ *Carney v. Village of Marseilles*, 136 Ill. 401; s. c. 26 N. E. 491.

municipality may be liable to an individual for so negligently constructing a foot-bridge as to make it appear to form a part of a highway bridge and so lead him to drive a loaded team thereon.¹⁸⁶ And the rule requires the bridge approaches to be kept equally safe.¹⁸⁷ The same rule applies to bridges as to other highways in general in respect to notice of their defects to be imputed to the authorities.¹⁸⁸ A town is not liable where the defect in the bridge was not the proximate cause of the injury.¹⁸⁹ Want of funds does not excuse the neglect to repair a bridge where it appears that the commissioner made no effort to obtain more after he had expended his bridge funds.¹⁹⁰

§ 1520. Abutting owners' rights and easements.—The state does not own the streets, and its sole power over them is to regulate their use for public purposes.¹⁹² The consent of the state to erect telegraph poles in highways may protect the telegraph company from indictment for creating a nuisance, but gives it no right to erect such poles against the owners of the fee in the highways, and such owners may be entitled both to damages and removal of the poles where they have not consented to and been compensated for the occupation of the highway by such poles.¹⁹³ And a telegraph company can not invoke the equity power of courts to prevent the abutting owners from interfering with such poles, though its lines have been erected under legislative sanction.¹⁹⁴ The interference with the easements of an abutting owner in a city street is pro tanto a taking of them as property for which he is entitled to be paid.¹⁹⁵ The right of an abutting owner is not, however, so absolute that he can prevent all interference to his detriment with the street on his front;¹⁹⁶ for example, where the fee

¹⁸⁶ *Fisher v. Village of Cambridge*, 133 N. Y. 527; s. c. 30 N. E. 663.

¹⁸⁷ *Bradford v. Mayor &c.*, 92 Ala. 349; s. c. 8 So. 683.

¹⁸⁸ *City of Sherman v. Nairey*, 77 Tex. 291; s. c. 13 S. W. 1028.

¹⁸⁹ *McClain v. Incorporated Town of Garden Grove*, 83 Iowa 235; s. c. 48 N. W. 1031.

¹⁹⁰ *Bullock v. Town of Durham*, 19 N. Y. S. 635.

¹⁹² *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641; s. c. 26 N. E. 919.

¹⁹³ *Eels v. American &c. Tel. Co.*, 20 N. Y. S. 600; *Blashfield v. Empire*

State &c. Co., 18 N. Y. S. 250; *Dunsbury v. Telegraph Co.*, 11 Abb. N. C. (N. Y.) 440.

¹⁹⁴ *Metropolitan Tel. Co. v. Colwell Lead Co.*, 67 How. Pr. (N. Y.) 365.

¹⁹⁵ *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576; s. c. 29 N. E. 802; *Kane v. New York El. R. Co.*, 125 N. Y. 164; s. c. 26 N. E. 278; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1; s. c. 25 N. E. 496.

¹⁹⁶ *Reinings v. New York &c. R. Co.*, 128 N. Y. 157, 164; s. c. 28 N. E. 640.

is in the city he can not prevent, and is not entitled to damages for, the laying of horse railroad tracks on the street in front of him, if there is not thereby an exclusive appropriation of the street;¹⁹⁷ and the same rule applies to steam railroad tracks.¹⁹⁸ But the abutting owner is entitled to damages where the railroad tracks and structures amount substantially to an exclusive appropriation of the street;¹⁹⁹ or where he has a fee in the street;²⁰⁰ or where the railroad and its structures are unauthorized and illegal.²⁰¹ A city having power to regulate the use of its streets may provide reasonable regulations for the exercise of a legislative franchise in them, but may not pass an ordinance declaring that such franchise or right shall not be exercised without the consent of the city.²⁰² Abutting owners on a city street, the fee of which is in the city, have a right of access thereto and other special easements therein, of which they can not be deprived without compensation by both the state and city combined.²⁰³ An abutting owner's easement in the street in front to its full width for purposes of access, light and air is property which can not be taken from him for public use without compensation.²⁰⁴ An elevated railroad structure in a city street is inconsistent with its character as an open public street, and therefore violates the rights of abutting owners though the title to the soil of the street be in the city, and though the structure be erected under the combined authority of state and city.²⁰⁵ An abutting owner in a populous city who keeps a retail store may have an action to restrain any obstruction which turns the tide of travel from his sidewalk to the opposite sidewalk.²⁰⁶ As the sidewalk

¹⁹⁷ *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Forty-second Street & C. R. Co.*, 50 N. Y. 206.

¹⁹⁸ *Fobes v. Rome & C. R. Co.*, 121 N. Y. 505; s. c. 24 N. E. 919.

¹⁹⁹ *Story v. New York El. R. Co.*, 90 N. Y. 122; *Mahady v. Bushwick R. Co.*, 91 N. Y. 148; *Washington Cemetery v. Prospect Park R. Co.*, 68 N. Y. 591.

²⁰⁰ *Williams v. New York & C. R. Co.*, 16 N. Y. 97; *Craig v. Rochester & C. R. Co.*, 39 N. Y. 404.

²⁰¹ *Hussner v. Brooklyn R. Co.*, 114 N. Y. 433; s. c. 21 N. E. 1002; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; s. c. 12 N. E. 568; s. c. sub nom. *Lahr v. Metropolitan R. Co.*, 104 N. Y. 268; s. c. 12 N. E. 528.

²⁰² *Allen v. Mayor & C.*, 53 N. J. L. 522; s. c. 22 Atl. 257.

²⁰³ *Reining v. New York & C. R. Co.*, 128 N. Y. 157; s. c. 28 N. E. 640; *Kane v. New York El. R. Co.*, 125 N. Y. 164; s. c. 26 N. E. 278; *Kernochan v. New York El. R. Co.*, 128 N. Y. 559; s. c. 29 N. E. 65; *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132; s. c. 28 N. E. 479.

²⁰⁴ *Lamm v. Chicago R. Co.*, 45 Minn. 71; s. c. 47 N. W. 455; *Adams v. Chicago R. Co.*, 39 Minn. 286; s. c. 39 N. W. 629; *Kaiser v. St. Paul R. Co.*, 22 Minn. 149; *Rosenthal v. Taylor R. Co.*, 79 Tex. 325; s. c. 15 S. W. 268.

²⁰⁵ *Williams v. Brooklyn El. R. Co.*, 126 N. Y. 96; s. c. 26 N. E. 1048.

²⁰⁶ *Flynn v. Taylor*, 127 N. Y. 596; s. c. 28 N. E. 418; *Callanan v. Gilman*, 107 N. Y. 360; s. c. 14 N. E. 264; *Welsh v. Wilson*, 101 N. Y. 254;

is constructed for and allotted to the use of pedestrians, its obstruction by trucks can not be justified on the ground of business necessity, even though the street be so crowded as not to allow the trucks to be backed up to the sidewalk; and the New York common council has power to permit such obstruction only in connection with the erection or repair of buildings.²⁰⁷ The owner of land over which a public way passes has the right to occupy the land above and below its surface to any extent that will not impair its usefulness as a way; for instance, the cornice of his house may extend over the street.²⁰⁸

§ 1521. Liability for defective construction.—Cities and towns are not bound to construct highways according to the highest standards of engineering; to do so would often be impracticable for want of funds.²⁰⁹ The length of the roads which a town is obliged to main-

s. c. 4 N. E. 633; *People v. Loehfelm*, 102 N. Y. 1; s. c. 5 N. E. 783; *People v. Horton*, 64 N. Y. 610.

²⁰⁷ *Richardson &c. Co. v. Barstow*, 26 Alb. N. C. (N. Y.) 150.

²⁰⁸ *Farnsworth v. City of Rockland*, 83 Maine 508; s. c. 22 Atl. 394.

²⁰⁹ In an article on "The Betterment of our Highways," in the September number of *The Atlantic Monthly* for 1892, p. 505, Mr. N. S. Shaler thus speaks of some of the difficulties of highway reform:—"Above all it will be difficult to persuade our rural people to provide themselves with systems of highways, the cost of which at the outset will be far greater than that of all the existing public improvements in their respective communities. . . . In the rough reckoning of the country engineer, it always seems to be advantageous to construct a road on the most direct alignment which will be passable to loaded vehicles, with all the power which can conveniently be put upon them. It is easy, however, to show that usually the only economy which is thus effected is in the cost of first construction. . . . Moreover, the expense of maintaining hilly roads, under

the wearing action of rain, frost and locked wheels, will more than counterbalance the cost of a longer but less inclined route. . . . Difficult as is the task which the surveyor has to meet in planning a highway, the work is relatively simple as compared with the more detailed part of his duties when he comes to determine the exact form and structure of the road-bed. He must take into account the general nature of the traffic for which the way is to be used, the quality of the underlying earth and the effect of the water upon it, the penetration of frost and its effects, the dangers from the scouring action of rain, and the character of the material to be used in building the traveled way. Simple as the task of road-building may seem to be, it is, in fact, more complicated than that which is encountered by the railway engineer. . . . A part of the badness of our American roads is due to the fact that the trackway is far too wide to be effectively maintained. In this art we may well take a lesson from the ancient Romans, perhaps the earliest skilful road-makers in the world. They in-

tain, the ease or difficulty of such maintenance, the amount of travel, and the amount of assessable property, are all elements to be considered in determining how high a degree of excellence can reasonably be required of a town in the construction or repair of any particular road or piece thereof.²¹⁰ Many of the streets of Brooklyn are paved with cobble-stones and are so rough as to pound and shake vehicles into pieces in a short time, the consequence being that the owners of vehicles have alone to pay the tax which ought to be generally distributed among the taxpayers. The duty of paving, however, is quasi-judicial, and the city is not liable to individuals for the manner in which it exercises its discretion as to paving.²¹¹

§ 1522. Defective highway plan—Liability for.—In some states a city is not liable, in cases in which a street is defective and unsafe by reason of the defective plan of its construction, even where the plan was not expressly adopted before the construction,²¹² but is liable for a defect caused by an unauthorized alteration of the original plan.²¹³ In Illinois and Wisconsin a city is held to the same liability where an injury results from a defective plan as where it results from negligence in the execution of the plan or in the control and maintenance of the streets after completion;²¹⁴ and this rule of liability has been adopted in Kansas, where it is held that a city has no more right to plan an unsafe condition of its streets than to plan or create a public nuisance.²¹⁵ In Iowa it is held to be no defense for a city that the de-

variably built their road-beds with no more width than was sufficient to permit two wagons conveniently to pass each other."

²¹⁰ *Sanders v. Inhabitants &c.*, 154 Mass. 475; s. c. 23 N. E. 778; *Hayes v. City of Cambridge*, 136 Mass. 402; *Rooney v. Inhabitants &c.*, 128 Mass. 580.

²¹¹ *Mills v. City of Brooklyn*, 32 N. Y. 489.

²¹² *Urquhart v. City of Ogdensburg*, 91 N. Y. 67. Where a sidewalk, roadway and gutter are constructed according to grades adopted by the board of trustees, and a crosswalk is laid by the street commissioner to match the rest of the work, without instructions as to its grade, except as implied by the grades of the

other portions of the work, negligence is not imputable to the village because of failure more definitely to establish the grade of the crosswalk, or by reason of any error in judgment in establishing the grade: *Betts v. Village of Gloversville*, 8 N. Y. S. 795; s. c. 56 Hun (N. Y.) 639.

²¹³ *Clemence v. City of Auburn*, 66 N. Y. 334.

²¹⁴ *City of Chicago v. Langlass*, 66 Ill. 361; *City of Chicago v. Gallagher*, 44 Ill. 295; *Prideaux v. City of Mineral Point*, 43 Wis. 513.

²¹⁵ *Gould v. City of Topeka*, 32 Kan. 485; s. c. 4 Pac. 822; *Topeka v. Sherwood*, 39 Kan. 690; s. c. 18 Pac. 933. In the Gould case just cited the court reviewed the authorities where it had been held that a city

fective sidewalk in question was made in the manner customarily adopted by the city.²¹⁶ But whether a sidewalk is properly constructed or not depends upon the necessities of the situation with a presumption in favor of a proper construction.²¹⁷

§ 1523. **The same subject continued.**—The fact that a road is so constructed that it is not likely to keep in good condition for a great length of time does not render the town liable unless the danger is so imminent that it can fairly be said to show a want of reasonable care and diligence not to repair it at once.²¹⁸ A municipality may be liable for a visibly defective construction of a street or sidewalk causing formations of ice, though but for such defective construction it would

was not liable for any mistakes in the exercise of its quasi-judicial powers. "In our opinion a city has no more right to plan or create an unsafe and dangerous condition of one of its public streets than it has to plan and create a public or common nuisance; and it is admitted that it has no right to do this: 2 Dillon Munic. Corp. (3d ed.), § 660. The rule contended for by counsel for the defendant has been applied to various cases, as follows: It has been applied to city improvements and the cities held not liable in cases where the property of individuals outside of the streets has been flooded and injured on account of the insufficiency of sewers or drains: *City of Atchison v. Challiss*, 9 Kan. 603; *Steinmeyer v. City of St. Louis*, 3 Mo. App. 256; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Darling v. City of Bangor*, 68 Maine 108; *Child v. City of Boston*, 86 Mass. 41; *Van Pelt v. City of Davenport*, 42 Iowa 308. The rule has also been applied and a city held not liable in a case where water on adjoining property was polluted by means of a sewer or drain: *Merrifield v. City of Worcester*, 110 Mass. 216. The rule has also been applied and a city held not liable in a case where, by the digging of a ditch, the rent of a person's house was dimin-

ished: *Lambar v. City of St. Louis*, 15 Mo. 610. And also to the same effect where, by the digging of a ditch and the construction of a culvert on the sidewalk, the plaintiff's abutting property was damaged: *White v. Corporation of Yazoo City*, 27 Miss. 357. The rule has also been applied and a city held not liable in a case where a school child was injured by an unsafe staircase: *Hill v. City of Boston*, 122 Mass. 344."

²¹⁶ *Weber v. City of Creston*, 75 Iowa 16; s. c. 39 N. W. 126.

²¹⁷ *Miller v. City of St. Paul*, 38 Minn. 134; s. c. 36 N. W. 271.

²¹⁸ *Stoddard v. Inhabitants &c.*, 154 Mass. 149; s. c. 27 N. E. 1014. In *Rocheffort v. Inhabitants &c.*, 154 Mass. 140; s. c. 27 N. E. 1013, the court said:—"Although the culvert was not so well built as to be likely to stand many years without repairs, it could not properly be held that the danger of a subsidence of the road was so imminent as to warrant holding the town chargeable with actionable neglect. It would throw too heavy a burden upon towns for the court, without more explicit legislation looking to that end, to hold them responsible merely because a road is so constructed that a defect therein of this character is likely to occur in the remote future."

not be liable for such formations.²¹⁹ In Michigan the rule is that a municipal corporation is not liable for constructing its streets upon a defective plan, and that in carrying them forward to completion it may determine for itself to what extent it will guard the public against possible accidents.²²⁰ A municipal corporation is not liable to individuals for constructing an insufficient sewer,²²¹ or for so grading streets as to cause an overflow of water on adjoining lands.²²²

§ 1524. Duty to keep streets reasonably safe.—As municipal corporations are not insurers of those who use the streets, their duty is discharged by making the streets reasonably safe;²²³ or, as the rule is expressed in New York, the duty of a city to keep its streets in a safe condition for travel is absolute, but it is only bound to exercise reasonable diligence and care in the performance of that duty.²²⁴ Whether this duty is performed or not in a particular case is a ques-

²¹⁹ *Adams v. Inhabitants &c.*, 147 Mass. 440; s. c. 18 N. E. 231, where the court said:—"The question of law involved in the exception was decided in the case of *Pinkham v. Inhabitants &c.*, 104 Mass. 78. In that case the jury were instructed that, 'if there were some special cause for the formation of ice in that particular locality, owing to the construction or condition of the road, it would be a defect, if it rendered the way unsafe and dangerous, though it was only smooth and slippery;' and the ruling was unanimously sustained by the court. The doctrine is stated in *Fitzgerald v. Inhabitants &c.*, 109 Mass. 204, in similar terms; and in the leading case of *Stanton v. City of Springfield*, 12 Allen (Mass.) 566, it is said that 'a way may be defective by being so improperly constructed as to induce a special or constant deposit of ice in a particular locality.' In the decision in *Billings v. City of Worcester*, 102 Mass. 329, there is nothing in conflict with this doctrine, although some of the reasoning in the opinion seems to lead away from it; but through the change in the law by the enactment

of the statute of 1877, ch. 234, that reasoning has become inapplicable to present cases: *Pub. Sts.*, ch. 52, § 18; *Post v. City of Boston*, 141 Mass. 189; s. c. 4 N. E. 815; *Blake v. City of Lowell*, 143 Mass. 296; s. c. 9 N. E. 627."

²²⁰ *Alexander v. City of Big Rapids*, 76 Mich. 282, 292; s. c. 42 N. W. 1071; *Davis v. Mayor &c.*, 61 Mich. 530, 535, 539; s. c. 28 N. W. 526; *City of Detroit v. Beckman*, 34 Mich. 125; *City of Lansing v. Toolan*, 37 Mich. 152; s. c. 38 Mich. 315; *McCutcheon v. Common Council &c.*, 43 Mich. 483; s. c. 5 N. W. 668; *McKellar v. City of Detroit*, 57 Mich. 158; s. c. 23 N. W. 621; *Shippy v. Village of Au Sable*, 65 Mich. 494; s. c. 32 N. W. 741.

²²¹ *Mills v. City of Brooklyn*, 32 N. Y. 489.

²²² *Wilson v. Mayor &c.*, 1 Denio (N. Y.) 595. See also, *Cole v. Trustees &c.*, 27 Barb. (N. Y.) 218; *Kavanagh v. City of Brooklyn*, 38 Barb. (N. Y.) 232.

²²³ *City of Vicksburg v. Hennessy*, 54 Miss. 391; *Jackson Tp. v. Wagner*, 127 Pa. St. 184; s. c. 17 Atl. 903.

²²⁴ *Turner v. Newburgh*, 109 N. Y. 301; s. c. 16 N. E. 344.

tion of fact for the jury.²²⁵ The care required is to be measured by the circumstances, and must naturally be greater in a populous city than in a sparsely settled town.²²⁶ In determining what is reasonable care the jury will consider the manifest danger and probability of an accident.²²⁷ The degree of care devoted to a highway should correspond to the degree of danger which may reasonably be anticipated from the knowledge of known defects, and when the danger is great the authorities must either warn the public of it or close the highway.²²⁸

§ 1525. **Primary municipal duty to repair—Abutting owners' liability.**—The general rule is that the primary duty to keep highways and streets in repair rests upon the municipal corporations within whose limits they are, this duty being implied in the acceptance of a charter from the state.²²⁹ Such duty is not discharged by the fact that a duty is also imposed upon abutting owners to keep the highway in repair in front of their land.²³⁰ A lot-owner's obligation to repair

²²⁵ *Bullock v. Mayor &c.*, 99 N. Y. 654; s. c. 16 N. E. 683; *Saulsbury v. Village of Ithaca*, 94 N. Y. 27; *Weed v. Ballston Spa*, 76 N. Y. 329; *Niven v. City of Rochester*, 76 N. Y. 619; *Evans v. City of Utica*, 69 N. Y. 166; *Clemence v. City of Auburn*, 66 N. Y. 334; *Todd v. City of Troy*, 61 N. Y. 506; *Diveny v. City of Elmira*, 51 N. Y. 506, 512; *Dewire v. Bailey*, 131 Mass. 169.

²²⁶ *Glasier v. Town of Hebron*, 131 N. Y. 447; s. c. 30 N. E. 239. In *Monongahela City v. Fischer*, 111 Pa. St. 9; s. c. 2 Atl. 87, *Paxson, J.*, said:—"In the closely built-up portions of a town or city the duty of the authorities to keep the entire street and sidewalks in a safe condition may be conceded. All portions of it are being constantly used by day and by night. But this has never been held to be the rule as regards country roads. They are seldom, if ever, kept in repair from side to side. A sufficient portion of the middle only is kept in smooth condition, and safe and convenient for travel." See also, *Perkins v. Inhabitants &c.*, 68 Maine 152; *Blake v. Inhabitants &c.*, 68 Maine 365;

Commonwealth v. King, 13 Met. (Mass.) 115; *Keyes v. Village of Marcellus*, 50 Mich. 439; s. c. 15 N. W. 542.

²²⁷ *Hubbell v. City of Yonkers*, 104 N. Y. 434; s. c. 10 N. E. 858.

²²⁸ *Wiltse v. Town of Tilden*, 77 Wis. 152; s. c. 46 N. W. 234.

²²⁹ *City of Rochester v. Campbell*, 123 N. Y. 405; s. c. 25 N. E. 937; *Saulsbury v. Village of Ithaca*, 94 N. Y. 27; *Conrad v. Trustees &c.*, 16 N. Y. 158.

²³⁰ *City of Rochester v. Campbell*, 123 N. Y. 405; s. c. 25 N. E. 937; *Russell v. Village of Canastota*, 98 N. Y. 496; *Saulsbury v. Village of Ithaca*, 94 N. Y. 27; *Robbins v. Chicago*, 4 Wall. 657; *Gridley v. City of Bloomington*, 88 Ill. 554; *State v. Inhabitants &c.*, 37 Maine 451. In *Smalley v. City of Appleton*, 75 Wis. 18; s. c. 43 N. W. 826, it was held that, though the street commissioner had ordered the abutting owner to repair the defect, the city was not thereby exempted unless the defect was actually repaired. A city is liable for injuries resulting from a depression in a sidewalk caused by operations of the abutting owner, if

streets or sidewalks does not exist at common law, but is statutory or arises from contract.²³¹ It seems well settled that the neglect of an abutting owner to keep the sidewalk in repair and to keep it free from snow and ice, as required by a city ordinance, does not render him liable to a party injured or to the city itself, unless such owner himself caused the defect.²³² If a city lot-owner neglects to repair his sidewalk as required by the city charter, the city may have such repair done and recover the expense from him, but that is the extent of his liability.²³³

§ 1526. **Municipal and abutting owners—Statutory liability.**—In some jurisdictions abutting owners are made primarily liable by statute or charter for injuries received on adjoining sidewalks, and in such cases the person injured must first exhaust his legal remedies against the abutting owners.²³⁴ Where it is made the primary duty of a lot-

to have actual or constructive notice of the defect, though said owner be also liable: *City of Philadelphia v. Smith* (Pa.), 16 Atl. 493; s. c. 23 W. N. C. (Pa.) 242.

²³¹ *Village of Fulton v. Tucker*, 3 Hun (N. Y.) 529. See also, *Moore v. Gadsden*, 93 N. Y. 12; *Wenzlick v. McCotter*, 87 N. Y. 122, 127.

²³² *City of Rochester v. Campbell*, 123 N. Y. 405, 420; s. c. 25 N. E. 937; *Moore v. Gadsden*, 93 N. Y. 12; *City of St. Louis v. Connecticut L. Ins. Co.*, 107 Mo. 92; s. c. 17 S. W. 637. In *Kirby v. Boylston Market Ass'n*, 14 Gray (Mass.) 249, 252, the court thus expressed the rule:—"The defendants as owners and occupants of the land abutting on Boylston street are not responsible to individuals for injuries resulting to them from defects and want of repair in the sidewalks, or by means of snow and ice accumulated thereon by natural causes, though by city ordinance it is made the duty of abutters under prescribed penalties to keep the sidewalks in good repair and reasonably to remove all snow and ice therefrom." See also, *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Hill v. City of Fond du Lac*, 56 Wis. 242; s. c. 14 N. W. 25; *Weller v. Mc-*

Cormick, 47 N. J. L. 397; s. c. 1 Atl. 516; *Flynn v. Canton Co.*, 40 Md. 312; *Heeney v. Sprague*, 11 R. I. 456; *City of Hartford v. Talcott*, 48 Conn. 525; *Eustace v. Jahns*, 38 Cal. 3; *Jansen v. City of Atchison*, 16 Kan. 358; *City of Keokuk v. Independent Dist.*, 53 Iowa 352; s. c. 5 N. W. 503; *Taylor v. Lake Shore R. Co.*, 45 Mich. 74; s. c. 7 N. W. 728.

²³³ *City of Rochester v. Campbell*, 123 N. Y. 405, 415; s. c. 25 N. E. 937.

²³⁴ In an action against the city of Sheboygan for injuries caused by an obstruction in the street, defendant answered, by way of abatement, that the obstruction was placed in the street by the owner of the abutting property. Held that, under the provisions of the city charter (laws Wis. 1874, ch. 266, § 24), before plaintiff can recover he must exhaust his legal remedies against the person who placed the obstruction in the street: *Raymond v. City of Sheboygan*, 70 Wis. 318; s. c. 35 N. W. 540, where Cole, C. J., said:—"A similar provision is found in a number of the city charters of this state, and this court has had occasion to consider its effect. Its validity has been affirmed, and it has been held that it was intended to

owner to repair the sidewalk, and in case of his default it is the duty of the city to do so, and both neglect their duty, they are not joint tort-feasors;²³⁵ and therefore the rule that one wrong-doer can not recover against the other for injuries caused by their joint offense does not apply as against a city which has paid damages caused by the negligence of an abutting owner.²³⁶ Where a city charter requires the individual offender to be joined as defendant with the city, the verdict may be against both, or against one and in favor of the other;²³⁷

relieve the city, so far as possible, with justice to the injured party, from liability for injuries occasioned by obstructions lawfully placed in its streets by persons for whose acts it was not directly responsible, and that whenever the injured person can, by the use of remedies furnished by law, recover his damages of the party primarily liable, he must do so before resorting to his remedy against the city: *McFarlane v. City of Milwaukee*, 51 Wis. 691; s. c. 8 N. W. 728. The same doctrine as to the city's responsibility in such a case is recognized in *Hincks v. City of Milwaukee*, 46 Wis. 559; s. c. 1 N. W. 230; *Amos v. City of Fond du Lac*, 46 Wis. 695; s. c. 1 N. W. 346; *Papworth v. City of Milwaukee*, 64 Wis. 389; s. c. 25 N. W. 431. Under the charter of Fond du Lac, § 206, providing that owners shall be primarily liable for injuries from defective sidewalks in front of their premises, and the city shall not be liable until plaintiff has exhausted his remedy against the owner, on proof that the sidewalk which caused the accident was before private property, and was constructed by the owner, plaintiff must show that he has exhausted his remedy against such owner: *Hiner v. City of Fond du Lac*, 71 Wis. 74; s. c. 36 N. W. 632; *Henker v. City of Fond du Lac*, 71 Wis. 616; s. c. 38 N. W. 187. *Contra*, *Noonan v. City of Stillwater*, 33 Minn. 198; s. c. 22 N. W. 444.

²³⁵ Under the charter of Detroit

(local acts Mich. 1883, p. 614), which authorizes the common council to provide by ordinance that, whenever any sidewalk requires to be built or repaired, the owner, agent or occupant of the adjacent lot shall be notified to build or repair the same, and declares that, if he neglect to do so for a time to be specified in such ordinance, the board of public works shall build or repair it, the expense to be assessed on such lot, the duty of the lot-owner to repair the sidewalk, when required to do so by ordinance and notice, does not cease on expiration of the time specified in the ordinance; and when both he and the board of public works neglect to repair, and the city has to pay damages for injury caused by the sidewalk's defective condition after such time had expired, the lot-owner is liable to the city therefor: *City of Detroit v. Chaffee*, 70 Mich. 80; s. c. 37 N. W. 882.

²³⁶ The city and the person whose negligence caused the injury are not in *pari delicto*; and where the negligence of the city is constructive, the rule that one wrong-doer can not recover damages against the other for injuries caused by their joint offense does not apply: *City of New York v. Dimick*, 2 N. Y. S. 46. See also, *Inhabitants &c. v. Boston &c. R. Co.*, 23 Pick. (Mass.) 24.

²³⁷ The charter of Austin, Minn., provides that no action shall be maintained against the city for damages caused by any obstruction or

unless it is prescribed by statute that the city shall not be liable unless judgment is also rendered against the individual whose negligence caused the injury.²³⁸

§ 1527. Limited liability for acts, etc., of independent contractor.—A city is not relieved from its duty and responsibility in respect to the safe condition of its streets by employing a contractor to do the work or repairs required to be done, though it has not yet accepted the work from him.²³⁹ Nor is a city relieved from such duty

excavation in a street, placed there by any person, or by his negligence in the management thereof, or his failure to maintain guards or lights thereat, unless such person be joined as a defendant; and, in case of judgment against defendants, execution shall first issue against such persons; and, if the city pay the judgment, it shall own and may enforce it against the other defendant. Held, that the verdict may be against both defendants, or against one and in favor of the other: *Clark v. City of Austin*, 38 Minn. 487; s. c. 38 N. W. 615.

²³⁸ The charter of St. Louis (2 R. S. Mo., p. 1626) provides that whenever the city shall be made liable to an action for damages by reason of the negligence of any person, and such person shall also be liable to an action on the same account by the injured party, the latter, on bringing action for such injury, shall join such other person or corporation as defendant, and no judgment shall be rendered against the city unless judgment is rendered against such other person or corporation. Held, where plaintiff was injured by falling on a sidewalk at a place where ice and snow had been allowed to accumulate, that it was not necessary to join as a party defendant with the city a corporation in front of whose premises such snow and ice had accumulated, although there was an ordinance requiring all persons to keep the sidewalks in front

of their premises free of such accumulations: *Norton v. City of St. Louis*, 97 Mo. 537; s. c. 11 S. W. 242.

²³⁹ *Village of Jefferson v. Chapman*, 127 Ill. 438; s. c. 20 N. E. 33. A municipal corporation, on which its charter imposes the duty of keeping its streets in a safe condition for travel, is liable for injuries caused by neglect to place proper lights and guards at night around an excavation which it authorized to be made in the street, though it may have stipulated for such precautions on the part of the contractor who made the excavation: *McAllister v. City of Albany*, 18 Or. 426; s. c. 23 Pac. 845. In *Turner v. City of Newburgh*, 109 N. Y. 301; s. c. 16 N. E. 344, Gray, J., said that "The city can not claim legal exemption from liability by reason of its having contracted out the construction of this sewer, and because it had not yet accepted the work of the contractor. The streets remained as much as ever in the care and under the supervision of its officials." A city having caused an excavation to be made is bound to see that it is carefully guarded, and is not absolved from that duty by having employed a contractor to make the excavation: *Brusso v. City of Buffalo*, 90 N. Y. 679; *Storrs v. City of Utica*, 17 N. Y. 104; *Robbins v. Chicago*, 4 Wall. 657, 679; *Water Co. v. Ware*, 16 Wall. 566; *City of Logansport v. Dick*, 70 Ind. 65; *City of St. Paul v. Seitz*, 3 Minn. 297.

by the fact that an auxiliary duty is imposed **on an independent body** like the police.²⁴⁰ A municipal corporation is not liable for the acts or negligence of an independent contractor while engaged in the performance of his contract if the highway defects did not cause the injury,²⁴¹ under the operation of the rule that a person is not responsible for the negligence of a contractor with him who is exercising an independent employment.²⁴²

§ 1528. Municipal duty of supervision over others.—A city is liable not only for its own neglect of its streets, but also for that of a person acting under its orders though not a municipal officer,²⁴³ because of its duty of supervision in such cases²⁴⁴ or because acting under its permit.²⁴⁵ And in such cases a city is liable without notice of

²⁴⁰ *Kunz v. City of Troy*, 104 N. Y. 344; s. c. 10 N. E. 442, where Andrews, J., said:—"It is sufficient for the purpose of this case to say that the powers conferred and duties enjoined upon the police by the act of 1870, in respect to the streets, are auxiliary only, and not exclusive." See also, *Todd v. City of Troy*, 61 N. Y. 506; *Conrad v. Trustees &c.*, 16 N. Y. 158.

²⁴¹ *Herrington v. Village of Lansingburgh*, 110 N. Y. 145; s. c. 17 N. E. 728, where the court said:—"At the place where the horses were fastened the street was in perfect condition, and the horses did not become restless or frightened from anything existing in the street, and the accident was in no way caused by any improper condition of the street, but simply by noise resulting from the blast. . . . If there was any carelessness which caused the injury it was that of the contractors. They could choose their own time for firing the blasts, and select their own agents. They could make the charges of powder large or small, and smother the blasts, etc., or they could carelessly omit all precautions, and for the consequence of their negligence they alone would be responsible. If it was a prudent thing to notify persons in the vicinity of the blast before it was

fired, then the contractors should have given the notice; but the duty to give it did not devolve on the village." See also, *Pack v. Mayor &c.*, 8 N. Y. 222; *Kelly v. Mayor &c.*, 11 N. Y. 432; *McCafferty v. Spuyten Duyvil &c. R. Co.*, 61 N. Y. 178; *Devlin v. Smith*, 89 N. Y. 470; *Wood v. City of Watertown*, 58 Hun (N. Y.) 298; s. c. 11 N. Y. S. 864.

²⁴² *Town of Pierrepont v. Lovelless*, 72 N. Y. 211; *Hexamer v. Webb*, 101 N. Y. 377, 383; s. c. 4 N. E. 755.

²⁴³ *Boucher v. City of New Haven*, 40 Conn. 456.

²⁴⁴ *Manchester v. City of Hartford*, 30 Conn. 118. See also, *Farman v. Town of Ellington*, 46 Hun (N. Y.) 41; *Bidwell v. Town of Murray*, 40 Hun (N. Y.) 190; *Bartlett v. Crozier*, 17 Johns. (N. Y.) 439; *Smith v. Wright*, 27 Barb. (N. Y.) 621.

²⁴⁵ *Cleveland v. King*, 132 U. S. 295; s. c. 10 S. Ct. 90, where it was held that a permit authorizing the occupation of part of a public street as a depository for building materials, and requiring proper lights at night to indicate their locality, does not relieve the city from the duty of exercising a reasonable diligence to prevent the holders of the permit from occupying the street in such a way as to endanger others in their proper use of it.

the defect, for ignorance of the defect is itself proof of the omission of the duty of supervision.²⁴⁶

§ 1529. **General municipal liability for neglect of streets.**—The general rule is that under the powers usually conferred upon municipal corporations in respect to streets within their limits, it is their duty to keep them in a reasonably safe condition for use by travelers in the usual modes, and that they are liable in damages for injuries resulting from neglect of such duty;²⁴⁷ and this rule extends not only to the roadbed but also to the structures over it.²⁴⁸ If a city has notice of an unlawful incumbrance on a street, for instance, a pile of bricks higher than the legal limit, it is liable for its neglect to remove it if in fact dangerous,²⁴⁹ though it has not by actual inspection ascertained its dangerous character.²⁵⁰

§ 1530. **Municipal liability in Michigan.**—The general rule as to municipal liability for the condition of streets did not exist formerly in Michigan, but was partly introduced by statute in 1879 and 1885. At one time there was a conflict in that state between the state and federal courts,²⁵¹ which was terminated in 1889 by the decision of the

²⁴⁶ *Boucher v. City of New Haven*, 40 Conn. 456. A street commissioner is elected by the people, and apparently not subject to removal by the council, and has the care of streets and sidewalks, and is to keep them free from obstructions and defects, and superintend construction and repair. It was held that the street commissioner is simply a subordinate agent, charged with specific duties, and that the corporation was not relieved from liability for injuries from defects in the streets and sidewalks occurring through negligence, especially as the city's liability for such injuries is expressly recognized in the requirement of the charter that written notice of the injury be given to the mayor or council: *City of Denver v. Williams*, 12 Colo. 475; s. c. 21 Pac. 617.

²⁴⁷ *Ehrgott v. Mayor &c.*, 96 N. Y. 264; *Hume v. Mayor &c.*, 74 N. Y. 264; *Requa v. City of Rochester*, 45 N. Y. 129; *Davenport v. Ruckman*,

37 N. Y. 568; *Conrad v. Trustees &c.*, 16 N. Y. 158; *Hutson v. Mayor &c.*, 9 N. Y. 163; *Mayor &c. v. Furze*, 3 Hill (N. Y.) 612; *Barnes v. District of Columbia*, 91 U. S. 540.

²⁴⁸ *Hume v. Mayor &c.*, 74 N. Y. 264; *Pedrick v. Bailey*, 12 Gray (Mass.) 161; *Drake v. City of Lowell*, 13 Met. (Mass.) 292; *Day v. Inhabitants &c.*, 5 Allen (Mass.) 98. See also, *Beach Contr. Neg.* (2d ed.), § 276.

²⁴⁹ *Rehberg v. Mayor &c.*, 91 N. Y. 137.

²⁵⁰ *Norristown v. Moyer*, 67 Pa. St. 355; *Donaldson v. City of Boston*, 82 Mass. 508.

²⁵¹ *City of Detroit v. Blackeby*, 21 Mich. 84; *Osborne v. Detroit*, 32 Fed. 36, where Brown, J., said:—"In *City of Detroit v. Blackeby*, 21 Mich. 84, it was held by a divided court that, in the absence of a statute to that effect, the cities of this state were not liable for damages received on defective sidewalks, and that remained the law of the state until

federal supreme court that the state decisions as to municipal liability for highway defects were binding upon the federal courts within the state.²⁵² Again in January, 1887, it was decided by the supreme court of Michigan that the act of 1885 making municipal corporations liable for defective sidewalks was unconstitutional;²⁵³ but in June, 1887, a comprehensive statute went into effect introducing into Michigan the general rule of municipal liability for highway defects;²⁵⁴ but such statute does not make the municipality liable where the highway defect was not the primary cause of the injury.²⁵⁵ It has been held that the statute of 1887 creating liability for injuries caused by defective sidewalks does not require that such walks should be wholly within the line of the street if the municipality has actually assumed control of them.²⁵⁶ The right of action under the statute of 1887 for injuries sustained from defective highways survives in case of death to the administrator.²⁵⁷

1879, when the first act was passed. The federal courts, however, had felt themselves bound by precedents of the supreme court and had established a different rule, the cause given of which was that aliens and non-residents were permitted to recover for such injuries when citizens of the state could not do so. In 1879 an act was passed making all townships, villages and cities liable to persons sustaining bodily injury upon any of the public highways or streets by reason of neglect to keep such highways and streets and all bridges, crosswalks and culverts on the same in good repair. In the case of *City of Detroit v. Putnam*, 45 Mich. 263; s. c. 7 N. W. 815, it was held that the act of 1879 did not allow damages for injuries sustained by defective sidewalks. In 1885 an act was passed to amend that of 1879, in which the word 'sidewalks' was inserted with the words 'highway, street, bridges, crosswalks and culvert,' and providing that 'the common-law liability of townships, villages and cities in this state for such injuries is hereby abrogated.'

²⁵² *Detroit v. Osborne*, 135 U. S. 492; s. c. 10 S. Ct. 1012.

²⁵³ *Church v. City of Detroit*, 64 Mich. 571; s. c. 31 N. W. 447.

²⁵⁴ Laws of 1887, No. 264, §§ 1 and 2, declare that any township, city or village neglecting to keep its highways, streets, bridges, sidewalks, crosswalks and culverts in reasonable repair shall be liable in damages for injury thereby caused to any person or to any animal or vehicle or other property; and § 3 of the same statute enacts that "It is hereby made the duty of townships, villages, cities or corporations to keep in reasonable repair, so that they shall be reasonably safe and convenient for public travel, all public highways, streets, bridges, sidewalks, crosswalks and culverts that are within their jurisdiction and under their care and control and open for public travel." It is held that this statute does not apply to a public alley: *Face v. City of Ionia*, 90 Mich. 104; s. c. 51 N. W. 184.

²⁵⁵ *Beall v. Athens Tp.*, 81 Mich. 536; s. c. 45 N. W. 1014.

²⁵⁶ *O'Neil v. Village of West Branch*, 81 Mich. 544; s. c. 45 N. W. 1023.

²⁵⁷ *Racho v. City of Detroit*, 90 Mich. 92; s. c. 51 N. W. 360.

§ 1531. The same subject continued—The rule in other states.—

A city charged by its charter with the duty of keeping its streets safe is liable for neglecting to do so.²⁵⁸ In Ohio a person injured in consequence of municipal neglect to keep the streets in order has a common-law right of action for damages.²⁵⁹ There is a conditional statutory liability in Oregon, and the general rule exists in Colorado.²⁶⁰ The District of Columbia is liable for the neglect of its streets in the city of Washington.²⁶¹ The Arkansas rule is that municipal corporations are under a duty to keep their streets in repair, but not liable to individuals for neglect to do so unless made so by statute.²⁶² The prevalence of a rule in some other states similar to that of Arkansas has been before considered in the chapter on "Torts."²⁶³ In Massachusetts, and generally in New England, a city, like a town, is not liable to an action for a defect in a highway unless such right of action is given by statute;²⁶⁴ and this is the rule in New Jersey and California and a few other states.²⁶⁵ In the state of New York the municipal duty of keeping the streets reasonably safe and convenient exists towards all who are lawfully in the streets; for example, toward one lawfully at work on the street,²⁶⁶ and toward children at play on the

²⁵⁸ Under its charter it is the duty of the city of Richmond, Virginia, to keep its sidewalks in safe condition, and it is liable to a person injured by reason of its neglect so to do: *Gordon v. City of Richmond*, 83 Va. 436; s. c. 2 S. E. 727.

²⁵⁹ *Cleveland v. King*, 132 U. S. 295; s. c. 10 S. Ct. 90.

²⁶⁰ Under the Oregon statute providing that an action may be maintained against public corporations "for an injury to the rights of the plaintiff arising from some act or omission" of such corporations, a city is liable for an injury caused by the neglect of its officers to repair streets which it is their duty to maintain, unless the charter expressly exempts the city from liability: *Sheridan v. City of Salem*, 14 Or. 328; s. c. 12 Pac. 925. Cities and towns incorporated under the general law of Colorado (Gen. St. Colo., ch. 109, p. 598) have exclusive control of their streets, and are liable for damages caused by a fail-

ure to repair, whether such liability is specifically imposed by the act or not: *City of Boulder v. Niles*, 9 Colo. 415; s. c. 12 Pac. 632.

²⁶¹ *District of Columbia v. Woodbury*, 136 U. S. 450; s. c. 10 S. Ct. 990.

²⁶² *Arkadelphia v. Windham*, 49 Ark. 139; s. c. 4 S. W. 450.

²⁶³ Ch. 20, vol. 1.

²⁶⁴ *Hill v. City of Boston*, 122 Mass. 344; s. c. 23 Am. R. 332; *Oliver v. City of Worcester*, 102 Mass. 489; *Hixon v. City of Lowell*, 13 Gray (Mass.) 59, 64; *Harwood v. City of Lowell*, 4 Cush. (Mass.) 310; *Brady v. City of Lowell*, 3 Cush. (Mass.) 121; *Morgan v. City of Hallowell*, 57 Maine 375; *Jones v. City of New Haven*, 34 Conn. 1, 13; *Hewison v. City of New Haven*, 37 Conn. 475.

²⁶⁵ *Pray v. Mayor &c.*, 32 N. J. L. 394; *Winbigler v. Mayor &c.*, 45 Cal. 36. See also, § 806, ante.

²⁶⁶ *Rehberg v. Mayor &c.*, 91 N. Y. 137.

street.²⁶⁷ Under some of the New England statutes this duty extends only to travelers, and not to children at play on the street,²⁶⁸ or to mere loungers on the street.²⁶⁹ But in mitigation of the harsh statutory rule it is held that a momentary stopping does not deprive a traveler of his rights as such,²⁷⁰ even where he leaves his carriage and picks berries at the roadside.²⁷¹ And a child on the street does not cease to be a traveler when he steps aside for an instant to clasp in play a post in the highway, or to look at toys in a shop-window.²⁷² In Wisconsin, where the liability for defective sidewalks is statutory, and confined to travelers, it is held that a child injured while rolling his hoop on a defective sidewalk may recover because traveling and playing at the same time.²⁷³ In Illinois a person passing over a sidewalk is deemed a traveler thereon, whether his object is business or pleasure or merely to gratify an idle curiosity.²⁷⁴ Trespassers on highways are entitled to the same protection as others.²⁷⁵

²⁶⁷ *McGuire v. Spence*, 91 N. Y. 303; *McGarry v. Loomis*, 63 N. Y. 104.

²⁶⁸ *Tighe v. City of Lowell*, 119 Mass. 472; *Blodgett v. City of Boston*, 8 Allen (Mass.) 237; *McCarthy v. City of Portland*, 67 Maine 167; *Stinson v. City of Gardiner*, 42 Maine 248; *Lyons v. Inhabitants &c.*, 119 Mass. 491. See also, *Beach Contr. Neg.* (2d ed.), §§ 278, 279.

²⁶⁹ *Stickney v. City of Salem*, 3 Allen (Mass.) 374.

²⁷⁰ *Bourget v. City of Cambridge*, 156 Mass. 391; s. c. 31 N. E. 390; *Bliss v. Inhabitants &c.*, 145 Mass. 91; s. c. 13 S. E. 352; *Varney v. Manchester*, 58 N. H. 430; *Duffy v. City of Dubuque*, 63 Iowa 171; s. c. 18 N. W. 900.

²⁷¹ *Britton v. Inhabitants &c.*, 107 Mass. 347. Whether a person traveling along a highway who undertakes to throw aside a telephone wire hanging so as to endanger travelers, and is injured by the electricity with which it is charged, is guilty of contributory negligence and is not entitled to the damages recoverable under Public Statutes, ch. 52, § 18, for injuries received through a defect in a highway, is a question for the jury: *Bourget v. City of Cambridge*, 156 Mass. 398;

s. c. 31 N. E. 390. Holmes, J., said:—"It seems to us that to throw on one side, out of the way of travel, a light, movable object which is an annoyance or a nuisance where it is, is one of those every-day acts of kindly feeling which fairly may be said to be an incident of travel as it commonly goes on and to be within the protection of the law." It was held to be immaterial that the wire belonged to plaintiff's master: *Citing Burt v. City of Boston*, 122 Mass. 223; *Hill v. Winsor*, 118 Mass. 251.

²⁷² *Gulline v. City of Lowell*, 144 Mass. 491; s. c. 11 N. E. 723; *Hunt v. City of Salem*, 121 Mass. 294.

²⁷³ *Reed v. City of Madison*, 83 Wis. 171; s. c. 53 N. W. 547. See *Strong v. City of Stevens Point*, 62 Wis. 255; s. c. 22 N. W. 425.

²⁷⁴ *City of Chicago v. Keefe*, 114 Ill. 222; s. c. 2 N. E. 67.

²⁷⁵ A child who, while walking along the top of a private coping adjoining a city sidewalk, falls therefrom into an excavation made by the city, is a trespasser, and can not recover from the city for injuries sustained: *Clark v. City of Richmond*, 83 Va. 355; s. c. 5 S. E. 369. Plaintiff's evidence showed that her son, seven years old, was climbing

§ 1532. **Liability for ways which public is invited to use.**—Where a municipality so acts in respect to a walk or way as to hold it out as a public thoroughfare it is liable for its defects and unsafe condition;²⁷⁶ and is estopped from claiming that the land has not been legally laid out as a highway;²⁷⁷ and in such a case it is not very material whether or not a street has become such by formal acceptance and user by the public.²⁷⁸ The case is different where the highway was made under a statute which was unconstitutional and conferred no authority and created no duty.²⁷⁹ A city is not liable for the defective condition of a sidewalk or way outside of the street which it did not build and does not control;²⁸⁰ but there is an exception to this

up and sliding down the post of an awning erected over the sidewalk, and fell into the gutter, some barrels standing on the sidewalk being overturned in his fall, and striking him on the chest, causing his death. It was held that as the deceased had no right to be where he was at the time of the accident, and as the awning was a lawful structure, the city was not liable: *Gaughan v. City of Philadelphia*, 119 Pa. St. 503; s. c. 13 Atl. 300; *Oil City &c. Bridge Co. v. Jackson*, 114 Pa. St. 321; s. c. 6 Atl. 128.

²⁷⁶ *Village of Mansfield v. Moore*, 124 Ill. 133; s. c. 16 N. E. 246, where the court said:—"They invited the public to use it as belonging to the village. Having assumed to perform the same duty in regard to it as though it was a part of one of the streets, they were bound to use the same degree of vigilance as they exercised in reference to other sidewalks within the limits of the corporation." See also, *Gridley v. City of Bloomington*, 68 Ill. 47; *Champaign City v. Patterson*, 50 Ill. 61; *City of Bloomington v. Bay*, 42 Ill. 503; *City of Joliet v. Verby*, 35 Ill. 58; *Codner v. Bradford*, 10 Wis. 443; *Reinhard v. Mayor*, 2 Daly (N. Y.) 243. Plaintiff must allege and prove that the sidewalk on which the injury occurred was, at the time and place of the injury, controlled

and treated by the authorities as a public sidewalk, and opened as such: *Chapman v. Milton*, 31 W. Va. 384; s. c. 7 S. E. 22; *Shannon v. Town of Tama City*, 74 Iowa 22; s. c. 36 N. W. 776.

²⁷⁷ *Sewell v. City of Cohoes*, 75 N. Y. 45; *Mayor v. Sheffield*, 4 Wall. 189; *Houfe v. Town of Fulton*, 34 Wis. 608; *Stark v. Lancaster*, 57 N. H. 88; *City of Aurora v. Colshire*, 55 Ind. 484. In *O'Neil v. Village of West Branch*, 81 Mich. 544; s. c. 45 N. W. 1023, the village caused a sidewalk to be built and assumed control of it; and it was held to be its duty to keep it in repair whether it was wholly within the line of the street or not.

²⁷⁸ *Phelps v. City of Mankato*, 23 Minn. 276. Where a hotel is set back six feet and nine inches from the line of the lot, and the sidewalk extended from the hotel ten feet and ten inches into the street, that portion on the lot being constructed or paid for by the proprietor of the hotel, the whole being open to the public to pass and re-pass at pleasure, it will be deemed a part of the street of the city (*Reese, C. J.*, dissenting): *Foxworthy v. City of Hastings*, 25 Neb. 133; s. c. 41 N. W. 132.

²⁷⁹ *Mayor v. Cunliff*, 2 N. Y. 165.

²⁸⁰ *Jewhurst v. City of Syracuse*, 108 N. Y. 303; s. c. 15 N. E. 409;

rule when the boundary line of the street is not visible so as to inform persons when they are on or off the street.²⁸¹ In Wisconsin a municipality is not bound to open and keep in repair the whole width of a highway; if it grades and constructs a traveled track of sufficient width and keeps it safe, it is not liable for defects outside of that track into which a traveler strays without necessity.²⁸² The same rule exists in Vermont and Missouri,²⁸³ and in most of the other states as to rural highways.²⁸⁴ If the road margins have been worked into a road and used as such, they also must be kept reasonably safe for

Carpenter v. City of Cohoes, 81 N. Y. 21; *Veeder v. Village of Little Falls*, 100 N. Y. 343; s. c. 3 N. E. 306.

²⁸¹ *Jewhurst v. City of Syracuse*, 108 N. Y. 303; s. c. 15 N. E. 409; *Cogswell v. Inhabitants &c.*, 4 Cush. (Mass.) 307; *Hayden v. Inhabitants &c.*, 7 Gray (Mass.) 358; *Alger v. City of Lowell*, 3 Allen (Mass.) 402. Where a city deposits, and permits others to deposit, refuse material in a river, close to and adjoining the end of a graded public street, so that the deposit appears to be a prolongation and part of the street, and the same is dangerous to any one stepping thereon, the city may be guilty of such negligence as to render it liable to any one injured by stepping on the deposit: *Ray v. City of St. Paul*, 40 Minn. 458; s. c. 42 N. W. 297.

²⁸² *Goeltz v. Town of Ashland*, 75 Wis. 642, 645; s. c. 44 N. W. 770; *Cartright v. Belmont*, 58 Wis. 370; s. c. 17 N. W. 237; *James v. City of Portage*, 48 Wis. 677; s. c. 5 N. W. 31; *Prideaux v. City of Mineral Point*, 43 Wis. 513; *Matthews v. Town of Baraboo*, 39 Wis. 674; *Hawes v. Town of Fox Lake*, 33 Wis. 438; *Kelly v. Town of Fond du Lac*, 31 Wis. 179, 186. In the last case the court laid down the rule which has since been followed in Wisconsin:—"The responsibility of towns, without doubt, primarily extends

only to losses or damages sustained by reason of defects in the traveled portion of the highway, for they are not bound to keep the highway in its whole width in a suitable or safe condition for travel. It is in general the duty of the traveler, therefore, to remain in the traveled track, or that part of the highway which, to a reasonable width, has been graded or prepared for that purpose. Hence if without necessity or for his own pleasure or convenience he voluntarily deviates from the traveled track, which is in good condition, and in so doing meets with an accident from some cause outside of the traveled track, the town will not be responsible for any damage or injury he may thus sustain."

²⁸³ *Sykes v. Town of Pawlet*, 43 Vt. 446; *Walker v. Kansas City*, 99 Mo. 647, 652; s. c. 12 S. W. 894; *Potter v. Town of Castleton*, 53 Vt. 435; *Rice v. Town of Montpelier*, 19 Vt. 470.

²⁸⁴ *Monongahela City v. Fisher*, 111 Pa. St. 9; s. c. 2 Atl. 87; *Perkins v. Inhabitants &c.*, 68 Maine 152; *Kelley v. City of Columbus*, 41 Ohio St. 263; *Keyes v. Village of Marcellus*, 50 Mich. 439; s. c. 15 N. W. 542; *Willey v. Portsmouth*, 35 N. H. 304; *Durant v. Palmer*, 29 N. J. L. 544; *Kellogg v. Inhabitants &c.*, 4 Gray (Mass.) 65.

travel.²⁸⁵ Generally the whole of a city street should be kept in a safe condition for travel.²⁸⁶

§ 1533. **Municipal recourse against third persons.**—If a municipal corporation, after being sued, has paid damages for injuries where the highway defect was caused by third persons' torts or negligence or by their breach of contract to repair, or has paid such damages without suit where the liability was undoubted, it may maintain an action against the third person for reimbursement, including such incidental expenses as it incurred in defending the action against itself.²⁸⁸ In such cases the municipality is subrogated to the cause of action against the wrong-doer which the injured party originally had, and can recover against such wrong-doer only by proving his tort or negligence, the injury or the damage, and its payment.²⁸⁹ Where a municipal corporation is sued for damages arising out of highway defects and has a cause of action against third persons for reimbursement, it may, by notice, impose the burden of defense on such third persons, and if they make default or do not defend successfully they are bound by the result of the suit, and can not in any subsequent litigation between the municipality and themselves dispute the material facts on which the

²⁸⁵ *Whitney v. Town of Essex*, 42 Vt. 520; *Ozier v. Town of Hinesburgh*, 44 Vt. 220; *Ashton v. City of Newton*, 134 Mass. 507; *Stafford v. City of Oskaloosa*, 57 Iowa 748; s. c. 11 N. W. 668.

²⁸⁶ *Monogahela City v. Fisher*, 111 Pa. St. 9; s. c. 2 Atl. 87. See the not very satisfactory ruling in *Barr v. Kansas City*, 105 Mo. 550; s. c. 16 S. W. 483; but relying on *City of Lincoln v. Smith*, 28 Neb. 762; s. c. 45 N. W. 41, and *Lindsay v. City of Des Moines*, 68 Iowa 368; s. c. 27 N. W. 283, in the last of which the court says:—"We think the court should not have allowed the defendant to prove that there were over one hundred and fifty miles of sidewalk in the city of Des Moines; and the jury ought not to have been instructed that the extent of sidewalk in the city which has to be looked after may be considered in deciding whether the city officers used proper diligence in removing the snow and ice. It appears to us that the care

and diligence required to keep sidewalks in proper condition can not be affected or varied by the number of miles of walk in the city. If labor is necessary for the purpose, the force should be commensurate with the work to be done. In other words, a city with forty thousand inhabitants and one hundred and fifty miles of sidewalk should be held to the same degree of care in this respect as the smaller towns with less extent of sidewalk."

²⁸⁸ *City of Rochester v. Campbell*, 123 N. Y. 405, 411; s. c. 25 N. E. 937; *City of Rochester v. Montgomery*, 72 N. Y. 65; *Village of Fulton v. Tucker*, 3 Hun (N. Y.) 529; *City of Brooklyn v. Brooklyn &c. R. Co.*, 47 N. Y. 476; 2 *Thompson Neg.* (1st ed.) 791.

²⁸⁹ *City of Rochester v. Campbell*, 123 N. Y. 405, 413; s. c. 25 N. E. 937; *Village of Port Jervis v. First Nat'l Bank*, 96 N. Y. 550; *City of Rochester v. Montgomery*, 72 N. Y. 65; *Robbins v. Chicago*, 4 Wall. 657.

adjudication in the former suit rested.²⁹⁰ In such cases the liability of the third person does not depend on his receiving notice of the action of the injured party, but omission of such notice imposes upon the municipality the burden of establishing all the actionable facts.²⁹¹ The notice to the third person need not be written or express, but may be implied from his knowledge of the pendency of the action and his participation in its defense.²⁹² This right of action over against the third person is not affected by the fact that he was a licensee of the municipality to do a lawful act on the highway, for his implied agreement was to so act as to save the public from danger and the corporation from liability.²⁹³

§ 1534. Liability when defects concur with other causes.—When the defect in a street concurs with another cause for which a municipal corporation is not responsible, it must be such that without its operation the injury would not have occurred, or the corporation is not liable, and the evidence must so preponderate against the corporation as not to leave the jury to conjecture.²⁹⁴ Though a city or town may have been negligent in permitting a hole or obstruction to continue in

²⁹⁰ *Village of Port Jervis v. First Nat'l Bank*, 96 N. Y. 550; *City of Rochester v. Montgomery*, 72 N. Y. 65.

²⁹¹ *Chicago v. Robbins*, 2 Black 418, 423; *Binsse v. Wood*, 37 N. Y. 526; *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 275, 281; *Aberdeen v. Blackmar*, 6 Hill (N. Y.) 324.

²⁹² *Heiser v. Hatch*, 86 N. Y. 614; *Barney v. Dewey*, 13 Johns. (N. Y.) 224; *Beers v. Pinney*, 12 Wend. (N. Y.) 309.

²⁹³ *Mairs v. Manhattan &c. Ass'n*, 89 N. Y. 498, 503; *Congreve v. Morgan*, 18 N. Y. 84; *Village of Seneca Falls v. Zalinski*, 8 Hun (N. Y.) 571; *Chicago v. Robbins*, 2 Black 418, 423; *Newton v. Ellis*, 85 Eng. C. L. 123.

²⁹⁴ *Ring v. City of Cohoes*, 77 N. Y. 83, 88; *Harrington v. City of Buffalo*, 2 N. Y. S. 333. A slope over a sidewalk in a city, formed by sand and small stones that had washed out of an embankment from time to time, being allowed to accumulate, became covered with sleet and ice during a cold night; and a person in

going to his place of business early in the morning, fearing to go down the steps in front of his house, attempted to walk over the slope, fell and was injured. It was held that, if the accident was caused by the ice alone, the city would not be liable; but that if the condition of the slope, which the city had negligently allowed to be formed and remain over the walk, was a concurring cause of the fall, without which the accident would not have happened, the city would be responsible: *Taylor v. City of Yonkers*, 105 N. Y. 202; s. c. 11 N. E. 642. In this case *Finch, J.*, thus reviewed the authorities:—"The question involved has been quite earnestly debated in other states where it arose under statutes requiring towns to keep the streets safe and convenient. In Maine and Massachusetts it is held that if, besides the defect in the way, there is also another proximate cause of the injury contributing directly to the result, for which neither of the parties is in fault, the town is not liable: *Moore v. Inhabitants &c.*, 32

the highway, yet it is not liable for an injury which is not the natural and probable result of such negligence, but produced by another independent and efficient intervening cause,²⁹⁵ which could not, with reasonable diligence, have been foreseen;^{295a} such negligence must have been the proximate cause of the injury or the municipality is not liable.²⁹⁶ In the application of the rule that, in order to recover for an

Maine 46; *Moulton v. Inhabitants &c.*, 51 Maine 127; *Marble v. City of Worcester*, 4 Gray (Mass.) 395; *Billings v. City of Worcester*, 102 Mass. 329. These rulings are based largely upon two grounds; that the town is liable for the defect alone, and that the proportion of injury due to that cause is impossible to be ascertained. A contrary rule is held in Vermont and New Hampshire: *Hunt v. Town of Pownal*, 9 Vt. 411; *Winship v. Enfield*, 42 N. H. 197. We have already stated the rule to be in this state that the defect, even when a concurring cause, must be such that without its operation the accident would not have happened. Where the defect is the sole explanation of the injury there is no difficulty; but where there is also another for which no one is responsible, we have held that the plaintiff must fail if his evidence does not show that the damage was produced by the former cause: *Searles v. Manhattan R. Co.*, 101 N. Y. 661; s. c. 5 N. E. 66. And we added that he must fail also if it is just as probable that the injury came from one cause as the other, because he is bound to make out his case by a preponderance of evidence, and the jury must not be left to a mere conjecture or to act upon a bare possibility."

²⁹³ Plaintiff had been driven safely past a hole in the road, and a pile of stones placed on a highway by the town supervisors, when the horse became frightened by a donkey, turned short round, breaking a wheel of the buggy, and ran back, one axle dragging on the ground. The dragging axle caused the buggy

to be drawn to the side of the road, where it caught in the hole. The buggy was upset, and plaintiff injured. Held, that the township was not liable; the occurrence being extraordinary, and not the natural and probable result of the negligence, but of an independent, primary, efficient, proximate, extraordinary cause: *Schaeffer v. Jackson Tp.*, 150 Pa. St. 145; s. c. 24 Atl. 629. See also, *Beall v. Athens Tp.*, 81 Mich. 536; s. c. 45 N. W. 1014. In *Kieffer v. Hummelstown Borough*, 151 Pa. St. 304; s. c. 24 Atl. 1060; 17 L. R. A. 217, it was held that a pile of stones on the roadside leaving a space for travel of twenty-six feet will not render a borough liable for an injury to a person thrown upon the stones by the fall of the horse he is riding where this is occasioned by the struggles of another horse in his team which is frightened by the shooting of guns near the road. See also, *Jackson Tp. v. Wagner*, 127 Pa. St. 184; s. c. 17 Atl. 903; *Beach Contr. Neg.* (2d ed.), § 245.

^{295a} 1 *Thompson Neg.* (2d ed.), § 49.

²⁹⁶ *Herr v. Lebanon*, 149 Pa. St. 222; s. c. 24 Atl. 207. In *Chartiers Tp. v. Phillips*, 122 Pa. St. 601; s. c. 16 Atl. 26, it was held to be error not to charge as requested that "to render a township liable for an injury by a defect in a highway it must have been the sole efficient cause of the injury, and if the jury find from the evidence that this accident to the plaintiff was caused by the uncontrollable struggle of a choking horse, or from this cause concurring with a defect in the highway, then their verdict must be for

injury caused by a highway defect, the defect must have been the sole cause of the accident, the instruction was held to be correct that if there was only a momentary loss of control of plaintiff's horse, and the control would have been instantly regained if plaintiff's carriage had not come in contact with the defect, the plaintiff could recover.²⁹⁷ It is obvious that where a horse gets wholly beyond the control of the driver the highway defect can not be the sole cause of an accident.²⁹⁸

§ 1535. Plaintiff's concurring act in cases of danger and emergency.—When a person's injury is the natural consequence of his proper attempt to avoid a defect in the highway, for example, where in the attempt to avoid a mud hole, in the darkness he drives off the road at the side, he should not be charged with contributory negligence.²⁹⁹ And this rule applies where, to avoid apparently imminent danger caused by the defect, a person jumps from a carriage and is injured;³⁰⁰ but does not apply where the concurring cause is the negligence of the driver of the carriage in which plaintiff is riding.³⁰¹ A town may be liable for a defect in a highway although the innocent act of a third person is a concurring cause of the injury.³⁰² The

the defendant." In *Moulton v. Inhabitants &c.*, 51 Maine 127, it was decided that if there be two efficient independent proximate causes, the primary being one for which the town is not responsible and the other a defect in the highway, the injury can not be said to have been received through such defect and the town is not liable therefor.

²⁹⁷ *Babson v. Inhabitants &c.*, 101 Mass. 93.

²⁹⁸ *Rowell v. City of Lowell*, 7 Gray (Mass.) 100; *Richards v. Inhabitants &c.*, 13 Gray (Mass.) 344; *Davis v. Inhabitants &c.*, 4 Allen (Mass.) 557; *Stickney v. City of Salem*, 3 Allen (Mass.) 374; *Titus v. Inhabitants &c.*, 97 Mass. 258.

²⁹⁹ *Pomeroy v. Inhabitants &c.*, 154 Mass. 462; s. c. 28 N. E. 899.

³⁰⁰ *Flagg v. Inhabitants &c.*, 142 Mass. 280; s. c. 8 N. E. 42; *Williams v. Inhabitants &c.*, 119 Mass. 237; *Sears v. Inhabitants &c.*, 105 Mass. 310; *Lund v. Inhabitants &c.*, 11 Cush. (Mass.) 563. See also, *Beach Contr. Neg.* (2d ed.), § 40, and numerous cases there cited.

³⁰¹ *Kidder v. Inhabitants &c.*, 7 Gray (Mass.) 104; *Rowell v. City of Lowell*, 7 Gray (Mass.) 100. See also, *Beach Contr. Neg.* (2d ed.), § 115.

³⁰² *Hayes v. Inhabitants &c.*, 153 Mass. 514; s. c. 27 N. E. 522, where a telephone wire out of place caught in the wheels of a wagon approaching that of plaintiff and he saw it and called to the driver, who paid no attention to him; plaintiff was unable to turn out and was hurt in bending back to avoid the wire, and the town was held to be liable. *Holmes, J.*, said:—"If the act which concurs with the defect in producing the result complained of is imminent, and is of a kind which the defendant is bound to expect and provide for, such, for instance, as another man's driving upon the road, the jury may find against the town, as when a particular state of the weather is the concurring cause. It can make no difference whether the defect brings the plaintiff into contact with the innocent vehicle, as in *Flagg v. Inhabitants &c.*, 142 Mass.

exigency in which a person finds himself may affect the question how far he ought to apprehend the danger, and how far he can run a risk, which ought not ordinarily to be incurred, without losing his right to recover.³⁰³

§ 1536. **Limited liability in grading streets.**—A city is not liable to an abutting owner for a merely consequential injury to his property caused by changing the grade of an adjoining street,³⁰⁴ but is liable for a physical invasion of his property and such an infringement upon his right to lateral support to his soil as undermines his land and wrecks his buildings.³⁰⁵ The provision of the Missouri constitution that private property shall not be taken or damaged for public use without just compensation applies where property is damaged by a change in the grade of a street, though there was a charter power to change the grade.³⁰⁶ In Illinois, provided no property of an abutting owner is taken in the course of a change of grade or other improvement, he can not recover for a consequential injury unless his whole property has been depreciated by the improvement, and this fact of depreciation is to be determined by comparing market values before and after the improvement.³⁰⁷ Under the Pennsylvania constitution

280; s. c. 8 N. E. 42, or the innocent vehicle brings the plaintiff into contact with the defect, as the jury might find to have been the fact here. The act of the third party is equally necessary to the result and is equally innocent in the two cases."

³⁰³ *Pomeroy v. Inhabitants &c.*, 154 Mass. 462, 465; s. c. 28 N. E. 899.

³⁰⁴ *Kehrer v. Richmond*, 81 Va. 745. Compare *Keating v. Cincinnati*, 38 Ohio St. 141, with *City of Cincinnati v. Penny*, 21 Ohio St. 499.

³⁰⁵ *Stearns v. City of Richmond*, 88 Va. 992; s. c. 14 S. E. 847, where in changing the street grade the city excavated to the depth of sixty feet, causing plaintiff's land to cave in so as to destroy the wall of a brick building twenty feet from the street line. It was held that there was a taking of plaintiff's property, and that the damage was direct, not consequential; following *Pumpelly v. Green Bay Co.*, 13 Wall. 166. See

also, the case of *Parke v. City of Seattle*, 5 Wash. 1; s. c. 31 Pac. 310, where the court criticised the rule laid down by Judge Dillon (§ 990) as not being wholly sustained by his own citations, and followed the decision in the above-cited case of *Stearns v. City of Richmond*. See also, *Thurston v. City of St. Joseph*, 51 Mo. 510; overruling *City of St. Louis v. Gurno*, 12 Mo. 414.

³⁰⁶ *Van De Vere v. City of Kansas*, 107 Mo. 83; s. c. 17 S. W. 695; *Sheehy v. Kansas City &c. R. Co.*, 94 Mo. 574; s. c. 7 S. W. 579; *Householder v. City of Kansas*, 83 Mo. 488.

³⁰⁷ *Springer v. City of Chicago*, 135 Ill. 552; s. c. 26 N. E. 514; *City of Elgin v. Eaton*, 83 Ill. 535; *Chicago &c. R. Co. v. Francis*, 70 Ill. 238; *Chicago &c. R. Co. v. Hall*, 90 Ill. 42; *Chicago &c. R. Co. v. Haller*, 82 Ill. 208; *St. Louis &c. R. Co. v. Capps*, 67 Ill. 607; *Eberhart v. Chicago &c. R. Co.*, 70 Ill. 347; *Chicago &c. R. Co. v. Maher*, 91 Ill. 312; *Chicago &c. R.*

a municipal corporation is liable to an abutting owner for an injury to his property caused by a change of grade.³⁰⁸ Before the act of 1872 the city of New York was under no common-law or statutory liability to owners of real estate for injury to their property caused by changes of grade in the streets adjoining their premises;³⁰⁹ and under said act of 1872 its liability was limited to a claim by such owners for the delivery of assessment bonds for the amount of damages respectively awarded to them by the board of assessors.³¹⁰ But a city is liable for an injury caused, not by the action of the city or its common council in establishing a grade, but by the street committee in adapting a sidewalk to the grade in violation of the requirements of the common council.³¹¹ Where the duty of changing the grade of a highway is imposed by law upon others than the highway authorities, as, for instance, upon a railroad company, such company is not liable to abutting owners for injury consequentially resulting from such grading.³¹²

§ 1537. **Liability in respect to latent defects.**—It is not the duty of a town, without notice, to protect travelers against latent defects in its highways.³¹³ A continued mud hole in a roadbed, the danger

Co. v. Loeb, 118 Ill. 203; s. c. 8 N. E. 460; Chicago &c. R. Co. v. Stein, 75 Ill. 41; Page v. Chicago &c. R. Co., 70 Ill. 324.

³⁰⁸ In O'Brien v. Philadelphia, 150 Pa. St. 589; s. c. 24 Atl. 1047, it was held that a property owner who has built upon his lot in conformity with the existing grade of an open highway can recover from the city for depreciation of his property caused by changing the actual physical elevation of the highway in front of the lot to conform to a plan regulation legally confirmed after he built, said plan being the first regulation of grade and differing from the elevation of the old highway. See also, New Brighton Borough v. Peirsol, 107 Pa. St. 280; Jones v. Bangor Borough, 144 Pa. St. 638; s. c. 23 Atl. 252; Ogden v. City of Philadelphia, 143 Pa. St. 430; s. c. 22 Atl. 694.

³⁰⁹ Heiser v. Mayor &c., 104 N. Y. 68, 72; s. c. 9 N. E. 866; Conklin v.

New York &c. R. Co., 102 N. Y. 107; s. c. 6 N. E. 663; Radcliff v. Mayor &c., 4 N. Y. 195; Wilson v. Mayor &c., 1 Denio (N. Y.) 595. In Lynch v. Mayor &c., 76 N. Y. 60, it was held that the city had the right to fill up and grade a street though thereby the surface water of adjoining lots was prevented from flowing upon the street, and the water thrown upon said lots was caused to flow upon these in a different way and in greater quantity.

³¹⁰ Heiser v. Mayor &c., 104 N. Y. 68; s. c. 9 N. E. 866.

³¹¹ Clemence v. City of Auburn, 66 N. Y. 334.

³¹² Conklin v. New York &c. R. Co., 102 N. Y. 107; s. c. 6 N. E. 663; Uline v. New York &c. R. Co., 101 N. Y. 98; s. c. 4 N. E. 536; Bellinger v. New York &c. R. Co., 23 N. Y. 42. Contra, Fletcher v. Auburn &c. R. Co., 25 Wend. (N. Y.) 462.

³¹³ Wakeham v. St. Clair Tp., 91 Mich. 15; s. c. 51 N. W. 696.

of which is concealed by the water which fills it, is not a latent defect.³¹⁴

§ 1538. **Municipal liability for snow and ice.**^{314a}—The later cases on municipal liability for injuries caused by snow and ice will be found in the chapter on streets, alleys, etc. A city is bound only to reasonable diligence, during freezing weather, to remove from its sidewalks ice formed from natural causes;³¹⁵ and cities and villages are not held liable for injuries caused by snow and ice, except where their neglect of duty is very clear.³¹⁶ The evidence must be consistent and preponderate against the corporation.³¹⁷ Such neglect is ordinarily a question for the jury on all the facts of quantity, weather, amount of

³¹⁴ In *Pettingill v. Town of Olean*, 48 N. Y. St. 96, the hole causing the injury, the character of which was concealed by the water which filled it, had existed for nearly a month. The highway commissioner had several times passed it on inspection tours and failed to discover it. It was held that the jury were warranted in finding that the hole's existence at the time of the injury was due to the commissioner's negligence.

^{314a} See ch. 29, ante.

³¹⁵ *Kaveny v. City of Troy*, 108 N. Y. 571; s. c. 15 N. E. 726.

³¹⁶ *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459, 470; s. c. 11 N. E. 43; *Smith v. Chicago*, 38 Fed. 388. A city is not liable for injuries occasioned by the slippery condition of a sidewalk, produced merely by smooth ice of recent formation: *Kinney v. City of Troy*, 108 N. Y. 567; s. c. 15 N. E. 728. When a sidewalk has been regularly cleared of snow within a reasonable time after it has fallen, but the surface has been generally coated with ice from natural causes, and plaintiff is injured by falling on such walk, the city is not liable, though the ice on which he slipped was formed by water dripping from a roof: *Kaveny v. City of Troy*, 108 N. Y. 571; s. c.

15 N. E. 726. In an action for injuries caused by slipping on an icy sidewalk, it appeared that the accident occurred on Sunday; that the condition of the walk was caused by sleet which fell the night before; that the walk had previously been kept reasonably safe; and that there was nothing peculiar about the formation of the ice that contributed to the fall. It was held that the plaintiff could not recover: *Harrigan v. Village of Hoosic Falls*, 1 N. Y. S. 57. See also, *Beach Contr. Neg.* (2d ed.), § 270 et seq.

³¹⁷ *Foley v. City of Troy*, 45 Hun (N. Y.) 396. In an action against a village for injuries caused by slipping on an icy sidewalk, the evidence showed the ice to be two inches deep or more. The time for which it had been there was variously stated at "all winter," "two or three weeks," and "four or five days." The ice was caused by water from melting ice running over the walk, there being no gutter opened to carry it away. Within four or five days before the accident it had rained and snowed, and it then froze. No ashes or other material had been placed on the ice. Held not evidence of negligence sufficient to warrant a recovery: *Gram v. Village of Greenbush*, 3 N. Y. S. 76.

travel, and lapse of time since the snow fell or ice formed.³¹⁸ The plaintiff should be nonsuited where the ice is of such recent formation as to exclude all question of notice or negligence,³¹⁹ and where the probability that an actionable defect caused the injury is wholly speculative.³²⁰ Where a film of ice over a whole city is caused by a sudden fall of temperature, and it is impracticable to remove it, the city is not negligent in waiting for a thaw before acting.³²¹ But the formation

³¹⁸ In an action against a city to recover damages for a personal injury received by the plaintiff by falling on the defendant's sidewalk, owing to the negligence of defendant in not removing ice and snow which had formed a ridge thereon, the question whether the defendant should have known of such obstruction, and removed it, is one for the jury to determine from all the circumstances,—the extent of the snow-fall, condition of the weather thereafter, amount of travel on the street, and the lapse of time between the snow-fall and the accident: *City of Boulder v. Niles*, 9 Colo. 415; s. c. 12 Pac. 632.

³¹⁹ Plaintiff's evidence showed that the accident occurred by her slipping on some ice that had accumulated that day near the outside edge of the sidewalk, caused by water dripping from the edge of an awning which extended over the walk, and freezing as it touched the stone pavement. It was held that the court properly ordered a non-suit: *Hanson v. Borough of Warren (Pa.)*, 14 Atl. 405. Where plaintiff was injured by stepping on ice, about two inches thick, which had formed on the sidewalk, but failed to show how, or how long, it had been formed, or that any officer of the city knew, or could by reasonable diligence have known, of it before the injury it was proper to direct a verdict for defendant: *Stanton v. City of Salem*, 145 Mass. 476; s. c. 14 N. E. 519. Where plaintiff was injured at 7 o'clock in the eve-

ning by falling on a slippery sidewalk, and the evidence showed that the icy condition of the walk was caused by the rain that had fallen during the afternoon, the city is not chargeable with constructive notice of the condition of the walk: *Springer v. City of Philadelphia (Pa.)*, 12 Atl. 490.

³²⁰ In *Taylor v. City of Yonkers*, 105 N. Y. 202; s. c. 11 N. E. 642, Finch, J., said:—The great balance of probability is that the ice was the efficient cause; there is no probability not wholly speculative that the slope was also such. No knowledge or intelligence can determine or ascertain that such a slope had any part or share in the injury, and to send the question to the jury is simply to let them guess at it. . . . For these reasons I think the plaintiff should fail and the motion for a non-suit should have been granted."

³²¹ *Taylor v. City of Yonkers*, 105 N. Y. 202; s. c. 11 N. E. 642; *Kaveny v. City of Troy*, 108 N. Y. 571; s. c. 15 N. E. 726. In an action for injuries resulting from a fall on an icy sidewalk, there being a conflict of evidence as to the quantity of ice and the length of time it had been on the walk, witnesses for defendant testifying that there was a thin film of ice that had frozen on the afternoon of the accident, it was prejudicial error to refuse to instruct that, if the ice had only been formed by rain or sleet that afternoon, plaintiff could not recover: *Keane v. Village of Waterford*, 2 N. Y. S. 182.

of ice in a particular locality, owing to the construction or condition of the street or sidewalk, may be a defect though only smooth and slippery.³²² A city is not necessarily liable because of an old formation of ice or other accumulation if a recent formation over it renders the sidewalk as dangerous as it would have been without the former accumulation.³²³ But if a dangerous ridge of ice is allowed to remain for several days in the middle of a sidewalk there is a presumption of municipal negligence;³²⁴ and the jury may properly consider such a

³²² *Adams v. Inhabitants &c.*, 147 Mass. 440; s. c. 18 N. E. 231; *Pinkham v. Inhabitants &c.*, 104 Mass. 78; *Fitzgerald v. Inhabitants &c.*, 109 Mass. 204. "A way may be defective by being so improperly constructed as to induce a special or constant deposit of ice in a particular locality." *Stanton v. City of Springfield*, 12 Allen (Mass.) 566.

³²³ *Taylor v. City of Yonkers*, 105 N. Y. 202; s. c. 11 N. E. 642; *Harrington v. City of Buffalo*, 2 N. Y. S. 333; *Kaveny v. City of Troy*, 108 N. Y. 571; s. c. 15 N. E. 726. In the last case *Finch, J.*, said:—"Doubtless the new ice came upon the old ice and possibly some addition was made to that from the drip of the eaves, but it can not be said upon the evidence produced that the plaintiff would not probably have fallen if not a drop of water had come from the eaves, or that the freezing of that drip was the proximate cause of her fall." The injured person fell on a ridge of old ice about two feet long and six inches wide, and frozen about two inches deep. There was evidence that the ridge had been on the sidewalk for several days. The evidence was conflicting as to whether there was a fall of snow, sleet and rain on the day of the accident. Held, that a refusal to charge that if the sidewalks were made generally slippery on the evening of the accident by a fall of sleet or snow that day, so that the sidewalk, at the place of the accident, would

have been slippery without regard to the ice previously formed, defendant was not liable, was reversible error: *Tobey v. City of Hudson*, 2 N. Y. S. 180. Where there is evidence that eight inches of snow fell within one day of the accident, and that before such storm there was no ice at the place of the accident, a refusal to charge that if the accident was caused by such storm, or ice formed from it, the city is not liable, is error, where plaintiff fails to show that the dangerous condition of the walk, resulting from such storm, continued any length of time; though there was evidence to warrant the jury in finding that the walk was in dangerous condition from previous storms: *Duncan v. City of Buffalo*, 2 N. Y. S. 503.

³²⁴ In an action against a city for injuries sustained by a fall on an icy sidewalk, evidence that there was, at the time of the accident, an oval ridge of ice six inches high, in the middle, sloping to the edges of the walk; that it had snowed three times within the eleven days preceding, aggregating twenty inches of snow, the last fall being five days before the accident, justifies the jury in finding that the ice resulted from the fall of snow referred to, and that the city had notice of its existence: *Harrington v. City of Buffalo*, 2 N. Y. S. 333. A verdict for plaintiff for injuries received from an icy sidewalk will not be disturbed on appeal, where there is evidence that there had been for a long

construction and maintenance of a sidewalk as causes frequent accumulation of ice.³²⁵ A city having a charter power to require lot-owners to clear the snow from the adjoining sidewalks may wait a reasonable time for them to do so, but on their failure must itself do it.³²⁶

§ 1539. **The same subject continued—Notice.**—A city is held to stricter liability where the ice producing the injury does not come from natural causes, such as the freezing of rain or sleet, but from the negligent escape of water in winter weather;³²⁷ but is not liable without actual or implied notice where the water was thrown upon the street by an unauthorized person.³²⁸ In the state of New York a city is not bound to prevent the formation of ice on a sidewalk from the drip of an adjoining owner's roof.³²⁹ A heavy snow storm is itself notice to a city that snow is obstructing its streets.³³⁰

time a thick coating of ice where plaintiff fell, and that other sidewalks in the vicinity had been cleared: *Provost v. Mayor &c.*, 3 N. Y. S. 531. Where it appeared that snow as it fell from time to time during the winter had not been cleaned off, but had been trodden down, and had become an uneven or humpy surface, which had been suffered to remain for about six weeks, the city was held liable: *Jones v. City of Troy*, 4 N. Y. S. 792.

³²⁵ Where it was shown that the sidewalk at the place of the accident had a greater slant towards the street than it had elsewhere, and a part of it had settled so that water ran towards the end of the walk, where ice frequently accumulated, while the walk was otherwise dry; and it was recognized by residents as a dangerous spot, a verdict for plaintiff was sustained: *Ayres v. Village of Hammondsport*, 7 N. Y. S. 174. In an action against a city for injuries caused by falling on an icy sidewalk, it appeared that at the place of the accident the sidewalk was covered with ice for a distance of about twenty-five feet. The ice was formed by water flowing down from an embankment and freezing. It

had alternately thawed and frozen for two or three weeks. The ice was in several layers, and at the time had a slight covering of snow. It did not appear that the streets were in a generally icy condition. The court held that notice to the city might be presumed from the long-continued accumulation: *Ney v. City of Troy*, 3 N. Y. S. 679.

³²⁶ *Taylor v. City of Yonkers*, 105 N. Y. 202; s. c. 11 N. E. 642.

³²⁷ *Todd v. City of Troy*, 61 N. Y. 506, 509. Plaintiff sued for injuries resulting from a fall caused by ice on a sidewalk formed from the overflow of a leaky hydrant on the other side of the street. The testimony was conflicting as to whether the temperature was such that the ice could have been for any time on the sidewalk. It was held that, though the ice may have existed but a few days, the city was liable in allowing an escape of water which would inevitably cause ice when the weather was cold: *Corbett v. City of Troy*, 6 N. Y. S. 381; s. c. 53 Hun (N. Y.) 228.

³²⁸ *Foley v. City of Troy*, 45 Hun (N. Y.) 396.

³²⁹ *Kaveny v. City of Troy*, 108 N. Y. 571; s. c. 15 N. E. 726.

³³⁰ Where a considerable quantity

§ 1540. **Obstructions—Liability for.**^{330a}—The duty of keeping streets in repair includes the duty to keep them free from dangerous obstructions; and a city is liable and negligent in allowing such obstructions to continue after notice thereof may be imputed to it.³³¹ This rule of liability applies to an obstruction placed by an abutting owner, in which case both he and the city may be liable.³³² A heap of garbage may be such an obstruction,³³³ and a pile of frozen

of snow has fallen, which, from the nature of the case, must have caused some obstruction on the sidewalks of a city, it is the duty of the city authorities within a reasonable time thereafter to remove or cause to be removed such obstruction. The falling of snow is sufficient notice, and the question of negligence is for the jury: *Foxworthy v. City of Hastings*, 25 Neb. 133; s. c. 41 N. W. 132.

^{330a} See ch. 29, ante.

³³¹ *Kunz v. City of Troy*, 104 N. Y. 344; s. c. 10 N. E. 442; *Weed v. Village of Ballston Spa*, 76 N. Y. 329. The complaint alleged that the city negligently suffered the alleged obstruction and nuisance to remain upon the street after notice of its existence. It was held that the action was for the city's negligence and not for damages caused by the existence of a nuisance, as, after notice, the city was negligent in not removing the obstruction: *Frankel v. City of New York*, 2 N. Y. S. 294. See also, *Welsh v. City of St. Louis*, 73 Mo. 71; *Fink v. City of St. Louis*, 71 Mo. 52; *Russell v. Inhabitants &c.*, 74 Mo. 480; *Mayor &c. v. O'Donnell*, 53 Md. 110; *Sides v. Portsmouth*, 59 N. H. 24; *McAllister v. City of Albany*, 18 Or. 426; s. c. 23 Pac. 845. Where plaintiff was injured in attempting to pass dirt thrown on defendant's sidewalk, as it appeared, one or two days before, in the presence of and without objection from the street superintendent, the deposit will be presumed wrongful in the absence of proof of its necessity, and the

sufficiency of the time for its removal is a question for the jury: *Shook v. City of Cohoes*, 108 N. Y. 648; s. c. 15 N. E. 531. A village which maintains a system of water-works is liable for injuries caused by its negligence in permitting the surface of a highway in which a water-box had been placed to wear away so that the water-box projected above the surface and obstructed the highway: *Wilkins v. Village of Rutland*, 61 Vt. 336; s. c. 17 Atl. 735.

³³² Where a dangerous piece of machinery is placed in an alley by the owner of abutting lots and is allowed to remain for years, both the individual and the city are guilty of negligence, and both are liable for injuries sustained by a child under nine years who was hurt upon such machinery: *City of Osage City v. Larkins*, 40 Kan. 206; s. c. 19 Pac. 658.

³³³ In an action against a city by one who was overturned in a sleigh by driving over a pile of rubbish in the street the evidence for plaintiff was that, as he was slowly driving up to the curbstone to alight after dark, without observing the obstruction, he was upset and seriously injured. The street was a frequented one and plaintiff had never noticed an obstruction there before. The rubbish was a pile of garbage about two feet high and six or eight feet long, and had been there three weeks. On the part of defendant there was evidence that no such pile existed, or, if any, that it was too

mud,³³⁴ and a pile of stones,³³⁵ and a tree stump in a public park,³³⁶ and a hydrant and a water-plug dangerously situated,³³⁷ and a road-scraper,³³⁸ and a wagon stored in the highway.³³⁹ A heap of sand left by building contractors may be such an obstruction,³⁴⁰ the rule being that such building obstructions must not be allowed to become dangerous.³⁴¹

§ 1541. Obstructions for private convenience.—As the primary use of a city street is for the passing and repassing of the public throughout its entire width, a city is liable for permitting such an obstruction of a street by any individual as constitutes a nuisance. Except for building purposes and for the loading and unloading of wagons,

small to have produced the accident. The evidence was held to justify a verdict against the city: *Kane v. City of Troy*, 1 N. Y. S. 536.

³³⁴ *City of Champaign v. Jones*, 132 Ill. 304; s. c. 23 N. E. 1125. See also, *Gallagher v. City of St. Paul*, 28 Fed. 305; *Stafford v. City of Oskaloosa*, 64 Iowa 251; s. c. 20 N. W. 174.

³³⁵ *Wilson v. Town of Spafford*, 32 N. Y. St. 532; *Bauer v. City of Rochester*, 35 N. Y. St. 959.

³³⁶ *Wolfe v. Erie &c. Tel. Co.*, 33 Fed. 320.

³³⁷ *King v. City of Oshkosh*, 75 Wis. 517; s. c. 44 N. W. 745; *Adams v. City of Oshkosh*, 71 Wis. 49; s. c. 36 N. W. 614; *City of Scranton v. Catterson*, 94 Pa. St. 202; *City of Indianapolis v. Cook*, 99 Ind. 10.

³³⁸ *Whitney v. City of Ticonderoga*, 37 N. Y. St. 135.

³³⁹ *Cohen v. Mayor &c.*, 113 N. Y. 532; s. c. 21 N. E. 700; *Callanan v. Gilman*, 107 N. Y. 360; s. c. 14 N. E. 264.

³⁴⁰ Under Howell's statutes of Michigan, § 1442, making municipal corporations liable for injuries to persons by reason of neglect to keep streets, etc., "in good repair and in a condition reasonably safe and fit for travel," one injured while driving in a street in the dark by a heap of sand left there by contractors building a house, which heap ex-

tended half way over the traveled portion of the road, and had been there for a month and was unguarded by lights or signals, may recover of the city: *Joslyn v. City of Detroit*, 74 Mich. 458; s. c. 42 N. W. 50.

³⁴¹ Under revised statutes of Ohio of 1889, § 2640, relating to municipal corporations, and providing that the council shall have the care, supervision and control of public highways, streets, etc., within the corporation, and shall cause the same to be kept open and in repair and free from nuisance, where a city has granted permits for the occupation of part of a street for the purpose of depositing building materials, requiring the locality to be indicated by proper lights during the night, its failure to exercise reasonable diligence in preventing such obstruction as may be dangerous to passers-by will render it liable for any damages that may be sustained by reason of the obstruction: *Cleveland v. King*, 132 U. S. 295; s. c. 10 S. Ct. 90. In an action for injuries sustained by driving at night against building material left in the street, a question whether it was not placed as such material is usually placed is properly excluded, especially as it calls for an opinion and not for facts: *Magee v. City of Troy*, 1 N. Y. S. 24.

individuals must not be allowed to obstruct or encroach upon streets for any private purpose, and a city will be held liable for authorizing or permitting such obstructions. This rule of liability was applied in 1889 with considerable strictness by the court of appeals in a case where the city of New York had in violation of the city consolidation act, given a permit or license to a grocer to store his wagon on the street;³⁴² and the court fortified such application by invoking the English doctrine that the king's highway is not to be used as a stable yard nor a private person be allowed to eke out the inconvenience of his own premises by taking in the highway.³⁴³ The legislature has expressly provided by the consolidation act before referred to,³⁴⁴ that New York city shall have no power to authorize the placing or continuing of any obstructions upon any street or sidewalk except temporarily during the erection or repair of a building on a lot opposite the highway.³⁴⁵

³⁴² *Cohen v. Mayor &c.*, 113 N. Y. 532; s. c. 21 N. E. 700.

³⁴³ *King v. Russell*, 6 East 427; *Rex v. Cross*, 3 Camp. 224; *Rex v. Jones*, 3 Camp. 230; *People v. Cunningham*, 1 Denio (N. Y.) 524; *Davis v. Mayor*, 14 N. Y. 506, 524.

³⁴⁴ § 86, subd. 4.

³⁴⁵ *People v. Mayor &c.*, 59 How. Pr. (N. Y.) 277; *Ely v. Campbell*, 59 How. Pr. (N. Y.) 333; *Lavery v. Hannigan*, 20 J. & Sp. (N. Y.) 463. The opinion in *Cohen v. Mayor &c.*, 113 N. Y. 532; s. c. 21 N. E. 700, cited above, is so valuable as to justify its transcription here. Peckham, J., said:—"The storing of a wagon in the highway was a nuisance. The primary use of a highway is for the purpose of permitting the passing and repassing of the public, and it is entitled to the unobstructed and uninterrupted use of the entire width of the highway for that purpose, under temporary exceptions as to deposits for building purposes, and to load and unload wagons, and receive and take away property for or in the interest of the owner of the adjoining premises, which it is not now necessary to more specifically enumerate. The extent of the right of such excep-

tional user was before us in the late case of *Callanan v. Gilman*, 107 N. Y. 360; s. c. 14 N. E. 264, and nothing more need be said regarding it here. It is no answer to the charge of nuisance that even with the obstruction in the highway there is still room for two or more wagons to pass, nor that the obstruction itself is not a fixture. If it be permanently, or even habitually in the highway, it is a nuisance. The highway may be a convenient place for the owner of carriages to keep them in, but the law, looking to the convenience of the greater number, prohibits any such use of the public streets. Familiar as the law is on this subject, it is too frequently disregarded or lost sight of. Permits are granted by common councils of cities, or by other bodies, in which the power to grant them for some purposes is reposed, and they are granted for purposes in regard to which the body or board assuming to represent the city has no power whatever and the permit confers no right upon the party who obtains it. As was said by Lord Ellenborough in the case of *Rex v. Jones*, 3 Camp. 230, the law upon the subject is much neglected, and great advantages would arise

§ 1542. **Liability for structures over the street.**—A permanent awning or other structure having its support within the street and extending over it, and so insecure as to be dangerous, is a defect in the street which the city is bound to repair after notice, express or implied, though the structure was not made by the city or under its authority;³⁴⁶ but the rule might be otherwise if the defect were secret or in-

from a strict, steady application of it. This case is a good example of its neglect. There is no well-founded claim of the existence of a power in the defendant to issue such a license. . . . The owner of this wagon was not a cartman, nor was the wagon used as a public cart, but only as a means to enable the grocer to transact his own private business. He acquired no right by virtue of the license to store his wagon in the street, and in doing so he was clearly guilty of maintaining a nuisance. The defendant was also guilty. It assumed to authorize the erection and continuance of a public nuisance. To be sure the legal powers to grant the license to obstruct the street was by the legislature withheld from the defendant, yet it did grant just such a permit and took compensation on account of it. In thus doing the city became a partner in the erection and continuance of such nuisance. . . . Under such circumstances the defendant might be held liable the same as if it had itself maintained the nuisance, for the owner of the wagon was nothing more than an agent through whom the defendant did the unlawful act: *Irvine v. Wood*, 51 N. Y. 224. . . . There is always reasonable ground for apprehending accidents from obstructions in a highway, and any person who wrongfully places them there or aids in so doing must be held responsible for such accidents as occur by reason of their presence. . . . We think that in a case like this where no obstruction would

have existed but for the wrongful conduct of the defendant, it must be held responsible for the damage which is caused by reason of the obstruction, even though it might not have happened if the licensee had been careful in regard to the manner in which he exercised the assumed right granted him by the license. The defendant under these circumstances must take the risk of such care, and not an innocent passer-by. This is not a case for the application of the doctrine that where the injury results from the negligent mode in which licensee exercises the privilege granted to him, which mode is not part of the license, there must be proof of negligence showing permission to use, and acquiescence in the mode after notice or knowledge on the part of the licensor. That may be the rule where the thing licensed is legal because of the license, and the illegality consists in the manner in which the license is carried out. The difficulty here does not consist alone in the negligent manner of fastening up the thills; but the license itself, the permission, with or without consideration, to obstruct the street at all for any such purpose as was the case here, is the wrongful act on the part of the defendant which renders it responsible for the damage naturally sustained from such obstruction."

³⁴⁶ *Hume v. Mayor &c.*, 74 N. Y. 264. In an action against a city for personal injuries caused by the falling of an awning on plaintiff while passing along the sidewalk, evidence

visible,³⁴⁷ or the structure gave way under a heavy weight of snow.³⁴⁸ Under the Massachusetts statute a reasonable distinction is made between a structure like an awning which is supported by the sidewalk and adapted to its use, and a structure like a sign which merely projects over the sidewalk; a city may be liable for the former,³⁴⁹ but not ordinarily and to the same extent for the latter.³⁵⁰ In some jurisdictions dangerous structures suspended or projecting over a street are treated as nuisances, and municipal corporations held to be liable for not abating them.³⁵¹

§ 1543. **Municipal liability for fright of horses.**—A highway may be rendered defective and unsafe, with consequent liabilities therefor, by objects placed or permitted to remain upon it which are calculated to frighten horses of ordinary gentleness,³⁵² for allowing bales of hay

that the awning for several years had been covered with boards in violation of an ordinance, and that snow had been allowed to accumulate on it for some time before the accident, the weight of which caused the fall, is sufficient to warrant a finding that the city was chargeable with notice of its defective condition: *Bieling v. City of Brooklyn*, 120 N. Y. 98; s. c. 24 N. E. 389.

³⁴⁷ *Hume v. Mayor &c.*, 74 N. Y. 264, 276; s. c. 47 N. Y. 639.

³⁴⁸ *Hume v. Mayor &c.*, *supra*.

³⁴⁹ *West v. City of Lynn*, 110 Mass. 514; *Drake v. City of Lowell*, 13 Met. (Mass.) 292; *Day v. Inhabitants &c.*, 5 Allen (Mass.) 98.

³⁵⁰ *Jones v. City of Boston*, 104 Mass. 75; *Salisbury v. Hershenroder*, 106 Mass. 458. A suspended flag and weight which caused the injury by falling were held not to be a defect in the highway within the meaning of the statute: *Hewison v. City of New Haven*, 37 Conn. 475; *Barber v. City of Roxbury*, 93 Mass. 318. See also, *Hixon v. City of Lowell*, 13 Gray (Mass.) 59; *Vinal v. Inhabitants &c.*, 7 Gray (Mass.) 421; *Stanton v. City of Springfield*, 12 Allen (Mass.) 566; *Hutchins v. City of Boston*, 12 Allen (Mass.) 571.

³⁵¹ *Champlin v. Village of Penn*

Yan, 34 Hun (N. Y.) 33; *Grove v. City of Fort Wayne*, 45 Ind. 429; *Bohen v. City of Waseca*, 32 Minn. 176; s. c. 19 N. W. 730; *Duffy v. City of Dubuque*, 63 Iowa 171; s. c. 18 N. W. 900.

³⁵² *Eggleston v. President &c.*, 18 Hun (N. Y.) 146; *Champlin v. Village of Penn Yan*, 34 Hun (N. Y.) 33, where the village was held liable for allowing an advertising banner to remain suspended above the street; and the court said:—"We are unable to discover any sensible reason for holding that an object permanently suspended directly over the traveled part of a highway, though fastened to supports outside the limits of the same, is not an obstruction to travel if it naturally tends to frighten horses of ordinary gentleness." See also, *City of Chicago v. Hay*, 75 Ill. 530; *Town of Rushville v. Adams*, 107 Ind. 475; s. c. 8 N. E. 292; *Bartlett v. Hooksett*, 48 N. H. 18; *Foshay v. Town of Glen Haven*, 25 Wis. 288; *Stanley v. City of Davenport*, 54 Iowa 463; s. c. 2 N. W. 1064; 6 N. W. 706; 37 Am. R. 261; *Hughes v. City of Fond du Lac*, 73 Wis. 380; s. c. 41 N. W. 407; *Ayer v. City of Norwich*, 39 Conn. 376; *Dimock v. Town of Suffield*, 30 Conn. 129.

to lie at the roadside in such a manner as to startle horses;³⁵³ for leaving in the traveled way a large rock calculated ordinarily to frighten horses;³⁵⁴ permitting the roadside to be used as a place of deposit for private property, and the person injured has the option to proceed against the township or the individual offender.³⁵⁵ The municipality is not liable where a horse takes fright at an object like a log or stone outside of the wrought and traveled part of the highway,³⁵⁶ and is not liable whether the object which causes the fright is at the side or margin of the highway,³⁵⁷ or within the wrought part of the way where it does not obstruct travel;³⁵⁸ but the individual who placed the offending obstruction is liable to the traveler;³⁵⁹ and it has been held that the town may be liable where an injury is caused by a horse shying at one defect and the carriage hitting the same or some other defect.³⁶⁰ Ordinarily the liability should be more strictly enforced where the offending object is within the traveled way.³⁶¹ There are many familiar objects which ought not to frighten an ordinarily tame and gentle horse;³⁶² but whether any given object is so frightful in its appearance as naturally to scare a horse of ordinary gentleness is usually a question for the jury.³⁶³ It does not follow because one or more gentle horses have been frightened at a given object that it will frighten all gentle horses; and proof that a number of horses have been frightened at an object does not raise a legal presumption that

³⁵³ *Morse v. Town of Richmond*, 41 Vt. 435. The Vermont statute provides that: "If any special damage shall happen to any person, his team, carriage or other property by means of the insufficiency or want of repairs of any highway, the person damaged shall have the right to recover."

³⁵⁴ *Card v. City of Ellsworth*, 65 Maine 547. And see particular applications of the rule, not altogether harmonious perhaps, in *Clark v. Inhabitants &c.*, 63 Maine 393; *Davis v. City of Bangor*, 42 Maine 522; *Lawrence v. Inhabitants &c.*, 35 Maine 100; *Merrill v. Inhabitants &c.*, 26 Maine 234.

³⁵⁵ *North Menheim Tp. v. Arnold*, 119 Pa. St. 380; s. c. 13 Atl. 444; *Piollet v. Simmers*, 106 Pa. St. 95.

³⁵⁶ *Beall v. Athens Tp.*, 81 Mich. 536; s. c. 45 N. W. 1014; *Agnew v. City of Corunna*, 55 Mich. 428; s. c. 21 N. W. 873.

³⁵⁷ *Keith v. Inhabitants &c.*, 2 Allen (Mass.) 552.

³⁵⁸ *Cook v. Inhabitants &c.*, 115 Mass. 571; *Cook v. City of Charlestown*, 98 Mass. 80; *Kingsbury v. Inhabitants &c.*, 13 Allen (Mass.) 186.

³⁵⁹ *Jones v. Housatonic R. Co.*, 107 Mass. 261; *Barnes v. Chapin*, 4 Allen (Mass.) 444.

³⁶⁰ *Woods v. Inhabitants &c.*, 111 Mass. 357; *Bly v. City of Haverhill*, 110 Mass. 520; *Bigelow v. Inhabitants &c.*, 3 Pick. (Mass.) 267.

³⁶¹ *Nichols v. Inhabitants &c.*, 66 Maine 402.

³⁶² *Piollet v. Simmers*, 106 Pa. St. 95; *Mallory v. Griffey*, 85 Pa. St. 275.

³⁶³ *Chamberlain v. Enfield*, 43 N. H. 356; *Winship v. Enfield*, 42 N. H. 197; *Cleveland &c. R. Co. v. Wynant*, 114 Ind. 525; s. c. 77 N. E. 118; *Fritsch v. City of Allegheny*, 91 Pa. St. 226.

another horse on a different occasion became frightened at the same object.³⁶⁴

§ 1544. **Notice of defect in highway.**^{364a}—Substantially the law in regard to notice of defects in the highway is the same as already considered in connection with streets, and what is said here will be supplemental. In the absence of actual notice of a highway defect the general rule is that a town or city is not liable for an injury caused by the defect, unless it has existed so long that notice or knowledge thereof should be imputed to the municipality.³⁶⁵ Notice may ordinarily be imputed by the jury where the defect has existed for a long time.³⁶⁶ Actual notice need not be proved where notice may be imputed³⁶⁷ unless required by statute,³⁶⁸ and a statute requir-

³⁶⁴ *Cleveland &c. R. Co. v. Wynant*, 114 Ind. 525; s. c. 17 N. E. 118; *Newson v. Georgia R. Co.*, 62 Ga. 339; *Wentworth v. Smith*, 44 N. H. 419; *Piollet v. Simmers*, 106 Pa. St. 95; *Denver &c. R. Co. v. Glasscott*, 4 Colo. 270; *Bloor v. Town of Delafield*, 69 Wis. 273; s. c. 34 N. W. 115. But see *Darling v. Westmoreland*, 52 N. H. 401; *Crocker v. McGregor*, 76 Maine 282. See also, § 810, ante.

^{364a} See ch. 29, ante.

³⁶⁵ If a step is properly constructed in the first instance, the city will not be liable for accidents caused by its getting out of repair, without proof that some of the city officers or agents having charge of such matters had actual notice of the defect, or proof that the defect had existed for such a length of time that the city authorities, by reasonable diligence in supervision, would or should have discovered it: *Miller v. City of St. Paul*, 38 Minn. 134; s. c. 36 N. W. 271. - - - The afternoon before plaintiff was injured the hardest rain of the season fell. Before the rain and afterwards, the marshal of the town went to the place, and examined it carefully, and could not detect any defect in the sidewalk or the sewer. The injury was caused by the dirt and sand becoming very wet from the hard rain, and caving in one side of the sewer. It was held that plaintiff was not entitled

to recover, the defect not having existed for a sufficient length of time from which notice thereof could be inferred on the part of the town: *Mayor &c. v. Wilson*, 82 Ga. 206; s. c. 9 S. E. 17. See also, *City of Philadelphia v. Smith*, 23 W. N. C. (Pa.) 242; s. c. 16 Atl. 493.

³⁶⁶ *Olson v. City of Worcester*, 142 Mass. 536; s. c. 8 N. E. 441; *City of Springfield v. Doyle*, 76 Ill. 202; *City of Lincoln v. Woodward*, 19 Neb. 259; s. c. 27 N. W. 110; *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459; s. c. 11 N. E. 43; *Kunz v. City of Troy*, 104 N. Y. 344; s. c. 10 N. E. 442; *Saulsbury v. Village of Ithaca*, 94 N. Y. 27; *Albrittin v. Mayor &c.*, 60 Ala. 486; *City of Atlanta v. Champe*, 66 Ga. 659; *City of Grand Rapids v. Wyman*, 46 Mich. 516; s. c. 9 N. W. 833.

³⁶⁷ Where the sidewalk at an intersection of two streets ends in a precipitous descent of some five or six feet, and this condition is permitted to exist for years, it is not incumbent on one injured by such obstruction to prove that the city had actual notice of the defect which caused the injury: *Whitfield v. City of Meridian*, 66 Miss. 570; s. c. 6 So. 244; *City of Sterling v. Merrill*, 124 Ill. 522; s. c. 17 Atl. 6; *City of Chicago v. Dalle*, 115 Ill. 386; s. c. 5 N. E. 578.

³⁶⁸ *Laws of New York of 1869*, tit.

ing such actual notice is not unconstitutional as depriving a citizen of his remedy.³⁶⁹ Of course, notice should not be imputed where the defect has been of very short continuance, as municipal corporations are held only to reasonable care and diligence in search for highway defects,³⁷⁰ and particularly where they are concealed by the darkness,³⁷¹ or are in a remote and little frequented part of the city.³⁷² And notice of latent defects should not be so readily imputed³⁷³ as of open and obviously dangerous defects.³⁷⁴ Notice is readily imputed

3, ch. 912, as amended by laws of 1881, ch. 183, p. 227, provide that the city of Cohoes shall not be liable for injury sustained by reason of any street or highway being out of repair, unsafe, or obstructed by snow or ice, unless actual notice of the danger or obstruction be given to the common council or superintendent of streets at least twenty-four hours previous to such damage or injury. It was held that it was not sufficient, in an action against a city for injuries caused by falling on an icy sidewalk, to show that the superintendent of streets knew or should have known of the obstruction by personal observation: *McNally v. City of Cohoes*, 53 Hun (N. Y.) 202; s. c. 6 N. Y. S. 842.

³⁶⁹ *McNally v. City of Cohoes*, 53 Hun (N. Y.) 202; s. c. 6 N. Y. S. 842.

³⁷⁰ *Sheel v. City of Appleton*, 49 Wis. 125; s. c. 5 N. W. 27; *Sikes v. Town of Manchester*, 59 Iowa 65; s. c. 12 N. W. 755. Where a contractor engaged in the erection of a building leaves a plank across a sidewalk on quitting work at night, in the absence of actual notice the city is not liable to one who fell over it within one hour and forty-five minutes after the workmen left the building, as such a length of time was not sufficient to charge notice: *City of Warsaw v. Dunlap*, 112 Ind. 576; s. c. 14 N. E. 568.

³⁷¹ *Klatt v. City of Milwaukee*, 53 Wis. 196; s. c. 10 N. W. 162; *Sweet v. Village of Gloverville*, 12 Hun (N.

Y.) 302; *Blakely v. City of Troy*, 18 Hun (N. Y.) 167.

³⁷² *City of Chicago v. McCarthy*, 75 Ill. 602. See *Kunz v. City of Troy*, 104 N. Y. 344; s. c. 10 N. E. 442.

³⁷³ In *Hanscom v. City of Boston*, 141 Mass. 242; s. c. 5 N. E. 249, it was held that the city was not liable under the public statutes for an injury to a traveler caused by falling into a coal hole in the sidewalk by reason of the cover turning over when he stepped on it because not fastened on the inside by the occupant of the cellar as it was designed to be, if the fact that it was unfastened was not known to any officer of the city, and was not apparent from the street. In *Gubasko v. City of New York*, 1 N. Y. S. 215, plaintiff was injured by the lower portion of a tree standing in a public street falling on him, the upper portion having been cut off some years before. The tree had a hole in it, but its fall was caused by a blow from a heavy truck which was passing, and after its fall was found to be decayed. It was held that if the tree was dangerous, but appeared to be safe to ordinary observation, defendant was not negligent; nor was defendant required to examine the interior of the hole, which was visible from one side of the tree, though thus it would have discovered the decay. See also, *Wendell v. Mayor &c.*, 39 Barb. (N. Y.) 329; *Prindle v. Fletcher*, 39 Vt. 255; *Borough of West Chester v. Town of Apple*, 35 Pa. St. 284.

³⁷⁴ When the defect is a patent one,

where the defect is permanent and frequently recurs.³⁷⁵ Notice of a highway defect is not to be imputed because the highway is so poorly constructed that such a defect is likely to occur in the indefinite future.³⁷⁶

§ 1545. **Notice when a question for the jury.**—Ordinarily the question whether a municipality or its officers used reasonable diligence to discover a defect is for the jury.³⁷⁷ Where the evidence is

and has existed five or six weeks, the jury is warranted in finding that the city had notice of it: *City of Philadelphia v. Smith*, 23 W. N. C. (Pa.) 242; s. c. 16 Atl. 493. See also, *Albrittin v. Mayor &c.*, 60 Ala. 486; *Harriman v. City of Boston*, 114 Mass. 241; *Kiley v. City of Kansas City*, 69 Mo. 102.

³⁷⁵ *Fleming v. City of Springfield*, 154 Mass. 520; s. c. 28 N. E. 910. The fact that about one-half an hour before the accident the person having the use of the coal-hole had removed the covering and had neglected to fasten it on the inside on replacing it does not necessarily defeat plaintiff's action, it appearing that the defect was permanent, and the neglect to fasten the covering habitual on the part of the occupant of the premises: *McGaffigan v. City of Boston*, 149 Mass. 289; s. c. 21 N. E. 371.

³⁷⁶ *Rochefort v. Inhabitants &c.*, 154 Mass. 140; s. c. 27 N. E. 1013; *McGaffigan v. City of Boston*, 149 Mass. 289; s. c. 21 N. E. 371; *Adams v. Inhabitants &c.*, 147 Mass. 440; s. c. 18 N. E. 231; *Post v. City of Boston*, 141 Mass. 189; s. c. 4 N. E. 815.

³⁷⁷ The fact that a sidewalk was inspected by a village officer a few weeks before plaintiff received an injury thereon is no defense to an action for such injury, and it is proper to submit to the jury the question whether the trustees used reasonable diligence in discovering whether the walk was out of repair: *Stebbins v. Village of Oneida*, 5 N. Y. S. 483. See also, *Kunz v. City of*

Troy, 104 N. Y. 344; s. c. 10 N. E. 442; 1 N. Y. S. 596. In an action for personal injury caused by a hole in the snow which covered a street of defendant to the depth of from one to two feet, it appeared that the street was one on which there was a great amount of traffic; and that, aside from such hole, the street was in good condition. Plaintiff's evidence showed that the hole had been in the same condition for from five to seven days before the accident, and that it was from four to six feet long, from one and one-half to two feet deep, and thirty inches wide, and ran lengthwise of the street. Defendant's witnesses estimated it as smaller. The question whether defendant was negligent in not discovering and filling the hole before the accident was properly submitted to the jury: *Fitzgerald v. City of Troy*, 7 N. Y. S. 103. On the day of the accident about one-tenth of an inch of snow had fallen, and in ten days preceding not more than five-tenths of an inch had fallen. It had thawed in the first portion of this period of ten days. The ice at the place of the accident was rough and uneven, looked like old ice, extended the width of the walk, and had been so a week or ten days. This was held sufficient to justify the jury in finding that the city had constructive notice: *Masters v. City of Troy*, 50 Hun (N. Y.) 485; s. c. 3 N. Y. S. 450. Where there is evidence from which the jury might have found that a defect caused by an accumulation of snow and ice had existed for nine

conflicting the jury must decide whether notice should be imputed to the city.³⁷⁸ The court may draw the jury's attention to the facts from which notice of the accident may be inferred.³⁷⁹ The facts may be so clear as to exclude any reasonable inference of constructive notice and in such case should not be submitted to the jury.³⁸⁰ In order to prove that a highway is defective at the place where plaintiff was injured it is competent to show that others have fallen or slipped at the same place.³⁸¹ Similar accidents in the same neighborhood may be proved as evidence not only of the actual condition of the highway but as tending to show notice to the municipality.³⁸² Thus evi-

days on a frequented sidewalk, which during that time was patrolled by a policeman, and several times passed by one of the selectmen of defendant town, these facts clearly afford evidence of notice of the defect, and of negligence in not remedying it, for the jury to pass on: *Fortin v. Inhabitants &c.*, 145 Mass. 196; s. c. 13 N. E. 599. A defect had continued several weeks, during which sometimes it became filled with dirt, when it was not conspicuous, and in wet weather it was washed out and became quite visible. Held sufficient evidence to go to the jury on the question of notice to the municipal authorities: *Schroth v. City of Prescott*, 68 Wis. 678; s. c. 32 N. W. 621.

³⁷⁸ Though a city giving license to a builder to pile building material in the street is entitled to notice of danger therefrom to passers-by, such notice is implied by the open and continuous neglect of the builder; and the fact of this notice, if in doubt, is to be left to the jury: *Magge v. City of Troy*, 1 N. Y. S. 24. When the evidence as to the condition of a sidewalk is conflicting, the question whether or not the condition was such as to impart constructive notice to the city is for the jury: *Troxel v. City of Vinton*, 77 Iowa 90; s. c. 41 N. W. 580.

³⁷⁹ There is no error in calling the attention of the jury to the fact that

the accident occurred in front of the police station, and within sight of the officers whose duty it was to have charge of the station: *Osborne v. City of Detroit*, 32 Fed. 36.

³⁸⁰ In an action against a city for injuries caused by slipping on ice, where the only evidence of the existence of ice prior to the accident is that it snowed on the third day before, rained on the second day before, and froze on the night before, together with the testimony of plaintiff that there was ice there on the night before, no inference of constructive notice can be reasonably made, and the question should not be submitted to the jury: *Davis v. City of Kingston*, 5 N. Y. S. 506.

³⁸¹ *Masters v. City of Troy*, 50 Hun (N. Y.) 485; *Quinlan v. City of Utica*, 11 Hun (N. Y.) 217; s. c. affirmed 74 N. Y. 603; *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459, 469; s. c. 11 N. E. 43.

³⁸² *Osborne v. City of Detroit*, 32 Fed. 36; *District of Columbia v. Armes*, 107 U. S. 519; s. c. 2 S. Ct. 840, where a policeman was allowed to testify that he remembered sending home in a hack a woman who had fallen there, and had seen as many as five persons fall there. See also, *City of Chicago v. Powers*, 42 Ill. 169; *City of Delphi v. Lowery*, 74 Ind. 520; *Kent v. Town of Lincoln*, 32 Vt. 591; *City of Augusta v. Hafers*, 61 Ga. 48; *House v. Metcalf*,

dence of the generally defective condition of a bridge or sidewalk is admissible though the injury occurred at a particular place therein.³⁸³ In Michigan the notice must relate to the particular defect which caused the injury, and not to a generally defective condition in the vicinage; for instance, a city can not be held in damages for the non-repair of a crosswalk by showing that the sidewalks in the vicinity were out of repair;³⁸⁴ and a similar rule exists in Massachusetts.³⁸⁵ The Iowa rule is that notice of defects which had been repaired before the accident is not sufficient, though the defects were at the same place as before;³⁸⁶ and qualifiedly in Ohio.³⁸⁷

§ 1546. **When notice is not necessary.**—Where a city has caused a defect by its own act or procurement it is not entitled to any notice of it:³⁸⁸ for instance, where negligent construction of some highway ap-

27 Conn. 631; *Calkins v. City of Hartford*, 33 Conn. 57; *Darling v. Westmoreland*, 52 N. H. 401; *Hill v. Portland &c. R. Co.*, 55 Maine 438; *City of Aurora v. Hillman*, 90 Ill. 61; *Weisenberg v. City of Appleton*, 26 Wis. 56. In an action for injuries caused by a defective sidewalk, evidence of the defective condition of the walk some distance from the place of injury, and also of its general defective condition, is admissible to show that the village had constructive notice of the defect: *Shaw v. President &c.*, 74 Wis. 105; s. c. 42 N. W. 271.

³⁸³ *Spearbracker v. Town of Larabee*, 64 Wis. 573; s. c. 25 N. W. 555. If a sidewalk is continuously unsafe for a considerable distance, and an accident occurs at one end of such unsafe portion, evidence of the condition of the walk for the whole distance is admissible, in an action against the town, to show that defendant should have known of its condition: *Armstrong v. Town of Ackley*, 71 Iowa 76; s. c. 32 N. W. 180. But see *Ruggles v. Town of Nevada*, 63 Iowa 185; s. c. 18 N. W. 866.

³⁸⁴ *Dundas v. City of Lansing*, 75 Mich. 499; s. c. 42 N. W. 1011; *Grand Rapids &c. R. Co. v. Huntley*, 38 Mich. 540.

³⁸⁵ *Collins v. Inhabitants &c.*, 6 Cush. (Mass.) 396; *Robinson v. Fitchburg &c. R. Co.*, 7 Gray (Mass.) 92; *Standish v. Washburn*, 21 Pick. (Mass.) 237; *Maguire v. Middlesex R. Co.*, 115 Mass. 239.

³⁸⁶ *Carter v. Town of Monticello*, 68 Iowa 178; s. c. 26 N. W. 129.

³⁸⁷ In an action against a municipal corporation to charge it with liability to one injured by stepping on a loose board in a sidewalk, it can not, as matter of law, be charged with notice of such defect, merely because it had knowledge of the existence of a general defect in the walk, in that it had become dishd through the settling of the middle stringers of the walk: *Incorporated Village of Shelby v. Clagett*, 46 Ohio St. 549; s. c. 22 N. E. 407.

³⁸⁸ *Mayor &c. v. Isaacks*, 68 Tex. 116; s. c. 3 S. W. 693; *Springfield v. Le Claire*, 49 Ill. 476; *Mayor &c. v. McCary*, 84 Ala. 469; s. c. 4 So. 630; *Brusso v. City of Buffalo*, 90 N. Y. 679; *Russell v. Inhabitants &c.*, 74 Mo. 480; *Stephens v. City of Macon*, 83 Mo. 345; *City of Austin v. Ritz*, 72 Tex. 391; s. c. 9 S. W. 884. In *Barr v. City of Kansas*, 105 Mo. 550; s. c. 16 S. W. 483, the court said:—"The hole could have been recovered within the hour of the discov-

purtenance by the municipality is shown.³⁸⁹ A city is not entitled to notice of a defect where its ignorance of it is the result of its omission of its duty of supervision,³⁹⁰ as where the defect is caused by the act of a contractor in the city employ³⁹¹ or by the negligence of a city employe.³⁹² If a municipal corporation causes work to be done

ery of its condition. Besides the displacement was not the result of an accident or the wrongful act of another, but the natural consequence of defects in its original construction by the city, of which it was charged with notice from the beginning and which it was under a continuing duty to repair." See also, *Russell v. Inhabitants &c.*, 74 Mo. 480; *Klein v. City of Dallas*, 71 Tex. 280; s. c. 8 S. W. 91; *Montgomery v. City of Des Moines*, 55 Iowa 101; s. c. 7 N. W. 421.

³⁸⁹ The declaration containing counts charging active malfeasance by negligence in the construction and restoration of an apron over a ditch, proof of notice to defendant of the defect is unnecessary, as it was bound to take notice that the improvement was itself dangerous; and hence it is not error to refuse to give instructions, not limited to any particular counts, which make such notice essential to recovery: *Village of Jefferson v. Chapman*, 127 Ill. 438; s. c. 20 N. E. 33. See also, *City of Crawfordsville v. Bond*, 96 Ind. 236; *Hiller v. Village of Sharon Springs*, 28 Hun (N. Y.) 344. Where there is no evidence either as to the manner of the construction of the crossing, or the quality of the material used, or the length of time since its construction, it is error to instruct the jury that, if the defect was the result of defective construction originally, the city would be chargeable without any notice of such defect: *Stein v. City of Council Bluffs*, 72 Iowa 180; s. c. 33 N. W. 455.

³⁹⁰ *Boucher v. City of New Haven*,

40 Conn. 456; *Manchester v. City of Hartford*, 30 Conn. 118.

³⁹¹ A provision of a city charter that, in order to render the city liable for "gross negligence" in non-repair of a street, the non-repair must have been continued for ten days after notice in writing given to certain officials, does not apply to a case where the city itself had an excavation dug by a contractor, discharged the contractor, and left the excavation as it was: *Mayor &c. v. Isaacks*, 68 Tex. 116; s. c. 3 S. W. 693. See also, *Brooks v. Inhabitants &c.*, 106 Mass. 271; *Wendell v. Mayor &c.*, 4 Abb. App. Dec. (N. Y.) 563.

³⁹² The provision of the charter of Oshkosh that the city shall not be liable for damages arising from defective streets, sidewalks, sewers, etc., unless before the accident an alderman of the ward knew of the defect, does not apply to the case of a horse injured by running at night into a pile of gravel and stones left in the street by an employe of the city while repairing the street: *Adams v. City of Oshkosh*, 71 Wis. 49; s. c. 36 N. W. 614. Plaintiff, while driving in defendant city, was injured through his horse taking fright at a large wooden roller which had been used in the care of the streets, and left standing therein by the servants of defendant. It was held that the defendant was liable for the nuisance, without regard to whether notice of the injury had been given as required by its charter, which provides that no action shall be maintained against the city for injuries caused by any de-

which is in its nature dangerous to the public, it is bound to take notice of the character of the work and of the condition in which it is left.³⁹³ The statutes may dispense with the necessity of a notice by imposing an absolute liability on municipalities for neglecting repairs.³⁹⁴

§ 1547. To whom notice may be given.—Notice of a highway defect to any municipal officer or agent having any duty to perform in respect to highway repairs is notice to the municipality; for instance, to an alderman as a member of the common council;³⁹⁵ and actual knowledge of such an officer is actual notice to the city.³⁹⁶ Under the application of this rule notice to a policeman has been held suffi-

cient in the condition of the street unless notice in writing, signed by the injured party, shall have been given to the proper persons within five days of the injury: *Hughes v. City of Fond du Lac*, 73 Wis. 380; s. c. 41 N. W. 407.

³⁹³ *Village of Jefferson v. Chapman*, 127 Ill. 438, 447; s. c. 20 N. E. 33; *City of Chicago v. Brophy*, 79 Ill. 277; *City of Chicago v. Johnson*, 53 Ill. 91; *City of Springfield v. Le Claire*, 49 Ill. 476.

³⁹⁴ Code of West Virginia, ch. 43, § 53, imposes an absolute liability on towns for injuries caused by the failure of the authorities to keep in repair those sidewalks within the corporate limits which they have opened and treated as public sidewalks, and a person injured by a defective sidewalk need not allege or prove that defendant had notice of the defect: *Chapman v. Milton*, 31 W. Va. 384; s. c. 7 S. E. 22.

³⁹⁵ *Dundas v. City of Lansing*, 75 Mich. 499; s. c. 42 N. W. 1011; *Carter v. Town of Monticello*, 68 Iowa 178; s. c. 26 N. W. 129; *City of Logansport v. Justice*, 74 Ind. 378; *City of Aurora v. Hillman*, 90 Ill. 61; *Trapnell v. Red Oak Junction*, 76 Iowa 744; s. c. 39 N. W. 884. But as to a latent defect, see *Vanderslice*

v. City of Philadelphia, 103 Pa. St. 102. It is admissible for plaintiff to prove that one of the aldermen of the city had notice of the defect in the crosswalk before the accident happened, as notice to one of the aldermen is notice to the city council, which body, under the city's charter, is invested with control of the streets: *McKeigue v. City of Janesville*, 68 Wis. 50; s. c. 31 N. W. 298. Notice to a city marshal of a defect in a sidewalk is not notice to the city, the marshal being clothed with no power and charged with no duty in the premises: *Cook v. City of Anamosa*, 66 Iowa 427; s. c. 23 N. W. 907.

³⁹⁶ The provision in a charter that the city shall not be liable for damages by reason of dangerous excavations, etc., without actual notice to one of the city officials three days before the accident, does not relieve the city from responsibility for the neglect of an alderman to erect a barrier on seeing the excavation and having actual knowledge of its dangerous character: *Cantwell v. City of Appleton*, 71 Wis. 463; s. c. 37 N. W. 813; *Fleming v. City of Springfield*, 154 Mass. 520; s. c. 28 N. E. 910.

cient,³⁹⁷ and to street commissioners,³⁹⁸ and to road overseers,³⁹⁹ and to street superintendents.⁴⁰⁰ And entries in books kept by the city and its departments to receive complaints of defective streets may be sufficient notice to the city.⁴⁰¹ In determining whether municipal officers should have discovered a defect, the jury may consider the fact that others did not notice it.⁴⁰²

§ 1548. Notice of injury.^{402a}—As we have already seen, in some states it is necessary to serve notice upon some designated municipal officer of the injury received and this is regarded as mandatory and a prerequisite to a right of action. Where a person is excused from giving the required statutory notice of an injury because it is impossible to do so from any physical or mental incapacity, the burden is upon such person to prove the existence of such incapacity, and proof of such physical and mental disorder as merely confines him to his bed is not sufficient,⁴⁰³ because such notice may be given through another

³⁹⁷ *Rehberg v. Mayor &c.*, 91 N. Y. 137; *Twogood v. Mayor &c.*, 102 N. Y. 216; s. c. 6 N. E. 275. By virtue of the ordinance of the city of Denver prescribing the duties of the chief of police, he is charged with the care of coal-holes and caps on the sidewalks of that city; and where he had knowledge of a defect existing in a cap, and owing to such defect an accident subsequently happened, the city should be charged with actual notice and be liable if there had been time before the accident reasonably sufficient to remedy the defect: *City of Denver v. Deane*, 10 Colo. 375; s. c. 16 Pac. 30. On the question of the liability of a city for an accident caused by an obstruction in a street, evidence that it was the duty of the police to report obstructions is admissible: *Bowman v. Tripp*, 14 R. I. 242.

³⁹⁸ *City of Scranton v. Catterson*, 94 Pa. St. 202.

³⁹⁹ *Parish v. Town of Eden*, 62 Wis. 272; s. c. 22 N. W. 399; *City of Osborne v. Hamilton*, 29 Kan. 1.

⁴⁰⁰ *Fleming v. City of Springfield*, 154 Mass. 520; s. c. 28 N. E. 910.

⁴⁰¹ In an action against a city for injuries received by reason of a de-

fect in the highway, a book kept in the office of the city messenger for the purpose of entering complaints as to the condition of the streets, sidewalks, etc., and recording the time when such complaints were attended to, is admissible to show notice to the city of the defect: *Blake v. City of Lowell*, 143 Mass. 296; s. c. 9 N. E. 627.

⁴⁰² *Broberg v. City of Des Moines*, 63 Iowa 523; s. c. 19 N. W. 340. See *City of Grand Rapids v. Wyman*, 46 Mich. 516; s. c. 9 N. W. 833.

^{402a} See ch. 29, ante.

⁴⁰³ Public statutes of Massachusetts, ch. 53, §§ 19, 21, require a person injured by a defect in a sidewalk to give notice to the city within thirty days, in writing, signed by himself, or some one in his behalf; but "if, from any physical or mental incapacity, it is impossible for the person injured to give the notice" within the time provided, he may give the same within ten days after such incapacity is removed. Plaintiff failed to give the notice until about three months after the injury, and the evidence showed that she had been confined to her bed; that her head had troubled her since the

person, and is in the nature of a condition precedent where the giving of it is not shown to be impossible.⁴⁰⁴ Where, as in Wisconsin, the statute makes service of notice, etc., a prerequisite to the maintenance of a suit against a town or city to recover for injuries sustained from a defect in a highway, service of the notice is indispensable, and the complaint must aver it.⁴⁰⁵ Where the time of the service of a notice, not its date, is the essential thing, it may be received in evidence with such explanations as can be given, although the date appears to have been altered.⁴⁰⁶ The question of the sufficiency of the notice is matter of law for the court.⁴⁰⁷ Notice of an injury sustained on a bridge to one of the several towns by which the bridge was jointly built is sufficient to bind all.⁴⁰⁸

§ 1548a. The same subject continued—Requisites of notice.—Inaccuracy in stating the cause of injury is not fatal unless it is misleading and in fact misleads.⁴⁰⁹ A notice of injury and claim is not

injury; that at times she had been dizzy, and her mind visionary; that for the first six weeks she was at times delirious in the night-time; that she appeared worse after opiates were given her by the physician's directions; and that she complained of her head frequently. These facts were held insufficient to show that it was impossible for her, from "physical or mental incapacity," to have given the notice: *May v. City of Boston*, 150 Mass. 517; s. c. 23 N. E. 220; *Mitchell v. City of Worcester*, 129 Mass. 525; *McNulty v. City of Cambridge*, 130 Mass. 275; *Lyons v. City of Cambridge*, 132 Mass. 534.

⁴⁰⁴ *Mitchell v. City of Worcester*, 129 Mass. 525; *Kenady v. City of Lawrence*, 128 Mass. 318; *Gay v. City of Cambridge*, 128 Mass. 387; *Larkin v. City of Boston*, 128 Mass. 521. A husband may serve the notice for his injured wife: *Smalley v. Appleton*, 75 Wis. 18; s. c. 43 N. W. 826.

⁴⁰⁵ *Wentworth v. Town of Summit*, 60 Wis. 281; s. c. 19 N. W. 97; *Dorsey v. City of Racine*, 60 Wis. 292; s. c. 18 N. W. 928.

⁴⁰⁶ *Spearbracker v. Town of Larabee*, 64 Wis. 573; s. c. 25 N. W. 555.

⁴⁰⁷ *Chapman v. Inhabitants &c.*, 76 Maine 427.

⁴⁰⁸ *Tyler v. Williston*, 62 Vt. 269; s. c. 20 Atl. 304.

⁴⁰⁹ Public statutes of Massachusetts, ch. 52, § 19, provide that persons injured by defects in the ways of cities or towns shall, within thirty days thereafter, give notice of the time, place and cause of the injury. It was held that, under acts of Massachusetts of 1882, ch. 36, such notice will not be insufficient for any inaccuracy in stating the cause of the injury if there was no intention to mislead, and the town was not, in fact, misled; and it is for the jury to find whether the notice was misleading or not: *Liffin v. Inhabitants &c.*, 145 Mass. 549; s. c. 14 N. E. 787; *Canterbury v. City of Boston*, 141 Mass. 215; s. c. 4 N. E. 808. See also, § 820, ante. A notice sufficiently states the cause of the injury which states that it occurred by reason of a pile of timber and a pile of hay, although the timber alone constituted the defect in the way: *Davis v. Inhabitants &c.*, 140 Mass.

fatally defective because it imperfectly or incorrectly designates the place of the injury.⁴¹⁰

§ 1549. Illustrations of sufficient notice.—The statutory notice of the nature and place of the injury is sufficient if given in general terms that can not be misunderstood. Technical terms and an accurate description in detail are not necessary.⁴¹¹ The notice required by

422; s. c. 5 N. E. 473. If a person steps into a drain running across the sidewalk of a street in a city, and, stumbling, falls over an embankment by the side of the street, which is unprotected by a railing, into an adjacent sewer, and is injured, a notice to the city stating the lack of a railing as the cause of his injury is sufficient: *Grogan v. City of Worcester*, 140 Mass. 227; s. c. 4 N. E. 230.

⁴¹⁰ A difference of sixty-five feet between the place of the accident, as proved, and the place as stated in the claim filed by plaintiff, is immaterial: *Masters v. City of Troy*, 50 Hun (N. Y.) 485; s. c. 3 N. Y. S. 450. In an action for personal injuries occasioned by a defect in a sidewalk the notice given by the plaintiff, as required by § 20, ch. 8, of the charter of the city of Minneapolis, stated that plaintiff, "while passing over a sidewalk upon the south side of T. street, between F. and S. avenues, . . . at a point near the intersection of said T. street and said S. avenue, . . . fell," etc. T. street crossed F. avenue, but did not go through to S. avenue, terminating at B. avenue, within one block of S. avenue. The defect complained of was upon T. street, but between F. and B. avenues. It was held that the notice sufficiently designated the place where the injury was received: *Harder v. City of Minneapolis*, 40 Minn. 446; s. c. 42 N. W. 350. The court said:—"In *Nichols v. City of*

Minneapolis, 30 Minn. 545; s. c. 16 N. W. 410, the manifest object of the provision of the charter now being considered was declared to be that the city might have timely notice of any claim made upon it, and thus be enabled to ascertain the facts to establish them while witnesses are obtainable, and the occurrence and the condition of the place at the time fresh in their recollection. It is obvious then that a notice which informs the proper authorities of the place with a reasonable certainty, and so that it can be found with reasonable diligence, is sufficient. And a notice of this character ought not to be construed with technical strictness. It is enough if it gives to the officer upon whom it must be served information with substantial certainty as to the place of injury, so as to be of aid to him in investigating the question of the liability of the municipality: *Spellman v. Inhabitants &c.*, 131 Mass. 443. And when it conveys the necessary information to the proper person it is good even though there are some inaccuracies in it: *City of La Crosse v. Town of Melrose*, 22 Wis. 459." See also, *Lowe v. Inhabitants &c.*, 133 Mass. 526; *Welch v. Inhabitants &c.*, 133 Mass. 529; *McCabe v. City of Cambridge*, 134 Mass. 484; *Lyman v. Hampshire Co.*, 138 Mass. 74; *Fopper v. Town of Wheatland*, 59 Wis. 623; s. c. 18 N. W. 514.

⁴¹¹ *Brown v. Town of Southbury*, 53 Conn. 212; s. c. 1 Atl. 819.

statute of the place of an accident is sufficiently specific if it describes a large hole in the planking of a bridge, although there are two smaller holes near by.⁴¹² Where a defect at the corner of two ways is minutely described in the notice required, the notice will not be deemed defective merely because it fails to specify the particular corner.⁴¹³ Nor is a notice defective because addressed personally to a municipal officer, if it is apparent that it was intended for the municipality.⁴¹⁴ A notice to a city of the place where an accident occurred which equally well describes two distinct localities, and can only be located by a description of ice which was there eight days before the notice was given, is insufficient.⁴¹⁵ A notice which merely states that the injury "was caused by an obstruction in the highway" is not sufficiently explicit.⁴¹⁶

§ 1550. Pleading of notice—Evidence of.—A complaint that a certain street formed a highway through a city, that it was badly out of repair, that the city had allowed a large ditch to be washed out on one side, and that plaintiff, being in ignorance of the ditch, and the city knowing said highway to be out of repair, was injured by driving into said ditch, was held, after verdict, to be a sufficient allegation of notice by the city.⁴¹⁷ A complaint against a city for negligently leaving an obstruction in its streets must allege that the city had notice of the obstruction, or ought to have had,⁴¹⁸ or must state facts from which such notice may be fairly inferred;⁴¹⁹ and for

⁴¹² *Lyman v. Hampshire Co.*, 138 Mass. 74.

⁴¹³ *Sargent v. City of Lynn*, 138 Mass. 599. A notice to a town described a defect in a way to be "the improper grading of the said road, and the want of proper railing by the side of said road." Held, that it could not be ruled, as matter of law, that notice of an improper declivity of a gutter at the roadside was not embraced in the notice given: *Spooner v. Inhabitants &c.*, 139 Mass. 235; s. c. 29 N. E. 662. The notice required to be given to a city as the foundation of an action to recover for injuries from a defective way may sufficiently locate the spot of the accident, even though the spot is described as being on the wrong side of the street, if from the rest of the description it is apparent that

no misunderstanding could have resulted: *Cloughessey v. City of Waterbury*, 51 Conn. 405.

⁴¹⁴ *Leonard v. City of Holyoke*, 138 Mass. 78.

⁴¹⁵ *Dalton v. City of Salem*, 139 Mass. 91; s. c. 28 N. E. 576.

⁴¹⁶ *Roberts v. Inhabitants &c.*, 140 Mass. 129; s. c. 2 N. E. 775.

⁴¹⁷ *City of Madison v. Baker*, 103 Ind. 41; s. c. 2 N. E. 236; *Corporation of Bluffton v. Mathews*, 92 Ind. 213; *Turner v. City of Indianapolis*, 96 Ind. 51.

⁴¹⁸ *Turner v. City of Indianapolis*, supra.

⁴¹⁹ *City of Lafayette v. Blood*, 40 Ind. 62; *Higert v. City of Greencastle*, 43 Ind. 574; *City of Fort Wayne v. De Witt*, 47 Ind. 391; *Town of Elkhart v. Ritter*, 66 Ind. 136.

want of such allegation of notice the complaint will be demurrable.⁴²⁰ Where the defective condition of a highway or bridge is not caused by the wrongful act of another, but arises from the fault of the corporation or county, or from decay or inherent insufficiency of the work, it is sufficient in the complaint to charge the negligence or omission complained of, and no averment of notice is necessary.⁴²¹ Subsequent repair is not evidence of prior notice of the defect.⁴²² The fact that a street commissioner was informed that there was a defect on a certain street, together with the presumption that he did his duty in going to look, will warrant a jury in finding that he had actual notice.⁴²³ As to defects caused by the acts of a city or village itself it is not necessary to prove either actual or constructive notice.⁴²⁴ The statute may make such presentment a condition precedent,⁴²⁵ or only a condition subsequent, or the statute may be only directory. In each case the terms of the statute must be clearly distinguished;⁴²⁶ and a substantial compliance with the statute is ordinarily sufficient.⁴²⁷

⁴²⁰ If the complaint, in an action against a town to recover damages sustained from a defect in a sidewalk, fails to aver notice on the part of the town of the existence of the defect, or facts imputing notice, it is demurrable: *Town of Spiceland v. Alier*, 98 Ind. 467; *Worster v. Proprietors &c.*, 16 Pick. (Mass.) 541; *City of Fort Wayne v. De Witt*, 47 Ind. 391.

⁴²¹ In an action against a county for its negligence in suffering the timbers of a bridge to become rotten, whereby plaintiff was injured, notice to defendant of the condition of the bridge need not be alleged: *Board &c. v. Bacon*, 96 Ind. 31. See also, *City of South Bend v. Paxon*, 67 Ind. 228; *City of Indianapolis v. Scott*, 72 Ind. 196; *Board &c. v. Brown*, 89 Ind. 48; *Board &c. v. Emerson*, 95 Ind. 579.

⁴²² The fact that immediately after an accident caused by a defective sidewalk the city removed it and substituted a better one, is relevant as tending to show that the walk was out of repair, but not that the city had notice: *City of Em-*

poria v. Schmidling, 33 Kan. 485; s. c. 6 Pac. 893.

⁴²³ *Welch v. City of Portland*, 77 Maine 384. Evidence of the condition of the sidewalk where plaintiff was injured and of similar accidents occurring there previously is admissible to show notice on the part of defendant: *Stebbins v. Village of Oneida*, 5 N. Y. S. 483; § 1545, ante.

⁴²⁴ *Riddle v. Village of Westfield*, 65 Hun (N. Y.) 432; s. c. 20 N. Y. S. 359; *Turner v. City of Newburgh*, 109 N. Y. 301; s. c. 16 N. E. 344; § 1546, ante.

⁴²⁵ Where a city charter, like that of Buffalo, requires that "all claims against the city" shall be presented for audit, a claim for injuries sustained from a defect in a street must be so presented before suit: *Nagel v. City of Buffalo*, 34 Hun (N. Y.) 1; *Minick v. City of Troy*, 19 Hun (N. Y.) 253; s. c. 83 N. Y. 514.

⁴²⁶ *McGaffin v. City of Cohoes*, 11 Hun (N. Y.) 531; s. c. 74 N. Y. 387; *Quinlan v. City of Utica*, 11 Hun (N. Y.) 217; *Childs v. Village of West Troy*, 23 Hun (N. Y.) 68.

⁴²⁷ A statutory requirement that a

§ 1551. **Evidence in personal injury cases.**—Plaintiff must prove the existence of the specific defect alleged in the complaint;⁴²⁸ in a given case he may do so by proving that the way was continuously defective;⁴²⁹ but not where the defect was clearly not continuous, as, for instance, a single loose board of a sidewalk.⁴³⁰ Where there is no evidence of an intervening change in the locus in quo the court may, in its discretion, allow evidence of a prior or later condition of the place of accident.⁴³¹ Evidence of repairs immediately subsequent

claim against a city shall be "presented to the common council for audit" is complied with by a presentation to the clerk of the common council: *Murphy v. City of Buffalo*, 38 Hun (N. Y.) 49.

⁴²⁸ *Armstrong v. Town of Ackley*, 71 Iowa 76; s. c. 32 N. W. 180. Testimony to a fall upon the same walk from a defect in it, by one who is unable to state the exact place of the defect, is altogether inadmissible, and it is error to admit it, so far as it relates to the point at which the accident complained of occurred: *Hoyt v. City of Des Moines*, 76 Iowa 430; s. c. 41 N. W. 63. In an action for personal injuries a witness was asked: "Don't you know as a fact that this sidewalk was fixed in March, 1887?" Held, that the question was objectionable, as it did not appear to refer to a repairing of the defect alleged by plaintiff, and therefore did not tend to show what was the condition of the sidewalk at the time of the accident, in February, 1887: *Hillesum v. Mayor &c.*, 56 N. Y. Super. Ct. 596; s. c. 4 N. Y. S. 806. In an action for injuries by slipping on an icy sidewalk, plaintiff may show that at about the same time other persons slipped and fell at the same place: *Masters v. City of Troy*, 50 Hun (N. Y.) 485; s. c. 3 N. Y. S. 450. In an action against a city for personal injuries caused by falling into a hole in a sidewalk, evidence that another fell into the same hole on the same night is inadmissible: *Moore v. City*

of Richmond, 85 Va. 538; s. c. 8 S. E. 387.

⁴²⁹ *Moore v. City of Richmond*, supra.

⁴³⁰ *Ruggles v. Town of Nevada*, 63 Iowa 185; s. c. 18 N. W. 866. In an action for injuries occasioned by a defective crossing, testimony tending to show generally the defective condition of the sidewalk a block or more each way from the crossing was inadmissible: *Dundas v. City of Lansing*, 75 Mich. 499; s. c. 42 N. W. 1011.

⁴³¹ In an action against a municipal corporation for injuries received from a fall on an icy sidewalk, evidence of the icy condition of the sidewalk a week before the accident is properly rejected, in the discretion of the presiding judge: *Woodcock v. City of Worcester*, 138 Mass. 268. In an action against a city for a personal injury sustained by falling on an icy sidewalk, evidence is competent to show the like condition of the sidewalk nineteen days later, and the height, slope and surface of an adjacent field, at a point twenty-five feet distant, there being no evidence of any intermediate change: *Berrenberg v. City of Boston*, 137 Mass. 231; s. c. 50 Am. R. 296; *Stone v. Inhabitants &c.*, 100 Mass. 49; *Fitzgerald v. Inhabitants &c.*, 109 Mass. 204. In an action against a city for injuries received from a defective sidewalk, testimony of the condition of the walk after the accident is inadmissible, in the absence of evidence that its condition

to an accident is admissible to show the existence of a defect which the city ought to repair,⁴³² and to show that the city exercised authority and control over the locus in quo;⁴³³ but not for the purpose of showing that the city was negligent, as negligence would depend also on notice to the city.⁴³⁴ As Baron Bramwell said:—"People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before."⁴³⁵ In some states the subsequent conduct of a common carrier may be proved if it tends to show an admission of negligence;⁴³⁶ but such subsequent

was the same at the time of the accident: *Hoyt v. City of Des Moines*, 76 Iowa 430; s. c. 41 N. W. 63.

⁴³² *Brennan v. City of St. Louis*, 92 Mo. 482; s. c. 2 S. W. 481; *Mitchell v. City of Plattsburg*, 33 Mo. App. 555; *City of Goshen v. England*, 119 Ind. 368; s. c. 21 N. E. 977; *Dale v. Delaware & C. R. Co.*, 73 N. Y. 468, 472; *City of Emporia v. Schmidling*, 33 Kan. 485; s. c. 6 Pac. 893.

⁴³³ *Sewell v. City of Cohoes*, 75 N. Y. 45; distinguishing *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1.

⁴³⁴ *Columbia R. Co. v. Hawthorne*, 144 U. S. 202; s. c. 12 S. Ct. 591; *Brennan v. City of St. Louis*, 92 Mo. 482, 488; s. c. 2 S. W. 481. See *Nally v. Hartford Carpet Co.*, 51 Conn. 524; *Morse v. Minneapolis & C. R. Co.*, 30 Minn. 465; s. c. 16 N. W. 358, where *O'Leary v. City of Mankato*, 21 Minn. 65; *Phelps v. City of Mankato*, 23 Minn. 276; and *Kelly v. Southern R. Co.*, 28 Minn. 98; s. c. 9 N. W. 588, are explained and limited. See also, *Baird v. Daly*, 68 N. Y. 547; *Corcoran v. Village of Peekskill*, 108 N. Y. 151; s. c. 15 N. E. 309; *Ely v. St. Louis R. Co.*, 77 Mo. 34; *Missouri Pacific R. Co. v. Hennessey*, 75 Tex. 155; s. c. 12 S. W. 608; *Terre Haute & C. R. Co. v. Clem*, 123 Ind. 15; s. c. 23 N. E. 965; *Hodges v. Percival*, 132 Ill.

53; s. c. 23 N. E. 423; *Lombar v. Village of East Tawas*, 86 Mich. 14; s. c. 48 N. W. 947; *Shinners v. Proprietors & C.*, 154 Mass. 168; s. c. 28 N. E. 10. Evidence that after the accident the sidewalk commissioner stated that he had given notice to repair the walk is inadmissible, where it does not appear whether the notice was given before or after the accident, or where the officer is not shown to have been acting in the discharge of his official duty when making the statement: *Hoyt v. City of Des Moines*, 76 Iowa 430; s. c. 41 N. W. 63.

⁴³⁵ *Hart v. Lancashire & C. R. Co.*, 21 L. T. (N. S.) 261, 263.

⁴³⁶ *Martin v. Towle*, 59 N. H. 31. In *West Chester & C. R. Co. v. McElwee*, 67 Pa. St. 311, in an action for death by negligence from cars striking a cart which was on scales near to a railroad track, it was held to be proper to show that after the accident the track was removed to a greater distance, the court saying:—"If the proximity of the track to the buildings did not increase the danger, why was it moved? And if it did, then a higher degree of care was necessary in order to avoid accident; and in this respect the evidence was properly received." See also, *McKee v. Bidwell*, 74 Pa. St. 218; *Pennsylvania R. Co. v. Hender-*

act should follow at once, and not be in fact an ordinary betterment having no particular reference to the accident.⁴³⁷ To prove contributory negligence in a case of injury on the highway, evidence of plaintiff's physical infirmities is admissible;⁴³⁸ and of his intoxication at the time;⁴³⁹ and evidence of an ordinance against fast driving.⁴⁴⁰

§ 1552. Instructions to jury.—A general and imperfect instruction to the jury may be so supplemented by another instruction as to be neither erroneous nor impertinent; for instance, as to the municipal duty of reasonable care and repair,⁴⁴¹ and as to plaintiff's duty of due care,⁴⁴² and as to the element of notice.⁴⁴³ One instruction must

son, 51 Pa. St. 315; *St. Louis &c. R. Co. v. Weaver*, 35 Kan. 412; s. c. 11 Pac. 408.

⁴³⁷ *Dale v. Delaware &c. R. Co.*, 73 N. Y. 468, 472.

⁴³⁸ In an action for injuries caused by a defective street crossing, evidence that plaintiff was short-sighted and wore spectacles is admissible as bearing on his contributory negligence in attempting to cross the defective crossing: *City of Austin v. Ritz*, 72 Tex. 391; s. c. 9 S. W. 884.

⁴³⁹ Code of Iowa, § 2704, provides that "under a denial of an allegation, no evidence shall be introduced which does not tend to negative some fact the party making the controverted allegation is bound to prove." In an action for personal injuries received by reason of defects in a street, it being incumbent on plaintiff to prove that he was free from contributory negligence, evidence was held to be admissible that at the time of the accident plaintiff was intoxicated: *Fernbach v. City of Waterloo*, 76 Iowa 598; s. c. 41 N. W. 370.

⁴⁴⁰ An ordinance of the city is admissible which makes immoderate driving in any street of the city, unless in case of urgent necessity, a misdemeanor, though no evidence of immoderate driving has been introduced: *Fernbach v. City of Waterloo*, 76 Iowa 598; 41 N. W. 390; overruling s. c. 34 N. W. 610.

⁴⁴¹ An instruction that "the city is not an insurer of the safety of persons traveling upon its sidewalks," followed by the true rule as to the city's liability, is not impertinent and uncalled for: *Lindsay v. City of Des Moines*, 74 Iowa 111; s. c. 37 N. W. 9. The failure in one instruction to qualify "repair" by the word "reasonable," in speaking of the duty of a municipal corporation "to maintain and keep in repair its sidewalks," is without prejudice where in other instructions the liability is expressly limited to the failure to exercise ordinary care and prudence: *Village of Mansfield v. Moore*, 124 Ill. 133; s. c. 16 N. E. 246.

⁴⁴² Where, in an action against a city to recover damages for personal injuries caused by a defective sidewalk, the court has instructed the jury as to the care which must have been exercised by the plaintiff to entitle him to a recovery, an instruction, the sole purpose of which is to tell the jury what the elements of damages are, and which should be taken into consideration by them in the event of finding the city guilty of negligence, is not objectionable for failing to contain a hypothesis of due care on the part of the plaintiff: *Village of Sheridan v. Hibbard*, 119 Ill. 307; s. c. 9 N. E. 901.

⁴⁴³ The failure to mention the element of notice to defendant in one instruction is without prejudice where the correct rule of notice is

not, however, be construed with another if the effect will be calculated to confuse or mislead the jury.⁴⁴⁴ An instruction as to notice must be correct in its theory; that is, as to whether no notice was required or constructive notice was required;⁴⁴⁵ and must not be obscure and misleading.⁴⁴⁶ But an untechnical and involved instruction is not

given in other instructions: *Village of Mansfield v. Moore*, 124 Ill. 133; s. c. 16 N. E. 246.

⁴⁴⁴ An instruction that, if plaintiff was injured owing to the negligence of the defendant in not removing an obstruction on its sidewalk which plaintiff may have proven was there, the jury may find for plaintiff, is erroneous, in that it does not require them to find that plaintiff was using ordinary care in walking on such sidewalk; and the fact that the law on the subject was correctly given in another instruction is not material, as it can not be known by which instruction the jury was governed: *City of Boulder v. Niles*, 9 Colo. 415; s. c. 12 Pac. 632.

⁴⁴⁵ In an action for injuries sustained from the negligent construction of a sidewalk and ditch in a street, an instruction that plaintiff can not recover unless defendant had notice of the defective and dangerous condition of the sidewalk and ditch, without further instruction as to the law of actual and constructive notice, and without qualification as to the possible finding that the city built the walk and ditch, is error: *Klein v. City of Dallas*, 71 Tex. 280; s. c. 8 S. W. 90. In an action against a city for injuries, a charge that if the jury should find "an open ditch cut by the city," etc., is not erroneous as assuming that the city cut the ditch: *City of Austin v. Ritz*, 72 Tex. 391; s. c. 9 S. W. 884. It is error to submit a case to the jury on the theory that the defective condition of the sidewalk for more than four weeks was the direct and proximate cause of the accident,

when it appears that the defect which caused the injury was a loose plank, put down but a few hours before the accident, before which time there had been no passable sidewalk for more than four weeks; it not appearing that the city officials had notice of the defect which caused the injury: *Hiner v. City of Fond du Lac*, 71 Wis. 74; s. c. 36 N. W. 632.

⁴⁴⁶ An instruction that if "the sidewalk in question was repaired and placed in good condition by the city, within a reasonable time prior to this alleged accident, and if said walk afterwards became out of repair without actual notice to the city, then plaintiff can not recover," is properly refused, as obscure and misleading, since actual notice by the city of the defect is not essential to plaintiff's recovery if the defect had existed for such a time that the city officers, by the use of reasonable diligence, might have discovered it before the accident: *City of Sterling v. Merrill*, 124 Ill. 522; s. c. 17 N. E. 6. In an action against a city for injuries, there being evidence to justify a finding either way as to whether a street on which an accident occurred had been opened and worked for public travel by authority of the city, it is error to refuse to charge that the opening and widening of streets is a matter of discretion, and that the city would not be responsible for the condition of the street until opened, though the street was named in the city ordinances: *City of Austin v. Ritz*, 72 Tex. 391; s. c. 9 S. W. 884.

necessarily misleading.⁴⁴⁷ A party can not object to an instruction given in the words of his request.⁴⁴⁸ An instruction which requires the jury to find that plaintiff exercised ordinary care, and that defendant's negligence in the construction or maintenance of the sidewalk produced the injury, properly states the rule of negligence.⁴⁴⁹ It is enough that an instruction as to contributory negligence requires ordinary care and prudence of plaintiff,⁴⁵⁰ and it is not error to refuse to repeat it or to refuse to give it in the form requested.⁴⁵¹

⁴⁴⁷ An instruction to the jury that they were to find whether the sidewalk at the place where the plaintiff was injured was in an "unreasonably dangerous" condition is not misleading: *Lindsay v. City of Des Moines*, 74 Iowa 111; s. c. 37 N. W. 9.

⁴⁴⁸ At the trial of an action involving the question of the existence of a public way by prescription, a general instruction that the use must be by the public, adverse and under a claim of right, and not permissive, and must be continuous and uninterrupted, was given in the words of plaintiff's prayer for instructions. It was held that they could not object that other instructions did not give sufficient effect to the acts of the landowners, negating acquiescence on their part: *Weld v. Brooks*, 152 Mass. 297; s. c. 25 N. E. 719.

⁴⁴⁹ *Village of Mansfield v. Moore*, 124 Ill. 133; s. c. 16 N. E. 246; *Calumet &c. Steel Co. v. Martin*, 115 Ill. 358; s. c. 3 N. E. 456.

⁴⁵⁰ An instruction that if plaintiff knew of the defect, and knew that it was dangerous to go upon the walk at night, and there was another way he might have taken, but, with this knowledge, persisted in going upon the street, he would be guilty of contributory negligence; but if, knowing the defect, he reasonably believed that it was not imprudent to go upon the walk, and had the right as a reasonably prudent man to so believe, his going upon the walk would not be negligence, and if,

after going on the walk, he used such care as an ordinarily prudent man would under the circumstances, and met with the accident through defendant's negligence, he is entitled to recover for the injury sustained; but if he did not use such care, he is not entitled to recover, although defendant was negligent, is correct: *Kendall v. City of Albia*, 73 Iowa 241; s. c. 34 N. W. 833.

⁴⁵¹ Where, in an action for injuries received at a defective street crossing, the court defines reasonable care, and instructs the jury that if from the injured person's knowledge of the condition of the locality, the length of time such condition had existed, the nearness or remoteness of other proper approaches available, and all other facts and circumstances proven, they find contributory negligence, plaintiff can not recover, although defendant was negligent as alleged, it is not error to refuse an instruction that the injured person's knowledge of the condition of the crossing, and that it was dangerous, will not prevent a recovery, if she used proper care: *Larsh v. City of Des Moines*, 74 Iowa 512; s. c. 38 N. W. 384. Plaintiff asked instructions that "the fact that she knew that a ridge of ice, dangerous in its character, existed at the place of injury, did not conclusively prove negligence on her part in attempting to pass over it; and that, if she had reasonable cause to believe that she could pass in safety over it, and used reasonable care in the attempt,

§ 1553. **Exercise of care by person injured.**—While a person's knowledge of the dangerous condition of a street or of a dangerous place therein generally imposes upon him a corresponding duty of care and caution in passing through or over or near it,⁴⁵² yet he is not negligent, as matter of law, in attempting to pass through or over it,⁴⁵³

she might recover; and that she was not bound, as a matter of law, to have her attention directed, at the moment of danger, to the alleged defect." These were not given, and, while plaintiff's counsel was making his closing argument, the court stated that, if a person knows a way to be dangerous when he enters on it, he can not, with ordinary prudence, proceed and take his chances, and, if injured, look to the town for indemnity; but in charging the jury the court left to them the whole question of what was due care, under all the circumstances, and whether plaintiff exercised such care. This was held no error: *Parker v. City of Springfield*, 147 Mass. 391; s. c. 18 N. E. 70; *Howes v. Grush*, 131 Mass. 207; *Inhabitants &c. v. Connecticut River R. Co.*, 144 Mass. 325; s. c. 11 N. E. 105.

⁴⁵² *Palmer v. Dearing*, 93 N. Y. 7, 10; *Gordon v. City of Richmond*, 83 Va. 436; s. c. 2 S. E. 727; *City of Fort Wayne v. Breese*, 123 Ind. 581; s. c. 23 N. E. 1038; *Moore v. Huntington*, 31 W. Va. 842, 848; s. c. 8 S. E. 512; *Beach Contr. Neg.* (2d ed.), § 246, where the whole subject of contributory negligence in actions for injuries from defective highways is minutely discussed in chapter 10.

⁴⁵³ *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459; s. c. 11 N. E. 43; *Bullock v. Mayor &c.*, 99 N. Y. 654; s. c. 2 N. E. 1; *McGuire v. Spence*, 91 N. Y. 303; *Brusso v. City of Buffalo*, 90 N. Y. 679; *Evans v. City of Utica*, 69 N. Y. 166; *Shook v. City of Cohoes*, 108 N. Y. 648; s. c. 15 N. E. 531; *City of Sandwich*

v. Dolan, 141 Ill. 430; s. c. 31 N. E. 416; *Ellis v. City of Peru*, 23 Ill. App. 35; *Langan v. City of Atchison*, 35 Kan. 318; s. c. 11 Pac. 38. In the last case in Massachusetts (*Pomeroy v. Inhabitants &c.*, 154 Mass. 462; s. c. 28 N. E. 899) in which this question was considered, *Holmes, J.*, said:—"Even if it were found that the plaintiffs knew they were attempting a dangerous drive, it could not be said, as matter of law, that they were not warranted in doing so." See also, *Linnehan v. Sampson*, 126 Mass. 506; *Eckert v. Long Island R. Co.*, 43 N. Y. 502; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316; s. c. 28 N. E. 172; *Maus v. City of Springfield*, 101 Mo. 613, 618; s. c. 14 S. W. 630. It has been so held as to one driving over a bridge which he knew to be defective: *Spearbracker v. Town of Larrabee*, 64 Wis. 573; s. c. 25 N. W. 555; *Kelly v. New York &c. R. Co.*, 9 N. Y. S. 90; *Taylor v. Town of Constable*, 10 N. Y. S. 607; *Gulf &c. R. Co. v. Gasscamp*, 69 Tex. 545; s. c. 7 S. W. 227; *Monongahela Bridge Co. v. Bevard (Pa.)*, 11 Atl. 575. In an action for personal injuries occasioned by a defective sidewalk, plaintiff's knowledge of the existence of the defect is not conclusive evidence of contributory negligence: *Argus v. Village of Sturgis*, 86 Mich. 344; s. c. 48 N. W. 1085. - - - Plaintiff was injured by the overturning of the sleigh in which she was riding, caused by embankments of snow and ice. All the streets were covered with deep snow, and, though the embankments were visible, it was not clearly shown that they ap-

nor bound to exercise extraordinary care.⁴⁵⁴ The question of his negligence in such a case is one of fact to be determined by the jury,⁴⁵⁵ and the burden of proving his contributory negligence is upon the city.⁴⁵⁶ Whether a place is so visibly and notoriously dangerous as to make the attempt to pass over it an act of negligence is ordinarily a question for the jury;⁴⁵⁷ but there may be an exception

peared dangerous. Plaintiff had no special knowledge of driving, and was being driven by a man. It was held that she was not, as matter of law, guilty of contributory negligence in allowing herself to be driven along that street: *Carr v. City of Easton*, 142 Pa. St. 139; s. c. 21 Atl. 822. See also, *Beach Contr. Neg.* (2d ed.), § 247.

⁴⁵⁴ *County Commissioners v. Burgess*, 61 Md. 29; *Murphy v. City of Indianapolis*, 83 Ind. 76; *City of Huntington v. Breen*, 77 Ind. 29; *Maulby v. City of Leavenworth*, 28 Kan. 745.

⁴⁵⁵ *Palmer v. Dearing*, 93 N. Y. 7, 10; *Bassett v. Fish*, 75 N. Y. 303; *Weed v. Village of Ballston Spa*, 76 N. Y. 329; *Niven v. City of Rochester*, 76 N. Y. 619; *Lanigan v. New York Gas Light Co.*, 71 N. Y. 29. Where plaintiff drove through a street which was being repaired, and the condition of which he knew, and his horse was frightened and ran away, the question of contributory negligence was properly left to the jury: *Hotchkin v. Borough of Phillipsburg (Pa.)*, 8 Atl. 434. Plaintiff on a dark night went home over a sidewalk which he knew to be dangerous. He was held not necessarily guilty of contributory negligence, although he might have avoided the sidewalk by taking to the street, or going between the sidewalk and a fence, or by going around the square, if these routes were not perfectly safe, but that it was a question for the jury whether he acted prudently under all the circumstances (*Gordon and Paxson, JJ.*, dissenting): *City of Altoona v.*

Lotz, 114 Pa. St. 238; s. c. 7 Atl. 240. See also, *Hampson v. Taylor*, 15 R. I. 83; s. c. 8 Atl. 331; 23 Atl. 732; *McKeigue v. City of Janesville*, 68 Wis. 50; s. c. 31 N. W. 298; *Byerly v. City of Anamosa*, 79 Iowa 204; s. c. 44 N. W. 359.

⁴⁵⁶ The burden of proving contributory negligence is upon the city, and it may be proved by affirmative testimony, or deduced from all the evidence in the case; it must be established by a preponderance of evidence: *Gordon v. City of Richmond*, 83 Va. 436; s. c. 2 S. E. 727.

⁴⁵⁷ *Embler v. Town of Walkill*, 132 N. Y. 222; s. c. 30 N. E. 404; *Bly v. Whitehall Village*, 120 N. Y. 506; s. c. 24 N. E. 943, where the court said:—"The evidence does not disclose a situation so palpably unsafe that this court can affirm, as a matter of law, that the plaintiff was negligent." Thus in *Jung v. City of Stevens Point*, 74 Wis. 547; s. c. 43 N. W. 513, the court was held correct in refusing to charge "that if the jury found the plaintiff did not know the condition of the highway but saw the water was over the road and there was nothing to indicate the line between the highway and the river, and then deliberately drove into the water on the highway without making any inquiry into the danger, they must find the plaintiff guilty of negligence." When there is no visible sign to indicate that any portion of a road-bed is unsafe, a traveler is not obliged to follow the beaten track but may travel over any part of the road prepared as a road-bed: *Wakeham v. St. Clair Tp.*, 91 Mich. 15; s. c. 51 N. W. 696.

to this rule in cases of extraordinary and appalling danger, as where a sudden freshet sweeps across the highway with wild and resistless force.⁴⁵⁸ It is strong evidence of negligence if one approaches a place he knows to be dangerous without looking where he is going.⁴⁵⁹ A traveler is bound to observe the presence of lawful obstructions, such, for example, as a temporary substitute for a sidewalk, made in the course of building or a public improvement, and to exercise greater care than would be necessary upon a permanent sidewalk.⁴⁶⁰ A traveler's right to use a highway is subordinate to the right of the authorities to make reasonable repairs, and a person who knows of a temporary defect co-existent with such repairs and voluntarily undertakes to brave it or test it, when it could be avoided, can not recover for an injury thereby incurred.⁴⁶¹ Not to avoid a dangerous place in a

⁴⁵⁸ *Hopkins v. Town of Rush River*, 70 Wis. 10; s. c. 34 N. W. 909; 35 N. W. 939; *Merrill v. Inhabitants &c.*, 78 Maine 200; s. c. 3 Atl. 575; *Phillips v. Ritchie Co.*, 31 W. Va. 477; s. c. 7 S. E. 427.

⁴⁵⁹ The testimony showed that plaintiff walked along the street without paying attention to the sidewalk, and that it was notoriously rotten, so that any one could see the earth beneath the plank. But the question of contributory negligence was left to the jury: *Osborne v. City of Detroit*, 32 Fed. 36. In an action to recover from a municipal corporation for leaving a deep and dangerous pit close to a street, into which plaintiff fell, and was injured, the evidence showed that he knew of the existence of the pit; that he had once before fallen into it; and that he fell into it while walking along at night, absorbed in thought, and not looking where he was going. He was held guilty of contributory negligence: *Walker v. Town of Reidsville*, 96 N. C. 382; s. c. 2 S. E. 74. For modifications of the rule in North Carolina, see *Bunch v. Town of Edenton*, 90 N. C. 431; *Rigler v. Charlotte &c. R. Co.*, 94 N. C. 604; *Murray v. Richmond &c. R. Co.*, 93 N. C. 92. In *Walker v. Town of*

Reidsville, supra, the court said:—"A reasonably careful and prudent man would not forget the presence of such danger in his immediate neighborhood—one that he had seen every day for a fortnight. He was bound to act on his information and use ordinary care and prudence in protecting himself from what he knew to be a menacing danger." See also, *Railroad Co. v. Houston*, 95 U. S. 697; *Beach Contr. Neg.* (2d ed.), § 37.

⁴⁶⁰ *Nolan v. King*, 97 N. Y. 565. See also, *City of Vicksburg v. Hennessy*, 54 Miss. 391; *Jacobs v. Inhabitants &c.*, 16 Maine 187.

⁴⁶¹ *Crescent Tp. v. Anderson*, 114 Pa. St. 643; s. c. 8 Atl. 379; *Forks Tp. v. King*, 84 Pa. St. 230; *Pittsburgh R. Co. v. Taylor*, 104 Pa. St. 306. At the time of the injury complained of defendant city was engaged in grading and graveling two cross-streets. A sidewalk had been laid on one side of one street, terminating at its intersection with the other, where, as there had been no crossing constructed, it was left several inches above the surface, to join on to the crossing when constructed. Plaintiff, while walking along the sidewalk, with knowledge of its unfinished condition, and with-

street by crossing the street or passing around through another street is not negligence as matter of law, but is a fact for the jury on a consideration of all the facts, and depends in each case on the degree of danger.⁴⁶² But ordinarily it is strongly presumptive of negligence to incur a known danger which can be avoided by a slight change of the route.⁴⁶³ Of course, the ordinary rule is wholly reasonable where

out looking, walked off the end of it, receiving the injuries sued for. It was held that she was not entitled to damages: *City of Plymouth v. Milner*, 117 Ind. 324; s. c. 20 N. E. 235. See also, *Larsh v. City of Des Moines*, 74 Iowa 512; s. c. 38 N. W. 384.

⁴⁶² The true rule was clearly and carefully stated by Devens, J., in *Parker v. City of Springfield*, 147 Mass. 391; s. c. 18 N. E. 70:—"There are different degrees of danger as there are defects in ways of a more or less serious character. As there are some defects which, if not rendering it absolutely impossible to pass over a way in safety, are such that only a reckless person would make the attempt, so there are others which would not prevent a prudent person from using the way, but would only impose upon him the duty of greater care and caution. It can not, therefore, be said that, if one knows a way to be in any degree dangerous, he can only use the highway at his own risk. Whether he acts prudently in attempting to use it, and takes the precautions he should in so doing, are questions for the jury." In an action for personal injuries sustained through a defective sidewalk plaintiff testified that she had often walked over the sidewalk in question, but expressly denied that she knew of its dangerous condition. It was held that whether plaintiff acted negligently in attempting to cross over the sidewalk instead of the opposite sidewalk, which was in good condition, was a question for the jury: *Boland*

v. City of Kansas, 32 Mo. App. 8. In an action against a city for injuries caused by a defective sidewalk, it appearing that plaintiff knew the sidewalk was out of repair and dangerous but that the injury probably resulted from a latent defect of which plaintiff was ignorant, and that plaintiff might have gone another way but little longer, an instruction that, if plaintiff knew the sidewalk to be dangerous, it was her duty to use all care to avoid defendant's negligence, and if she could have gone another way but little further she could not recover, would be improper: *Moore v. Huntington*, 31 W. Va. 842; s. c. 8 S. E. 512. In an action against a city for injury caused by falling on a defective sidewalk which plaintiff knew to be out of repair it is error to instruct the jury that, if plaintiff's most direct route home was over that sidewalk, then the fact that it was defective and had been so for some months would not oblige him to take a less convenient route, since the question whether plaintiff exercised ordinary care is one of fact: *City of Sandwich v. Dolan*, 133 Ill. 177; s. c. 24 N. E. 526; distinguishing *City of Aurora v. Hillman*, 90 Ill. 61.

⁴⁶³ *Fulliam v. City of Muscatine*, 70 Iowa 436; s. c. 30 N. W. 861; *Parkhill v. Town of Brighton*, 61 Iowa 103; s. c. 15 N. W. 853. One who undertakes to use a public road knowing it is unsafe and what defects made it so, and not choosing to avoid them by taking another road, precludes himself

there is no other way leading to the traveler's destination,⁴⁶⁴ or where the traveler, knowing of the defect, does not know it to be dangerous.⁴⁶⁵

§ 1553a. Duty to look and listen.—One who passes along a sidewalk is not bound to look and listen like one who approaches a railroad crossing, and is not negligent for not being on his guard against a defective or unlawful condition of the sidewalk⁴⁶⁶ or of the car-

from recovery against the township; and where the facts are undisputed the court should instruct a verdict for the township: *Hill v. Tionesta Tp.*, 146 Pa. St. 11; s. c. 23 Atl. 204. While the mere fact that the crosswalk was steep and dangerous, and that there was a safe way which plaintiff could have taken, will not prevent recovery, still, if knowing it to be dangerous, he knew or might have known that it was not prudent to walk over the crossing and down the slope and that there was another way he could have taken without material inconvenience, he could not recover, and the jury should have been instructed that the question of prudence was controlling: *Hartman v. City of Muscatine*, 70 Iowa 511; s. c. 30 N. W. 859. See also, *Gribble v. City of Sioux City*, 38 Iowa 390; *Moore v. Inhabitants &c.*, 32 Maine 46; *Gilman v. Inhabitants &c.*, 15 Gray (Mass.) 577.

⁴⁶⁴ Plaintiff's wife, the person injured, admitted that she knew that the sidewalk was not in good repair, but there was nothing to show that she regarded it as dangerous. She had passed over the walk frequently and others passed over it daily without mishap. At the time of the accident she was walking in the usual way, carefully, and this was the only walk leading to the place of her destination. Her conduct was held no such contributory negligence as to require the court to direct a verdict for defendant: *Troxel v. City of*

Vinton, 77 Iowa 90; s. c. 41 N. W. 580; *Kendall v. City of Albia*, 73 Iowa 241; s. c. 34 N. W. 833.

⁴⁶⁵ Though a person injured by a defect in a street after dark knew of such defect, but did not know it was dangerous, he can not be said, as a matter of law, to be guilty of contributory negligence in attempting to use the street, but the question is for the jury: *City of Richmond v. Mulholland*, 116 Ind. 173; s. c. 18 N. E. 832. In an action against a city for injuries caused by a defective sidewalk it appeared that plaintiff knew that the sidewalk was out of repair and dangerous; that the injury to plaintiff was not necessarily caused by the apparent defects, but possibly by the breaking of a decayed plank covering a culvert and which the plaintiff could not have detected by any reasonable prudence or care. It was held it was proper to submit the plaintiff's evidence showing these facts to the jury: *Moore v. Huntington*, 31 W. Va. 842; s. c. 8 S. E. 512.

⁴⁶⁶ *Gordon v. City of Richmond*, 83 Va. 436; s. c. 2 S. E. 727; *McGuire v. Spence*, 91 N. Y. 303. In *Chicago v. Babcock*, 143 Ill. 358; s. c. 32 N. E. 271, the court said:—"A person passing along a sidewalk in a city is required to use ordinary and reasonable care and diligence to avoid danger, but what is such ordinary and reasonable care depends upon the circumstances of each particular case, and is a question of fact

riage-way;⁴⁶⁷ he is not bound to anticipate danger without some knowledge of a condition of things suggesting danger.⁴⁶⁸ On the one hand streets and sidewalks should be in such a condition that travelers can use them without constant fear and solicitude; on the other, no traveler can shut his eyes to defects which he daily sees or which are obvious as he passes along.⁴⁶⁹ The fact of running on a street and not looking where one steps is not of itself negligence if the street is not known to be unsafe,⁴⁷⁰ for contributory negligence in such a case is a question for the jury on all the facts, and therefore it is error to charge the jury that one must use his eyes as well as his feet, to look where he is going and observe the condition of the sidewalk.⁴⁷¹

for the jury. A pedestrian upon such sidewalk may ordinarily assume that the sidewalk is in a reasonably safe condition for travel. To hold that such person is absolutely bound to keep his or her eyes constantly fixed on the sidewalk in a search for possible holes or other defects would be to establish a manifestly unreasonable and wholly impracticable rule." A person is not guilty of contributory negligence in not being on the lookout for an excavation in a public street, especially if the street was in a good condition when he passed over it last: *Mayor v. Isaacks*, 68 Tex. 116; s. c. 3 S. W. 693. Plaintiff was injured by falling into a hole in the sidewalk in front of defendant's premises. Plaintiff did not know of the existence of the hole, and, her attention being diverted, she did not notice it and fell in. The fact that her attention was momentarily distracted was held not to constitute contributory negligence; she had the right to assume that the sidewalk was safe: *Barry v. Terkildsen*, 72 Cal. 254; s. c. 13 Pac. 657. In an action for injuries caused by defective steps to a public building it is not error to charge that "a person passing down the steps . . . is not charged with the exercise of an active vigilance; that is, "being upon the lookout for danger:" *Swart v. Mayor &c.*, 5 N. Y. S. 98. See

also, *Cantwell v. City of Appleton*, 71 Wis. 463; s. c. 37 N. W. 813; *Turner v. City of Newburgh*, 109 N. Y. 301; s. c. 16 N. E. 344.

⁴⁶⁷ *Mayor &c. v. Isaacks*, 68 Tex. 116; s. c. 3 S. W. 693.

⁴⁶⁸ *Turner v. City of Newburgh*, 109 N. Y. 301, 307; s. c. 16 N. E. 344, where the court said:—"The street was open for public travel, and it does not appear that plaintiff knew of any defect in the crossing, and without such knowledge or notice she had the right to assume it was safe and secure."

⁴⁶⁹ *Parker v. City of Springfield*, 147 Mass. 391; s. c. 18 N. E. 70; *Moore v. Huntington*, 31 W. Va. 842, 848; s. c. 8 S. E. 512. A hole into which plaintiff fell was between and about eighty feet from two gas-lamps, which were lighted at the time, and by the light of which a person could see objects on the sidewalks so small as pieces of cinders. Plaintiff admitted that a person could have seen the sidewalk if he had looked at it. He was held guilty of gross negligence: *Moore v. City of Richmond*, 85 Va. 538; s. c. 8 S. E. 387.

⁴⁷⁰ *Barr v. City of Kansas*, 105 Mo. 550; s. c. 16 S. W. 483.

⁴⁷¹ *City of Chicago v. McLean*, 133 Ill. 148; s. c. 24 N. E. 527. For such a charge might take the question of negligence from the jury and declare that if certain facts exist neg-

The jury are to consider that things may naturally have diverted the attention of plaintiff from the defect in the street.⁴⁷²

§ 1554. Pedestrians' duty to use crossings and sidewalks.—In New York a person desiring to cross a street is not confined to the crossings either in the day or night; he may cross at any point that suits his convenience without imputation of negligence, for he has the right to assume that all parts of the street intended for travel are reasonably safe.⁴⁷³ He has not, however, the right to assume that all parts of the street are as smooth and even as the regular crossings, and particularly at night it can not be said to be wholly prudent for a person not to use convenient crossings which he sees before him.⁴⁷⁴ A person who is injured by voluntarily stepping from a sidewalk into a hole which he does not see is guilty of such negligence as will prevent a recovery;⁴⁷⁵ and the same is the rule where a pedestrian voluntarily leaves the highway in order to take a by-path.⁴⁷⁶ In some states vol-

ligence is established: *Myers v. Indianapolis &c. R. Co.*, 113 Ill. 386; s. c. 1 N. E. 899. In the *McLean* case just cited the case of *Village of Kewanee v. Depew*, 80 Ill. 119, is distinguished by the fact that the defect was known.

⁴⁷² It is for the jury to find whether one who, not knowing of a hole in the sidewalk, steps into it in the daytime while in the act of raising her umbrella, was guilty of contributory negligence: *City of Philadelphia v. Smith* (Pa.), 16 Atl. 493; s. c. 23 W. N. C. (Pa.) 242. The question of contributory negligence being one of fact for the jury, the court properly refused to charge that if the night was fair and two street lamps were burning brightly near the place of the obstruction or defect in defendant's sidewalk where plaintiff fell and received the injuries complained of, he could not recover: *City of Scranton v. Gore*, 124 Pa. St. 595; s. c. 17 Atl. 144; 23 W. N. C. (Pa.) 419.

⁴⁷³ *Brusso v. City of Buffalo*, 90 N. Y. 679.

⁴⁷⁴ In *Raymond v. Lowell*, 6 Cush. (Mass.) 524, the court, after speaking of the general right of foot-passengers to use the carriage-way, thus

continues:—"But a town is not obliged to keep all the way, by the sidewalk, in an equally suitable and convenient condition for crossing. This would be wholly impracticable. The necessity of providing for draining off the water requires that streets and sidewalks should be constructed with a view to that object; so if a foot-passenger, instead of availing himself of a crossing especially prepared, chooses to cross at another place, he must take care and see what is the actual state of the space between the sidewalk and the street. He has no right to assume that the way from the sidewalk to the street is smooth and even, but must exercise a caution and prudence adapted to the nature of the case." See also, *Cotterill v. Starkey*, 8 Car. & P. 691; *Boss v. Litton*, 5 Car. & P. 407.

⁴⁷⁵ *Aline v. Le Mars City*, 71 Iowa 654; s. c. 33 N. W. 160; *McLaury v. McGregor City*, 54 Iowa 717; s. c. 7 N. W. 91; *Zettler v. City of Atlanta*, 66 Ga. 195.

⁴⁷⁶ *City of Scranton v. Hill*, 102 Pa. St. 378. Where a traveler unnecessarily, for his own convenience, leaves the highway, and in so doing

untarily leaving the sidewalk and walking on the carriage-way is deemed an act of negligence,⁴⁷⁷ but in other states is to be submitted to the jury with the other facts on the question of contributory negligence,⁴⁷⁸ while in still other states it is deemed negligence not to leave a dangerous sidewalk and walk on the roadway.⁴⁷⁹ Though such a volunteer may have to assume the risk of apparent dangers, it is otherwise as to concealed defects allowed to continue through municipal negligence.⁴⁸⁰ The attempt to pass a dangerous place in a street in the darkness is not conclusive of negligence, but is a fact for the jury.⁴⁸¹ In accordance with the foregoing rule it is not negli-

meets with an accident outside of the highway, the city can not be responsible, no matter how near the highway the obstruction may be: *Biggs v. Huntington*, 32 W. Va. 55; s. c. 9 S. E. 51.

⁴⁷⁷ *O'Laughlin v. City of Dubuque*, 42 Iowa 539. Where, in an action against a city for personal injuries received by plaintiff by falling into an unguarded area way in an alley, it appears that the plaintiff, without any reason, walked out of his way on a dark night into the alley, it is reversible error to refuse to instruct the jury to the effect that, if it was imprudent to enter the alley on account of the darkness, and if the plaintiff persisted in going in there when he might have taken a nearer and safer way, he was guilty of contributory negligence: *Ely v. City of Des Moines*, 86 Iowa 55; s. c. 52 N. W. 475.

⁴⁷⁸ *Gerald v. City of Boston*, 108 Mass. 580; *Raymond v. City of Lowell*, 6 Cush. (Mass.) 524.

⁴⁷⁹ *Forker v. Borough of Sandy Lake*, 130 Pa. St. 123; s. c. 18 Atl. 609.

⁴⁸⁰ *Moore v. Huntington*, 31 W. Va. 842; s. c. 8 S. E. 512.

⁴⁸¹ *Finn v. City of Adrian*, 93 Mich. 504; s. c. 53 N. W. 614; *Bly v. Village of Whitehall*, 120 N. Y. 506; s. c. 24 N. E. 943; *Pomeroy v. Inhabitants &c.*, 154 Mass. 462; s. c. 28 N. E. 899; *Arey v. City of Newton*, 148 Mass. 598; s. c. 20 N. E. 327. Plain-

tiff had previous knowledge of the defect in the sidewalk, and testified that if she had been thinking about it, or looking for it, she would not have stepped into it. It appeared that the accident occurred at night, during stormy weather, when a mist prevailed, and that plaintiff had two of her children in charge, was in an anxious state of mind, and in a hurry to get home. The question of contributory negligence was properly left to the jury: *Dundas v. City of Lansing*, 75 Mich. 499; s. c. 42 N. W. 1011. In an action for damages resulting from a fall into an excavation in a sidewalk, when the evidence shows that the plaintiff knew of the excavation, and that on a dark night, passing that way, and remembering the defect, he attempted to pass around it, but by reason of misjudging the distance, and the excavation being unguarded, he fell into it and was injured, the question of his contributory negligence is for the jury: *Orleans Village v. Perry*, 24 Neb. 831; s. c. 40 N. W. 417. A stranger passing along a street at night came to a break in the sidewalk, and endeavored to descend, but while so doing, in a careful manner, he fell on a saw bench which had been left on the ground at the end of the sidewalk, and was injured. It was held not contributory negligence: *Village of Ponca v. Crawford*, 23 Neb. 662; s. c. 37 N. W. 609. See also, *City of*

gence, as matter of law, for a person to drive a blind horse on a dark night, but such an act is for the jury.⁴⁸² The strict Indiana rule is that if one knows of a dangerous place or obstruction in a sidewalk or street and attempts to pass over it in the darkness he can not recover for the injury he may thereby sustain,⁴⁸³ and this is the rule in some of the other states,⁴⁸⁴ even to the extent of requiring a person to leave a dangerous sidewalk and walk in the roadway.⁴⁸⁵

§ 1555. **Infirm persons—Duty of caution.**—Streets and sidewalks are for the use of persons of defective sight and hearing and for the infirm. A blind man on the street must be more cautious than one who can see, but it is not conclusive of negligence for him to be abroad.⁴⁸⁶ In passing upon the negligence of a blind man in going

Galveston v. Hemmis, 72 Tex. 558; s. c. 11 S. W. 29; *Shenandoah Borough v. Erdman* (Pa.), 12 Atl. 814. In an action for injuries sustained by falling into an excavation made the day of the accident across a sidewalk, and left open at night without lights or guard, and which plaintiff had stepped across on the opposite side of the street during the day, contributory negligence could not be predicated as a matter of law, but was a question for the jury: *Mayor &c. v. McCary*, 84 Ala. 469; s. c. 4 So. 630.

⁴⁸² *Brackenridge v. Fitchburg*, 145 Mass. 160; s. c. 13 N. E. 457. See *Smith v. Wildes*, 143 Mass. 556; s. c. 10 N. E. 446; *Wright v. Inhabitants &c.*, 132 Mass. 49; *Daniels v. Lebanon*, 58 N. H. 284. In the *Brackenridge* case *Holmes, J.*, said:—"Whatever the degree of darkness, it was for the jury to say whether the horse's possession of sight would have diminished appreciably the chances of accident, and it was at least open to them that the plaintiff had the right to assume that the city had done its duty and therefore that he was not bound to provide against its possible neglect." See also, *Lea-royd v. Godfrey*, 138 Mass. 315, 324; *Thompson v. Inhabitants &c.*, 7 Pick. (Mass.) 188; *Glidden v. Town of Reading*, 38 Vt. 52.

⁴⁸³ *Brucker v. Town of Covington*, 69 Ind. 33; *Pennsylvania Co. v.*

Sinclair, 62 Ind. 301; *City of Indianapolis v. Gaston*, 58 Ind. 224; *Jonesboro Co. v. Baldwin*, 57 Ind. 86; *Riest v. City of Goshen*, 42 Ind. 339; *President &c. v. Dusouchett*, 2 Ind. 586. Later cases, however, only require the exercise or ordinary care: *City of Bedford v. Neal*, 143 Ind. 425; s. c. 41 N. E. 1029; 42 N. E. 815; *Sale v. Aurora &c. Tpk. Co.*, 147 Ind. 324; s. c. 46 N. E. 669.

⁴⁸⁴ In an action against a municipal corporation for personal injuries, plaintiff testified that she fell over a rock while she was walking in the dark on a street that she knew to be obstructed and dangerous, though there were no danger signals to mark the obstructions. It was held that plaintiff was guilty of contributory negligence, and her evidence should have been excluded from the jury as insufficient to sustain the issue on her part: *Hesser v. Grafton*, 33 W. Va. 548; s. c. 11 S. E. 211.

⁴⁸⁵ *Forker v. Borough of Sandy Lake*, 130 Pa. St. 123; s. c. 18 Atl. 609; *City of Erie v. Magill*, 101 Pa. St. 616.

⁴⁸⁶ *Davenport v. Ruchman*, 37 N. Y. 568; *Harris v. Uebelhoer*, 75 N. Y. 169, 175. In *Requa v. City of Rochester*, 45 N. Y. 129, it was held that the fact of plaintiff's imperfect sight would not justify taking the question of his contributory negligence from the jury.

unattended upon the streets the jury are to consider the increased acuteness of his other senses, his acquaintance with the locality, his habit of going about alone, and his general capacity to take care of himself.⁴⁸⁷ The very old have a right to be on the street and to assume it is reasonably safe for their use.⁴⁸⁸ Their age is not such a disability as obliges them to remain at home or to go abroad at their peril. While a drunken man is as much entitled to a safe street as a sober man and more in need of it,⁴⁸⁹ yet if his intoxication contributes to the accident, he can not recover though the street was defective.⁴⁹⁰ An intoxicated person is not, however, an outlaw, and a

⁴⁸⁷ *Sleeper v. Sandown*, 52 N. H. 244, where the court said:—"Suppose defective vision, instead of total blindness, contributes to an accident or defect in any other of the senses, the loss of an arm or a leg, or sickness, or the infirmity of age or the weakness of childhood, would not the question in such cases most clearly be, whether, considering the condition of the person injured, it was want of ordinary care in him to be traveling on the highway at all. . . . Blindness is no more negligence than near-sightedness, and probably no more likely on the whole to contribute to an accident; and whether any one of the senses be wholly obliterated, or only obscured, can not, as we can see, make any difference with the application of the rule. Assuming, then, that the plaintiff in this case might, with a reasonable assurance of safety, undertake to cross this bridge, so that he was in no fault for being there, and that the accident was the combined result of his blindness and the want of a rail which the town ought to have supplied, it follows that his fault did not contribute and he is entitled to recover. All the evidence tending to show the extraordinary ability of plaintiff after he became blind, in executing various kinds of work, etc., was clearly admitted upon the question whether

it was a reasonably prudent act for him to attempt to pass the bridge."

⁴⁸⁸ Plaintiff, a man of eighty-two years, on a bright day, with nothing to obstruct the vision, fell into a hole caused by the displacement of a flagstone over a gutter. At the time he was somewhat dazzled by the sun, and his attention attracted by some one calling. The flag had been displaced by a rainstorm about a week before the accident. The village authorities had notice of it, but plaintiff had none. The street was traveled considerably; and though the flags were not laid as a sidewalk, but merely to cover a gutter, there was no other walk on that side of the street, and they were used as a walk. A verdict for plaintiff was sustained, plaintiff's negligence being a question for the jury: *O'Reilly v. Village of Sing Sing*, 1 N. Y. S. 582.

⁴⁸⁹ *Robinson v. Pioche*, 5 Cal. 460.

⁴⁹⁰ Where plaintiff falls from a sidewalk down an embankment, defendant city is not liable, though the sidewalk was defective, if plaintiff was intoxicated, and such intoxication contributed to the accident: *Lynch v. Mayor &c.*, 47 Hun (N. Y.) 524. Where the jury found that one using ordinary care could pass over the sidewalk without danger, the testimony of nine witnesses that plaintiff was drunk at the time is

mere concurrence in point of time of his intoxication and the injury will not bar his recovery against the city.⁴⁹¹ It is obvious enough that the intoxication of a man driving across a bridge does not contribute to the fall of the bridge;⁴⁹² and the general rule is that while intoxication is not conclusive evidence of negligence it is competent evidence.⁴⁹³ But drunkenness as a self-imposed disability is not regarded with the indulgence accorded to blindness or deafness, and especially when a drunken man is a trespasser he must enjoy his pleasure at his own risk.⁴⁹⁴

§ 1556. Violation of ordinance, etc., as contributory negligence.—

The rule that the violation of a law or regulation intended to prevent an accident is *prima facie* a contributory cause of the accident⁴⁹⁵ does

sufficient, against his denial, to support a finding of contributory negligence: *McCracken v. Village of Markesan*, 76 Wis. 499; s. c. 45 N. W. 223.

⁴⁹¹ *Alger v. City of Lowell*, 3 Allen (Mass.) 402, 406. As Brady, J., said in *Healy v. Mayor &c.*, 3 Hun (N. Y.) 708:—"By putting himself in that unfortunate condition he was not abandoned by the law. He was only subjected to its consequences whatever they might be, and if his drunkenness in any way contributed to his injury he must bear the burden. Whether it did or not was for the jury to determine."

⁴⁹² *Ford v. Umatilla Co.*, 15 Or. 313; s. c. 16 Pac. 33.

⁴⁹³ *City of Aurora v. Hillman*, 90 Ill. 61; *City of Rock Island v. Vandalsschoot*, 78 Ill. 485; *Baker v. City of Portland*, 58 Maine 199; *Stuart v. Inhabitants &c.*, 48 Maine 477; *Seymer v. Town of Lake*, 66 Wis. 651; s. c. 29 N. W. 554; *Weymire v. Wolfe*, 52 Iowa 533; s. c. 3 N. W. 541; *Loewer v. City of Sedalia*, 77 Mo. 431; *City of Salina v. Trosper*, 27 Kan. 544; *Cassedy v. Town of Stockbridge*, 21 Vt. 391; *Fernbach v. City of Waterloo (Iowa)*, 34 N. W. 610. In *Thorp v. Town of Brookfield*, 36 Conn. 320, defendant requested the court to charge that if

the plaintiff's driver was grossly intoxicated at the time of the accident the plaintiff could not recover, but the court was held to be correct in charging "that the intoxication of the driver would not of itself relieve the town of liability, but the question was whether or not he exercised reasonable care to avoid the danger; and that should the jury find he was intoxicated at the time of the accident they should take his condition into consideration with the other facts in determining such question."

⁴⁹⁴ *Beach Contr. Neg.* (2d ed.), § 391; *Denman v. St. Paul R. Co.*, 26 Minn. 357; s. c. 4 N. W. 605; *Herring v. Wilmington R. Co.*, 10 Ired. (N. C.) 402.

⁴⁹⁵ *Cordell v. New York &c. R. Co.*, 64 N. Y. 535; *Gorton v. Erie R. Co.*, 45 N. Y. 660. In an action against a city for injuries to a traveler from the collision of his carriage with a hitching-post in a highway on which he was traveling in the night, it appeared that the way was sixteen and one-half feet wide, and that sidewalks had been built on both sides; the entire width of the street was taken up by a carriage-way, sidewalk and slope; the post was on the outer edge of the slope, and on the border of the carriage-way. There

not apply where the accident is not the necessary legal or physical consequence of such violation; as where a traveler, having violated an ordinance by driving on a sidewalk, afterwards meets with an accident while driving on a foot-bridge, to which the ordinance does not apply.⁴⁹⁶

was a city ordinance prohibiting driving on sidewalks. The accident happened while plaintiff was attempting to pass a vehicle in front of him, and the evidence tended to show that in so doing he went on the sidewalk. The narrowness of the way was known to plaintiff. It was held that a verdict for defendant would not be disturbed: *Arey v. City of Newton*, 148 Mass. 598; s. c. 20 N. E. 327, where the court said:—"A traveler can not justify driving upon a sidewalk in violation of an ordinance merely because it is convenient in order to pass at a particular place a wagon that is before him. If any necessity would justify violating an ordinance of this kind, mere convenience would not: *Commonwealth v. Adams*, 114 Mass. 323."

⁴⁹⁶ *Fisher v. Village of Cambridge*, 133 N. Y. 527, where the court made

the following illustration of the restriction:—"If there had been an ordinance that every one driving on the highway bridge should keep to the right, would the fact that a person drove to the left, at a time when no one else was on the bridge, be a defense to an action to recover damages sustained by the bridge going down while such person was so driving on the left side of the bridge? The purpose of the ordinance would be regarded; and when it was seen that its purpose was to prevent accidents from collisions, and that it assumed the equal safety of both sides of the bridge so far as its ability to sustain a load was concerned, it certainly could not be held that in driving to the left under such circumstances the person was guilty of negligence which contributed to the injury because he thereby violated an ordinance."

CHAPTER XXXVII.

MANDAMUS AND QUO WARRANTO.

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(a) MANDAMUS.

§ 1557. **Mandamus—General.**—The remedy afforded by mandamus in matters relating to municipal corporations may be stated generally as the right to compel the performance of a public duty, or the enforcement of a public right.¹ When it relates to the performance of a duty by a public officer it has reference generally to ministerial duties and not duties which are legislative or judicial;² but a city council may be compelled to perform a duty imposed by law.³ A city council, being an inferior body, is not exempt from judicial control by mandamus.⁴ If it is the clear legal duty of the officers of a city to act, though vested with discretion to act, they may be compelled to do so, but not in a particular manner.⁵ Mandamus may issue, notwithstanding the existence of another remedy.⁶ It will not lie against a public officer where there is no law requiring him to act;⁷ the law must either expressly or by implication require him to do so.⁸ Jurisdiction to grant mandamus in the federal court must be based on a judgment or jurisdiction already acquired, and is not an original remedy.⁹ Mandamus may be directed to municipal as well as other corporations established by law, to compel them to receive and restore to their functions such of their members as they shall have refused to receive, and whom they shall have removed without suf-

¹ *Brokaw v. Commissioners*, 130 Ill. 482; s. c. 22 N. E. 596; *People v. Board of Education*, 127 Ill. 613; s. c. 21 N. E. 187; *People v. Kiple*, 171 Ill. 44; s. c. 49 N. E. 229.

² *Newton v. Leal* (Tex. Civ. App.), 56 S. W. 209. Cf. *English & Co. v. Hardy*, 93 Tex. 289; s. c. 55 S. W. 169.

³ *People v. Guggenheimer*, 59 N. Y. S. 913.

⁴ *People v. Guggenheimer*, 59 N. Y. S. 913.

⁵ *Reddick v. People*, 82 Ill. App. 85.

⁶ *People v. Guggenheimer*, 59 N. Y. S. 913.

⁷ *State v. Lockett*, 52 La. An. 1620; s. c. 28 So. 157.

⁸ *Davis v. Patterson*, 12 Pa. Super. Ct. 479.

⁹ *Shepard v. Tulare Irr. Dist.*, 94 Fed. 1.

ficient cause.¹⁰ Mandamus is the proper remedy in favor of a person claiming an office for which he has qualified and been commissioned to compel one holding over from a previous term to surrender the books and other property of the office, but it settles no question as to the ultimate right to the office for the term for which the commission has been issued.¹¹ It has been held that a petition for a writ of mandate to compel the submission of a certain question to the electors of a city concerning the separation of certain lands from the territory under the municipal jurisdiction of the city need not state under which of two statutes the election should be called, where the two acts are identical so far as is material to the petitioner's case. And where the common council and mayor of a city refused to order an election as provided by statute, it is to be presumed that they refused on account of some honest doubt as to their power in the premises, and that they will proceed to perform their duty as prescribed by the statutory law immediately upon being informed of a decision of the supreme court upholding their power so to do, and the supreme court will not order the election and fix the day therefor upon granting a mandamus to compel the calling of the election.¹²

§ 1558. Mandamus where discretion may be exercised.—Where the law has vested in a city council discretion to act, or in municipal officers discretionary authority, as it must necessarily do in many cases, courts are not inclined to enforce the performance of such duties. Where a city council passes over the mayor's veto an ordinance providing for the issue of bonds in excess of the amount of indebtedness which the city can lawfully incur, mandamus will not lie to compel the mayor to sign the bonds.¹³ In an action against a county and its county board for damages growing out of the construction of a ditch by the board, and thereby causing large quantities of water to flow over the land of the plaintiff, an injunction having finally been granted to restrain the county and county board from thus overflowing his land, the supreme court of Nebraska, as it did not appear that the duty imposed upon the county and county board by the decrees of the district court could not be enforced by that court in the due course of law, denied a mandamus to enforce that duty.¹⁴ A sound judicial discretion is to be used as to granting writs of mandamus, and where

¹⁰ *State v. Shakspeare*, 43 La. An. 92; s. c. 8 So. 893.

¹¹ *State v. Saxon*, 25 Fla. 792; s. c. 6 So. 858. See also, *High Extra. Rem.*, § 73; *People v. Kilduff*, 15 Ill. 492; *People v. Head*, 25 Ill. 287.

¹² *People v. Common Council &c.*, 85 Cal. 369; s. c. 24 Pac. 727.

¹³ *Chalk v. White*, 4 Wash. 156; s. c. 29 Pac. 979.

¹⁴ *State v. Fillmore Co.*, 32 Neb. 870; s. c. 49 N. W. 769.

circumstances make it unwise and inexpedient to allow the writ it should be refused when sought to enforce merely private rights.¹⁵ Applying this principle to the circumstances of a case before it, the supreme court of Mississippi, notwithstanding the clear legal right of the relators, publishers of school text-books, and the unlawful conduct of the superintendent of education in not contracting with the relators for text-books, and contracting with other publishers for their system of books, held that the refusal of a writ of mandamus to compel the superintendent to contract with the relators was proper, since to have allowed it would have seriously affected public interest, by changing the books in use.¹⁶ The writ of mandamus never lies to compel the officer of a county to do an act which is forbidden or not authorized by the laws of the state.¹⁷ Since the statute of New York requiring "police officials" to take a certain oath in relation to their interest in the manufacture and sale of intoxicating liquors does not declare the offices therein enumerated vacant by reason of the failure of the officers to take the oath, but merely disqualifies a person from holding such office, and furnishes a cause of forfeiture, mandamus to fill a vacancy will not lie. A vacancy can be created only by a direct proceeding for that purpose.¹⁸ One is not entitled to a mandamus to compel a city council to issue to him a certificate of election as councilman where he has made no demand for the issue of such certificate.¹⁹ It has been held that the claim of a county clerk for issuing subpoenas to delinquent taxpayers under the tax law of that state, and for moneys paid the register of deeds for searches in his office to ascertain the names of such owners, was not such a claim as the board of supervisors could be compelled to audit and allow, although, upon a proper showing under a provision of the tax law, the board might be required to determine the amount of compensation, if any, the relator should receive for his services under that law, and how it should be paid.²⁰ It has also been held that although the holder

¹⁵ *Effingham &c. Co. v. Hamilton*, 68 Miss. 523; s. c. 10 So. 39. See also, *State v. Board of Education*, 24 Wis. 683; *People v. Contracting Board*, 27 N. Y. 378.

¹⁶ *Effingham &c. Co. v. Hamilton*, 68 Miss. 523; s. c. 10 So. 39.

¹⁷ *Chicot Co. v. Kruse*, 47 Ark. 80; s. c. 14 S. W. 469, reversing the court below and ordering a dismissal of the petition for a mandamus to compel the county court to audit a claim for feeding of jurors, approved by the circuit court, for a price increased by reason of the low market

value of county scrip. See also, *Supervisors v. United States*, 18 Wall. 71, 77; *United States v. Clark Co.*, 95 U. S. 769; *United States v. Labette Co.*, 2 McCrary 25; s. c. 12 Cent. L. J. 36; *State v. Macon Co. Court*, 68 Mo. 29; s. c. sub nom. *State v. Walker*, 7 Cent. L. J. 390.

¹⁸ *People v. Board of Trustees &c.*, 13 N. Y. S. 447.

¹⁹ *State v. Smith*, 31 Neb. 590; s. c. 48 N. W. 468.

²⁰ *Sherman v. Board &c.*, 84 Mich. 108; s. c. 47 N. W. 513.

of a written order on the board of supervisors of a county for the issuance of a warrant for part of a debt due by the county for building a bridge is to that extent the equitable assignee of the debt, he can not, by mandamus, compel the board to make an allowance and issue a warrant in his favor for the amount named in the order.²¹ And so under a provision of a city charter that "the common council shall * * * be the judge of the election and qualification of its own members," it was held that the duties of a new council, in determining the election of its members, are judicial, and not ministerial, and that mandamus will not lie to compel them to seat a person returned as alderman-elect by the inspectors of election.²²

§ 1559. Reinstatement of officer—Canvass of election.—Under the New York statute requiring that in every public department honorably discharged Union soldiers shall be preferred for appointment, a mandamus to compel a sheriff to reinstate a clerk whose employment ended with the expiration of the preceding sheriff's term of office will not issue where the application fails to show that the clerk applied for the position before his successor was appointed, or that his successor was not himself an honorably discharged Union soldier.²⁴ Where an alternative writ of mandamus to compel the officers of a city to canvass the votes cast at an election for a member of the school board shows that illegal votes were cast, but that it is impossible for the officers of the city to separate the legal votes from the illegal votes, or to tell for whom the legal votes were cast, such writ states no cause of action, and a motion to quash should be sustained.²⁵ A motion for a peremptory mandamus to compel defendant, as county clerk, to issue to relator a certificate of his election to the office of prosecuting attorney of the county, and to certify the vote to the secretary of state, will be denied, where it appears from the return to the alternative writ that the defendant had in due form canvassed the vote and issued a certificate of the election of relator's opponent, to whom the governor had issued and delivered a commission, after which relator had instituted a statutory contest for the office, which was then pending.²⁶

§ 1560. Premature application—Laches.—Where the charter of an Illinois village gave the clerk thirty days from the passage of an or-

²¹ Foote v. Board &c., 67 Miss. 156; s. c. 6 So. 612.

²² Halloran v. Carter, 13 N. Y. S. 214. See also, People v. Hall, 80 N. Y. 117; People v. Common Council, 78 N. Y. 33; People v. Chapin, 104 N. Y. 96; s. c. 10 N. E. 141.

²⁴ Sargent v. Gorman, 131 N. Y. 191; s. c. 29 N. E. 946; affirming s. c. 14 N. Y. S. 481.

²⁵ Mayor &c. v. Hall, 46 Kan. 531; s. c. 26 Pac. 1021.

²⁶ State v. Smith, 104 Mo. 661; s. c. 15 S. W. 614.

dinance in which to post copies of it, a mandamus proceeding commenced fourteen days after the passage of an ordinance to compel him to post copies of it was held to be premature, and the writ denied.²⁷ Under the statute of Michigan which provides that in case of the temporary disability of one of the elder justices of the peace to act on the township board, "one of the remaining justices," on being notified by such board, shall act thereon, mandamus will not lie at the suit of a justice third in order of seniority, in case of such temporary disability, to compel the board to seat the relator.²⁸ An account for services as clerk of a board of county commissioners in South Carolina was not itemized, and was not presented to the board in office when rendered, nor was it presented to or filed with the commissioners during the fiscal year the services were rendered, or the year next thereafter, as required by the statute of that state, but was presented two years afterwards, and marked "Approved." Two years after approval a writ of mandamus to pay it was prayed for. It was held that the delay was against the policy of the state, and unreasonable, and the writ should be denied.²⁹ A mandamus to compel the authorities of a city to allow a railroad corporation to construct its road through the city should be refused while an action to dissolve the railroad corporation is pending.³⁰

§ 1561. **Control of official discretion.**—The expediency of the construction or repair of a bridge, under the statutes of Ohio relating to bridges, rests in the administrative discretion of the county commissioners, and such discretion can not be controlled by mandamus.³¹ It has been held that mandamus will not lie to compel the board of police commissioners of New York, under the statutes of the state providing for pensions to widows of policemen, to place the widows of deceased policemen upon the pension roll, as the laws in that connection especially provide that the board "shall have power in its discretion" to grant such pension, and their discretion is not reviewable by any judicial tribunal.³² It was said in a California case that the test for the issuance of a writ of mandamus to compel a board, tribunal or officer to do an act which he has refused to do is not whether the refusal involves the exercise of discretion or an exercise of judicial power, but whether it was a determination which the

²⁷ *Gorruley v. Day*, 114 Ill. 185; s. c. 27 N. E. 370; affirming s. c. 11 N. Y. S. 782.

²⁸ *Grondin v. Logan*, 88 Mich. 247; s. c. 50 N. W. 130.

²⁹ *State v. Knight*, 31 S. C. 81; s. c. 9 S. E. 692.

³⁰ *People v. Newton*, 126 N. Y. 656;

³¹ *State v. Commissioners*, 49 Ohio St. 301; s. c. 30 N. E. 785.

³² *People v. Martin*, 131 N. Y. 196; s. c. 30 N. E. 60.

law intended to be final; and if not, whether there is a plain, speedy and adequate remedy in the ordinary course.³³ Applying this principle, a statute which required the auditor of a municipal corporation to examine the proceedings in relation to a street assessment before countersigning a street assessment warrant, and provided that he "must be satisfied that the proceedings have been legal and fair," was construed not to make his determination a final disposition of the matter, and that if the proceedings for assessment were in accordance with the requirements of the statute mandamus would issue to compel him to countersign the warrant.³⁴

§ 1562. The same subject continued.—Mandamus will not lie in New York to a county judge who had appointed a civilian crier of his court, disregarding the application of relator, an honorably discharged Union soldier who was qualified for the position, to compel him to appoint relator to the position. Relator in this case, it was held, had no legal right to the appointment in preference to other soldiers, and the office having been filled the county judge had no longer the power to appoint him.³⁵ So also it has been held in the same state that the judgment and discretion of the trustees of a village in selecting for appointment a superintendent of public works, could not be controlled or reviewed by mandamus; and where, in their discretion, they determine that a candidate, not a Union veteran, has superior qualifications to one who is, the court can not control their action in that respect in such a proceeding.³⁶

³³ Wood v. Strother, 76 Cal. 545; s. c. 18 Pac. 766. See also, as to the rule of discretion, etc., State v. La Fayette Co. Court, 41 Mo. 221, 226; Council &c. v. People, 78 Ill. 382, 389; Houghton Co. v. Auditor-General, 36 Mich. 271, 273.

³⁴ Wood v. Strother, 76 Cal. 545; s. c. 18 Pac. 766.

³⁵ People v. Wendell, 57 Hun (N. Y.) 362; s. c. 32 N. Y. St. 129; 10 N. Y. S. 587. See also, People v. Trustees &c., 54 Hun (N. Y.) 16; s. c. 7 N. Y. S. 125; People v. President &c., 29 N. Y. St. 723; s. c. 8 N. Y. S. 512, 960; People v. Barden, 30 N. Y. St. 52; s. c. 8 N. Y. S. 960; People v. Summers, 30 N. Y. St. 614; s. c. 9 N. Y. S. 700; Matter of Wortman, 22 Abb. N. C. (N. Y.) 137; s. c. 2 N.

Y. S. 324; and Matter of Sullivan, 28 N. Y. St. 566; s. c. 8 N. Y. S. 401, distinguished in People v. Wendell, *supra*.

³⁶ People v. Trustees &c., 54 Hun (N. Y.) 16; s. c. 26 N. Y. St. 54; 7 N. Y. S. 125. See also, People v. Common Council, 78 N. Y. 33; People v. Board &c., 2 Abb. Pr. (N. S.) (N. Y.) 177; People v. Easton, 13 Abb. Pr. (N. S.) (N. Y.) 159; People v. Contracting Board, 27 N. Y. 378; People v. Reardon, 49 Hun (N. Y.) 425; s. c. 3 N. Y. S. 560; People v. Chapin, 103 N. Y. 635; s. c. 8 N. E. 368; People v. Chapin, 104 N. Y. 96; s. c. 10 N. E. 141; People v. Brennan, 39 Barb. (N. Y.) 651; Howland v. Eldredge, 43 N. Y. 457.

§ 1563. **The same subject continued—Board of assessment.**—The courts of New York have declared these rules as to mandamus in relation to taxes:—The court will not by mandamus direct a quasi-judicial tribunal what to do. It can only set the same in motion where it has refused to act. Where a board of assessors has acted, for instance, and rendered judgment in assessment proceedings, certiorari, and not mandamus, is the proper remedy for obtaining a review of the judgment.³⁷ But mandamus is the proper remedy to compel the board of assessors of a city to correct a clerical error in including relator's lot in an assessment, where it is in fact outside of the district of assessment.³⁸ And it is proper to join a collector of assessments in a proceeding in such a case to restrain him from proceeding to collect the illegal taxes.³⁹ Nor is the fact that it does not affirmatively appear that the relator had applied to the board of assessors before commencing the proceeding a jurisdictional defect; and the omission is not such substantial error as requires the reversal of an order awarding a mandamus. Nor will it defeat the relator's proceeding that the assessment has been confirmed by the common council, and that the statute declares that an assessment when so confirmed shall be "final and conclusive," as such provision will not apply to a case where the assessment is utterly void and illegal and without jurisdiction.⁴⁰

§ 1564. **The same subject continued—Improvement of highways.**—In affirming a denial of a mandamus to compel town supervisors to rebuild a bridge, the supreme court of Minnesota, on this subject of interference with the discretion and judgment of town boards, said:—"It is unnecessary for us to consider under what circumstances, if at all, the court will assume to control these officers in the exercise of the duties imposed upon them in respect to highways, and which from their very nature must be largely discretionary. It is certain that this should not be done unless the particular act the performance of which is sought to be enforced is so plainly and imperatively required that a refusal or neglect to do it can not be reasonably based upon grounds of discretion. And in such matters other considerations than the need or utility of the particular improvements are

³⁷ *People v. Gilon*, 24 Abb. N. C. (N. Y.) 125; s. c. 18 Civ. Pro. 112; 30 N. Y. St. 519; 9 N. Y. S. 563. See also, *People v. Common Council*, 78 N. Y. 33.

³⁸ *People v. Wilson*, 119 N. Y. 515; s. c. 23 N. E. 1064; 30 N. Y. St. 79; affirming s. c. 27 N. Y. St. 279; 7 N. Y. S. 627. See also, *People v. Asses-*

sors, 44 Barb. (N. Y.) 148; *People v. Olmsted*, 45 Barb. (N. Y.) 644; *People v. Board &c.*, 4 Hill (N. Y.) 20; *Barhyte v. Shepherd*, 35 N. Y. 238.

³⁹ *People v. Wilson*, 119 N. Y. 515; s. c. 23 N. E. 1064.

⁴⁰ *People v. Wilson*, 119 N. Y. 515; s. c. 23 N. E. 1064.

to be taken into account, and should be allowed to affect the action of such officers who are charged with the care of the public highways of the town generally. For instance, the amounts of funds applicable to road and bridge purposes which is limited by statute; the extent, nature and relative importance of the improvements which may be deemed to be necessary throughout the town, concerning which, in general, the discretion of the supervisors and not of the courts must be exercised; the probable cost of the particular improvement in question as compared with its usefulness; the question whether the improvement, if made, would probably be permanent or would be speedily destroyed by the elements; and perhaps other considerations must be allowed to affect the judgment and action of the board."⁴¹

§ 1565. The same subject continued—Rebuilding a bridge.—The supreme court of West Virginia, after declaring the rules as to its action in applications for mandamus to governing authorities of a county, held that mandamus would not lie to compel the county court, under the statutes of that state, to rebuild a destroyed bridge, where it had, under another statute, decided to build a bridge so near the site of the former as to evince an intention to change its location.^{41a}

§ 1565a. Petition for mamdamus.—A county auditor must act in Ohio whenever he is "informed or has reason to believe" that property has been improperly omitted from the tax duplicate; and if he declines to act upon reasonable information, mandamus will lie to compel him to act; the petition being sufficient if it states facts showing reason to believe property has been improperly omitted.⁴² In Illinois, in mandamus proceedings to compel levy and collection of a tax to pay town bonds, a failure to demand proper action on the part of the town officers is not excused by an averment in the petition that the town and its officers wholly neglected and refused to make any provisions for payment of the bonds, and that, therefore, a formal demand would prove unavailing.⁴³ Generally where a matter is in the

⁴¹ State v. Town of Somerset, 44 Minn. 549; s. c. 47 N. W. 163.

^{41a} State v. County Ct., 33 W. Va. 589; s. c. 11 S. E. 72. See also, Satterlee v. Strider, 31 W. Va. 789; s. c. 8 S. E. 552; Doolittle v. County Ct., 28 W. Va. 258; Wintz v. Board, 28 W. Va. 227; Supervisors v. Min-turn, 4 W. Va. 300.

⁴² State v. Crites, 48 Ohio St. 142; s. c. 26 N. E. 1052; holding a "tax

ferret" to be a proper relator to compel action upon facts furnished by him. - - - Mandamus issued on relation of town, authority of applicant must appear in writ or petition: State v. Board &c., 70 Wis. 485, 491; s. c. 36 N. W. 396, 398.

⁴³ People v. Town of Mt. Morris, 137 Ill. 576; s. c. 27 N. E. 757. Petition and alternative writ in such case should show a demand: Inger-

discretion of a city council, a board, or municipal officers to do or not to do an act or thing mandamus will not lie.⁴⁴

§ 1566. Relator's right.—Mandamus will only issue to compel action when the relator has a clear legal right to have a service performed by the party to whom he seeks to have the writ directed.⁴⁵ Where a county treasurer was not justified in paying interest coupons out of any other than specific funds raised for that purpose, and in his hands, until the board of commissioners of the county have issued an order upon him to do so; and the validity of the bonds and coupons held by the relator was controverted and the county commissioners had not levied a tax for the purpose of their payment nor given an order to the treasurer to pay them,—for the lack of a clear showing of right in his petition the relator was held not entitled to a mandate to the county treasurer to pay his coupons.⁴⁶ In Nebraska, where the question is one of public right and the object of the mandate is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and as such interested in the execution of the laws.⁴⁷ “This rule,” though, said the Nebraska court, “applies more particularly to the enforcement of such public duties which the failure to perform will affect the entire community alike,” and expressed a doubt as to whether it would apply in the case before them, an application for a mandamus to the city council to

man v. State, 128 Ind. 225; s. c. 27 N. E. 499.

⁴⁴ State v. Jones, 155 Mo. 570; s. c. 56 S. W. 307; Miles v. Wells, 22 Utah 55; s. c. 61 Pac. 534; Oxyby v. Board of Supervisors &c., 124 Mich. 463; s. c. 83 N. W. 132. It is not proper to compel the city council to do an act that is discretionary: People v. McMurray, 27 Colo. 277; s. c. 61 Pac. 226. Cf. City of Denver v. Bayer, 7 Colo. 113; s. c. 2 Pac. 6; Denver &c. R. Co. v. Nestor, 10 Colo. 403; s. c. 15 Pac. 714; Denver &c. R. Co. v. Domke, 11 Colo. 247; s. c. 17 Pac. 777; Denver &c. R. Co. v. Barsaloux, 15 Colo. 290; s. c. 25 Pac. 165. The fixing of the grade of a street being in the discretion of the municipal authorities they can not be compelled to exercise that discretion in a particular way: People v. Clark,

58 N. Y. S. 12; s. c. 40 App. Div. (N. Y.) 214. Mandamus will not lie to compel the council to appoint as commissioners of health persons nominated by the mayor: In re City of Rensselaer, 64 N. Y. S. 704. Where the action of board of education is not merely ministerial, mandamus will not lie: State v. Township Board &c., 19 Ohio C. C. 574.

⁴⁵ Bailey v. Lawrence Co., 2 S. Dak. 533; s. c. 51 N. W. 331. See also, People v. Supervisors &c., 11 N. Y. 563; State v. Kavanagh, 24 Neb. 506; s. c. 39 N. W. 431; People v. Supervisors &c., 36 Mich. 377; Fitch v. McDiarmid, 26 Ark. 482.

⁴⁶ Bailey v. Lawrence Co., 2 S. Dak. 533; s. c. 51 N. W. 331.

⁴⁷ State v. Shropshire, 4 Neb. 411; State v. Stearns, 11 Neb. 104; s. c. 7 N. W. 743.

remove a wooden building which had been placed in a certain part of the city with their authority.⁴⁸ Justice Cowen, of the supreme court of New York, reviewing cases upon this subject, said: "Most of the cases respect private or corporate rights. Courts or officers or corporations are to be put in motion with a view to enforce some matter of private interest. In such case the title to relief at the suit of relator must appear, and he should present himself as a party, otherwise a mere stranger might obtain a mandamus officially and for purposes not at all desirable to the real party. In matters of public right, however, it is otherwise; here the people are the real party, as in the other they are the nominal."⁴⁹ The Nebraska court concluded as follows: "The distinction between cases where a private person may act as relator to enforce a public duty and where to maintain the action he must show an interest is not very clearly drawn in the cases. The dividing line, however, appears to be, that where private or corporate rights are affected, then the relator must show interest, while if the state is the real party and the relator the mere informer, to procure the enforcement of a mere public duty, then a private individual may become the relator."⁵⁰

§ 1567. Instances illustrating use of mandamus.—Where a ditch commissioner has collected assessments levied for the construction of a ditch, mandamus will lie to compel him to distribute to the contractor the amount due him for construction, the commissioner's liability being not for breach of contract but for failure in his ministerial duty to lawfully distribute the fund.⁵¹ Mandamus will lie to the mayor of a city to sign a warrant to discharge the indebtedness incurred under a contract for public work which has been awarded by the common council over the veto of the mayor, as the city is bound by it.⁵² Where the amount of a claim against a county is undisputed, it is the duty of a board of supervisors in New York to allow it, and its refusal to do so is not a mere error of law but a breach of duty which the courts will remedy by mandamus.⁵³ Mandamus will lie against a street railway company to compel it to pave its track according to a valid city ordinance;⁵⁴ and it will issue to compel com-

⁴⁸ *State v. City of Kearney*, 25 Neb. 262; s. c. 41 N. W. 175.

⁴⁹ *People v. Collins*, 19 Wend. (N. Y.) 56.

⁵⁰ *State v. City of Kearney*, 25 Neb. 262; s. c. 41 N. W. 175, holding that the relator in this case could not maintain the action for mandamus.

⁵¹ *Ingerman v. State*, 128 Ind. 225; s. c. 27 N. E. 499.

⁵² *People v. Gleason*, 8 N. Y. S. 728.

⁵³ *People v. Board of Supervisors*, 56 Hun (N. Y.) 459; s. c. 10 N. Y. S. 88.

⁵⁴ *State v. Jacksonville St. R. Co.*, 29 Fla. 590; s. c. 10 So. 590.

missioners to allow claims of jurors for attendance fees.⁵⁵ A remonstrance against the issuance of a liquor license was duly filed with the licensing board, in which causes fatal to the granting of a license were assigned and proof introduced tending to sustain such charges. The board overruled the remonstrance and granted a license. The remonstrants having appealed, the supreme court of Nebraska held that there being no controversy as to the essential facts above stated, a mandamus to compel the board to revoke the license until a decision was rendered on the appeal was fully authorized.⁵⁶ Mandamus by a county to compel a former county treasurer to pay over to his successor money due from him as treasurer, being a civil action under the Nebraska code of civil procedure, has been held to be barred unless brought within four years after the expiration of the treasurer's term.⁵⁷ A county officer, on the refusal of a board of county commissioners to provide office-room for him, where the statute of North Dakota makes it the duty of such board to provide offices for the class of county officers to which he belongs, may compel the board by mandamus to furnish him with an office.⁵⁸ Under the statute of Oregon authorizing the allowance of the writ of mandamus on the petition of a "party beneficially interested," the fact that persons are residents and taxpayers of a county entitles them to apply for mandamus to compel the county clerk to move the records and keep his office in the town alleged to have been chosen as the permanent county-seat at an election held for that purpose.⁵⁹

§ 1568. Private parties as relators.—In a case where a resident taxpayer applied for a mandamus to compel the mayor and common council of a city to rescind a resolution designating the places of registration and the places for holding the first election in the city under a consolidation act on the ground of the unconstitutionality of that act, it was declared by the supreme court of Michigan that it is not the policy of the law to permit private individuals the use of the writ of mandamus against public officers, except in cases where they have some special interest not possessed by the citizens generally.⁶⁰

⁵⁵ *Woffenden v. Board of Supervisors &c.*, 1 Ariz. 237; s. c. 25 Pac. 647. *School Dist.*, 30 Neb. 520; s. c. 46 N. W. 613.

⁵⁶ *Byrum v. Peterson*, 34 Neb. 237; s. c. 51 N. W. 829. See also, *State v. Bays*, 31 Neb. 514, 516; s. c. 48 N. W. 270, 271. ⁵⁸ *Cleary v. Eddy Co.*, 2 N. Dak. 397; s. c. 51 N. W. 586. ⁵⁹ *State v. Grace*, 20 Or. 154; s. c. 25 Pac. 382.

⁵⁷ *State v. King*, 34 Neb. 196; s. c. 51 N. W. 754; following *State v.* ⁶⁰ *Smith v. Mayor &c.*, 81 Mich. 123; s. c. 45 N. W. 964. See also,

Chief Justice Shaw laid down this rule as follows: "The general rule of law is that a private individual can apply for a writ of mandamus only in a case where he has some private or particular interest to be subserved, or some particular right to be preserved or protected, by the aid of this process, independent of that which he holds in common with the public at large; and it is for the public officers exclusively to apply, where public rights are to be subserved."⁶¹ The supreme court of Michigan upon the same rule denied a writ of mandamus applied for by relator to compel the controller of the original city before the consolidation to receive and file a chattel mortgage on the ground that the relator had no real interest to be subserved, the application being evidently made for the sole purpose of testing the validity of the act of consolidation. The issuing of the writ being discretionary with the court it would only be granted to serve or protect substantial rights.⁶² Mandamus to the officers of a borough in Pennsylvania to compel the erection of approaches to a bridge will not be granted on the petition of a private relator where the substance of the injury alleged is that customers were kept from the relator's mill by want of approaches to the bridge. To justify mandamus upon petition of a private relator, he must show a certain specific and legal right in himself for which the law does not afford him a specific legal remedy adequate to redress the injury suffered.⁶³ Mandamus will not lie in Illinois to compel a board of town auditors to audit and allow a claim of commissioners of highways for reimbursement because of a judgment secured against them for illegally digging a ditch by the side of the highway, to the damage of an adjoining property owner.⁶⁴ Where a writ of mandamus is issued against the mayor and aldermen of a city, commanding them to pay forthwith a judgment against the city, or to show cause why a peremptory writ should not be issued requiring them to levy a tax for the purpose of paying the same, service upon the mayor alone is sufficient for the purpose of eliciting an answer, as the city is the real party in interest.⁶⁵ Where a person

People v. Regents &c., 4 Mich. 98; People v. Green, 29 Mich. 121; People v. Board &c., 38 Mich. 421; People v. Board &c., 42 Mich. 422; s. c. 4 N. W. 274.

⁶¹ In re Wellington, 16 Pick. (Mass.) 87; approved in People v. Inspectors, 4 Mich. 186. See also, Bobbett v. State, 10 Kan. 9; Turner v. Commissioners, 10 Kan. 16; Scripture v. Burns, 59 Iowa 70; s. c. 12

N. W. 760; State v. Eberhardt, 14 Neb. 201; s. c. 15 N. W. 320; Heffner v. Commonwealth, 28 Pa. St. 108.

⁶² Alderton v. Binder, 81 Mich. 133; s. c. 45 N. W. 968.

⁶³ Commonwealth v. Westfield Borough, 11 Pa. Co. Ct. 369.

⁶⁴ Board &c. v. People, 38 Ill. App. 239.

⁶⁵ Hitchcock v. City of Galveston, 48 Fed. 640.

having judgment against a city has garnished stocks owned by it to an amount sufficient to satisfy his claim, he can not have a writ of mandamus to compel the levy of a tax while the question of the validity of his garnishment is still pending in the supreme court on his own appeal.⁶⁶

§ 1569. Acts in excess of officer's powers.—Where proceedings subsequent to the laying out of a highway resulting in the refusal of the town meeting to approve and accept such highway are regular, or if irregular only in matters which do not go to the jurisdiction of the justice before whom an appeal, under the Wisconsin statutes, may be taken from a determination of supervisors as to damages, the validity of the proceedings being thus sustained, no peremptory mandamus could issue to compel supervisors to lay out and open the highway, for the reason that the negative vote of the town meeting would have deprived the supervisors of power to do so.⁶⁷ In Michigan a city treasurer can not proceed by mandamus against the cashier of a banking corporation to compel the payment by him of the taxes assessed against owners of shares in the corporation, as the remedy to collect such tax is clear under the statutes.⁶⁸

§ 1570. Michigan decisions—Control of official discretion.—The constitution of Michigan directs the legislature to provide by law for the removal of any officers elected by a county, township or school district. A statute empowers the governor to remove such officers when he is satisfied from sufficient evidence that they have been guilty of official misconduct or wilful neglect of duty, etc.; but the governor is not to act on such charges until they have been exhibited to him in writing, verified by the affidavit of the party making them that he believes them to be true, "with a statement of the prosecuting attorney of the county that in his opinion the case demands investigation." It has been held, on an application for mandamus to compel a prosecuting attorney to make and attach such statement to a petition for the removal of an alderman of a city, where it appeared that the prosecuting attorney had informed the persons signing the petition that in his opinion no investigation was necessary, that the court had no jurisdiction.⁶⁹ Where the governor undertook to appoint a member of the

⁶⁶ *Hitchcock v. City of Galveston*, 48 Fed. 640.

⁶⁷ *State v. Varnum*, 81 Wis. 593; s. c. 51 N. W. 958.

⁶⁸ *Eyke v. Lange*, 90 Mich. 592; s. c. 51 N. W. 680.

⁶⁹ *McLaughlin v. Burroughs*, 90 Mich. 311; s. c. 51 N. W. 283.

board of county auditors when there was no vacancy, and the sheriff of the county took sides with the governor's appointee and attempted to install him into the office of county auditor by taking the official books from the chairman of the board of auditors, and by placing them in possession of the governor's appointee, mandamus will issue against the sheriff for their restoration to the chairman of the board.⁷⁰ And where the public exigencies demand a speedy determination of the title to the office, which is plainly in the auditor whose term is about to expire, the question should be settled in the mandamus proceeding by the chairman of the board against the sheriff, who is in fact only a nominal party, and who really represents the governor's appointee, without compelling the parties to resort to the more dilatory proceedings by *quo warranto*.⁷¹

§ 1571. **Restoration to office.**—The New Jersey supreme court have, in a well discussed and considered case, in awarding a peremptory mandamus to restore a person removed from office, declared these rules as to remedies: When an office is filled *de facto* by a person claiming it under color of right, the proper remedy to test the claimant's title is *quo warranto* and not mandamus.⁷² An office is deemed to be full *de facto* whenever a person elected has been admitted to it, notwithstanding the election may on legal grounds turn out to be invalid; provided such election is consistent with an honest misapprehension of the law and not evidence of a palpable disregard of its provisions. Where a mandamus is applied for to compel a corporation to restore relator to an office to which he is *prima facie* entitled, the incumbent is not a necessary party to the allowance of a peremptory mandamus. When a relator in office *de jure et de facto* is interfered with by one whose lack of title *de jure* is *res judicata*, mandamus and not *quo warranto* is the proper remedy.⁷³ Before a person claiming

⁷⁰ *Lawrence v. Hanley*, 84 Mich. 399; s. c. 47 N. W. 753.

⁷¹ *Lawrence v. Hanley*, 84 Mich. 399; s. c. 47 N. W. 753.

⁷² *State v. Mayor &c.*, 52 N. J. L. 332; s. c. 19 Atl. 780. See also, *King v. Mayor*, 2 T. R. 259; *King v. Mayor &c.*, 4 T. R. 699; *King v. Mayor &c.*, 6 Ad. & El. 349.

⁷³ *State v. Mayor &c.*, 52 N. J. L. 332; s. c. 19 Atl. 780. See also, *Rex v. Lisle*, Andr. 163, s. c. 2 Str. 1090; *Frost v. Mayor &c.*, 5 El. & B. 531; *Rex v. Bankes*, 3 Burr. 1452; *Rex v. Holmes*, Hil. term,

9 Geo. II, B. R.; *Rex v. Mayor &c.*, 4 Burr. 2008; *Shortt Mandamus* 122; *People v. Mayor &c.*, 3 Johns. Ch. (N. Y.) 79; *People v. Lane*, 55 N. Y. 217; *Matter of Gardner*, 68 N. Y. 467; *People v. Ferris*, 76 N. Y. 326; *Ellis v. County Com'rs*, 2 Gray (Mass.) 370; *Conlin v. Aldrich*, 98 Mass. 557; *Dew v. Judges*, 3 Hen. & Mun. (Va.) 1; *Mayor &c. v. Gear*, 27 N. J. L. 265; *State v. Miller*, 45 N. J. L. 251; *State v. City Council &c.*, 39 N. J. L. 416; *State v. City Council &c.*, 42 N. J. L. 335; *State v. Mayor &c.*, 35

to be an officer is entitled to a mandamus he must show a clear right to it, and must produce in evidence an ordinance, passed by the requisite vote of the council, providing for his election or appointment. He must prove that he is a *de jure* or *de facto* officer.⁷⁴ Where an alderman was not qualified when elected mandamus by his predecessor is the proper remedy.⁷⁵ Mandamus is not sustained to secure office more than a year after the election and qualification of another, in the performance of his duties,⁷⁶ nor to aid in obtaining an office two months before expiration of term.⁷⁷

§ 1572. **To restore removed officials.**—In ordering that a mandamus be made peremptory to compel the mayor of a city to restore to office certain persons who had been removed by him, the supreme court of Louisiana has declared these rules: Mandamus may be directed to corporations established by law to compel them to receive and to restore to their functions such of their members as they shall have refused to receive, and whom they shall have removed without sufficient cause. The district courts have jurisdiction and power to examine into and decide whether an officer of a municipal corporation has been removed from office on charges that are sufficient in law to warrant removal proceedings, and whether the proceedings have been legally conducted, in case the law authorizes a removal only for due cause. During the pendency of a mandamus proceeding to test the validity of an act of removal from office of relators by the mayor, commissions intermediately issued to other persons can not be given the effect of extinguishing relators' cause of action. In case charges have been preferred against several municipal officers at one and the same time, who are tried together, and are removed from office by one and the same order, they have sufficient identity and mutuality of interest to authorize them to be joined as relators in one and the same mandamus proceeding.⁷⁸ Mandamus lies to compel election commissioners to act where the facts essential to relator's rights are undisputed or stand confessed by the pleadings.⁷⁹

N. J. L. 190; *State v. Board &c.*, 51 N. J. L. 240; s. c. 17 Atl. 112; *People v. Scrugham*, 20 Barb. (N. Y.) 302.

⁷⁴ *Ward v. Cook*, 78 Ill. App. 111.

⁷⁵ *Kean v. Rizer*, 90 Md. 507; s. c. 45 Atl. 468. Is not proper to try the title to an office, but is proper to reinstate one wrongfully discharged: *State v. Police Com'rs &c.*, 80 Mo. App. 206.

⁷⁶ *State v. Finley*, 74 Mo. App. 213.

⁷⁷ *State v. Finley*, 74 Mo. App. 213.

⁷⁸ *State v. Shakspeare*, 43 La. An.

92; s. c. 8 So. 893, in which the court held that if upon an examination of the charges which were preferred against certain police commissioners, it was found that they did not in law amount to malfeasance in office, the order of the mayor of the city of New Orleans removing them from office would be revoked, and they would be restored to their functions and franchises.

⁷⁹ *State v. Higgins*, 76 Mo. App.

319.

§ 1573. **To obtain possession of office.**—Under the California statute providing that the writ of mandamus may issue “to compel the admission of a party to the use and enjoyment of a right of office to which he was entitled and from which he is fully precluded,” a writ of mandamus will lie against a board of education to restore a teacher who had been “elected” to a position from which she has been removed without cause, her right to retain the position being given by express provision of law.⁸⁰ The court further held that the position of a teacher not being an office, the right to have a writ of mandamus to restore her to her position was not affected by the fact that another person had been placed in her position.⁸¹ A mandamus will not be granted to compel the directors of a village to receive the relator as a member of the board to which he has been elected, where the answer to the writ shows that relator was not a resident and freeholder of the ward for which he was elected, as required by the village charter.⁸² Mandamus to observe the provisions of the New York statute giving preference of appointment to honorably discharged Union soldiers and sailors will lie, the act itself declaring that “all public officials are charged with the faithful compliance with its terms, both in letter and spirit.”⁸³

§ 1574. **To compel performance of judicial functions.**—It is settled in Indiana that the writ of mandamus will not issue against a board of commissioners of a county, when acting in a judicial capacity, to direct the performance of a judicial duty in any particular mode or to render any particular judgment. Where a board of commissioners refuses to act, however, in a matter upon which it is their duty to take some action, the writ will issue to compel action, but will not dictate the kind of judgment to be rendered.⁸⁴ So, where a board of county commissioners submitted the question of purchasing a certain toll road to the electors of the townships through which the road ran, at which election a majority of such voters declared in favor of the purchase, and the board afterwards refused to make an order for such purchase, it was held that mandamus would not lie to compel the board to make such an order, its action being a judicial one.⁸⁵ Nor

⁸⁰ *Kennedy v. Board &c.*, 82 Cal. 483; s. c. 22 Pac. 1042.

⁸¹ *Kennedy v. Board &c.*, 82 Cal. 483; s. c. 22 Pac. 1042.

⁸² *People v. Sheffield*, 47 Hun (N. Y.) 481.

⁸³ *Matter of Sullivan*, 55 Hun (N. Y.) 285; s. c. sub nom. *Sullivan v. Gilroy*, 8 N. Y. S. 401.

⁸⁴ *State v. Board &c.*, 131 Ind. 90; s. c. 30 N. E. 892. See also, *State v. Board &c.*, 45 Ind. 501; *State v. Board &c.*, 63 Ind. 497.

⁸⁵ *State v. Board &c.*, 131 Ind. 90; s. c. 30 N. E. 892. See also, *Gilson v. Board &c.*, 128 Ind. 65; s. c. 27 N. E. 235; *White v. Burkett*, 119 Ind. 431; s. c. 21 N. E. 1087.

would it lie in this case, because the party applying for it had an adequate legal remedy in his right of appeal from the action of the board to the circuit court.⁸⁶ Mandamus will issue in a proper case to compel a county board to act upon a claim against the county, where final action has been refused; but in a proceeding in mandamus the court will not determine the validity of any offset set up by the county.⁸⁷ The court said: "The purpose of this action is not to compel the allowance of relator's account, but merely to require respondents to take final action thereon. Whether such account shall be allowed in whole or in part or be entirely rejected can not be adjudicated in a proceeding by mandamus, but must be determined in the first instance by the county board when they come to take final action upon the claim."⁸⁸

§ 1575. To compel payment of judgment.—On an application for a writ of mandamus to compel the city of New Orleans to pay a judgment regularly obtained against it, such judgment was held conclusive as to the city's liability; and no defense can be made on the ground that the debt was not paid out of the revenues of the year for which it was contracted in accordance with the statute providing that no municipal corporation shall expend any money in any year in excess of the actual revenue for that year, and that the revenue for each year shall be devoted to the expenditures thereof.⁸⁹ It was also held that the legislature having declared that a ten-mill tax is sufficient to provide for the unbonded expenditures of the city of New Orleans, it is not within the discretion of the council to exhaust the entire revenue with one class of disbursements and leave others to accumulate: therefore a writ of mandamus will issue to compel it to pay a valid judgment against the city, either out of surplus revenues for the current year, or, if there is no available surplus, to include it in the budget for the ensuing year.⁹⁰ And on such an application for a writ of mandamus the fact that other judgments besides the relator's have been recorded under the Louisiana statute did not require that

⁸⁶ *State v. Board &c.*, 131 Ind. 90; s. c. 30 N. E. 892. See also, *Marshall v. State*, 1 Ind. 72; *Board &c. v. Hicks*, 2 Ind. 527; *State v. Board &c.*, 25 Ind. 210; *Grusenmeyer v. City of Logansport*, 76 Ind. 549; *Platter v. Board &c.*, 103 Ind. 360; s. c. 2 N. E. 544; *City of Logansport v. La Rose*, 99 Ind. 117; *Padgett v. State*, 93 Ind. 396.

⁸⁷ *State v. Slocum*, 34 Neb. 368; s. c. 51 N. W. 969.

⁸⁸ *State v. Slocum*, 34 Neb. 368; s. c. 51 N. W. 969.

⁸⁹ *Mayor &c. v. United States*, 49 Fed. 40; following *United States v. New Orleans*, 98 U. S. 381, 395.

⁹⁰ *Mayor &c. v. United States*, 49 Fed. 40.

the writ of mandamus applied for by the relator should direct all the judgments to be paid in their proper order, since the court will not undertake to enforce the rights of persons who do not invoke its aid.⁹¹

§ 1576. **To compel audit of claims.**—A board of supervisors being the court of original jurisdiction to determine the validity of claims against a county, in such determination it acts judicially.⁹² Its conclusion, if it has properly proceeded, can only be reviewed by a writ of certiorari.⁹³ The court may by mandamus direct the board of supervisors to properly proceed to audit a claim, but it can not by mandamus direct the board to allow a claim upon which it must pass judicially.⁹⁴ Where a claim has been presented to a board of supervisors in New York, and it has been informally examined without the swearing of witnesses, or the giving of an opportunity to claimant to produce witnesses or present his legal rights by counsel, mandamus will lie to the board to audit the claim, on the ground that they have not judicially investigated the claim.⁹⁵ If such a claimant, after the alternative writ of mandamus has been obtained, accepts the order of a board for the sum at which it had previously assumed to audit his claim, and draws the money thereon, he is estopped from making any further demand on the claim, though at the time of accepting it he stated that he did it without prejudice to his rights in the mandamus proceedings, and the supervisor who delivered the order assented to the condition.⁹⁶ Mandamus will not lie to a board of county supervisors to re-audit an account where a previous board has considered the whole claim on its merits, and in good faith exercised its judgment, and rendered a decision as to the amount which should be allowed.⁹⁷ Mandamus lies to

⁹¹ *Mayor &c. v. United States*, 49 Fed. 40.

⁹² *Brown v. Green*, 46 How. Pr. (N. Y.) 302, 306; *People v. Stocking*, 50 Barb. (N. Y.) 573; *People v. Barnes*, 114 N. Y. 317; s. c. 20 N. E. 609; 21 N. E. 739; *People v. Board &c.*, 21 How. Pr. (N. Y.) 322-328.

⁹³ *People v. Board &c.*, 51 N. Y. 442; *People v. Board &c.*, 25 Hun (N. Y.) 131, 135; *People v. Barnes*, 114 N. Y. 317; s. c. 20 N. E. 609; 21 N. E. 739; *Hyatt v. Bates*, 35 Barb. (N. Y.) 308; s. c. on appeal, 40 N. Y. 164.

⁹⁴ *People v. Chapin*, 104 N. Y. 96; s. c. 10 N. E. 141.

⁹⁵ *People v. Board &c.*, 15 N. Y. S. 748.

⁹⁶ *People v. Board &c.*, cited in the preceding note. See also, *People v. Board &c.*, 33 Hun (N. Y.) 305; *People v. Board &c.*, 3 How. Pr. (N. S.) (N. Y.) 241; *Chase v. Saratoga Co.*, 33 Barb. (N. Y.) 603.

⁹⁷ *People v. Board &c.*, 16 N. Y. S. 254. The court said:—"There is no statute law, however, requiring [a board of supervisors] to review decisions of prior boards in reference to claims that have been once properly considered and audited against the county. There being no law requiring them to perform such an act, they can not be compelled by mandamus to do what the law does not require them to do. The ex-

compel a city to audit and pay a claim for hydrant rent,⁹⁸ and to compel a town board to make and file a certificate of rejection or allowance of a claim,⁹⁹ but will not lie to compel the auditing of claims against the state in a particular way or for any particular amount.¹⁰⁰

§ 1577. Payment of claims and warrants.—If the county commissioners refuse to pay a claim when there are funds in the county treasury liable thereto, the remedy is by mandamus, and not by actions for damages against them personally.¹⁰¹ If there is no money in the treasury of a municipal corporation for the payment of a warrant, a mandamus to its governing board to draw a warrant upon its treasurer should be denied.¹⁰² A peremptory mandamus should not issue to compel a board of town auditors to audit a claim of a commissioner of highways for a judgment for legal services recovered against and

amination of the account by the board may be regarded and treated in the nature of a trial, and its allowance or disallowance is the decision of that tribunal; and when the board has properly exercised that jurisdiction which the law imposes in auditing claims against the county, the sufficiency of the evidence or the injustice of the decision can not be reviewed or inquired into by mandamus, nor will a mandamus lie to compel the board to reach any different decision. While the writ of mandamus is an appropriate remedy to compel public officers, judicial as well as ministerial, to act, where the act is ministerial the officers may be compelled to perform the act according to law; but where the officers are vested with judicial or discretionary power to decide a question upon a disputed state of facts, they can not be compelled by mandamus to decide in a particular way. . . . If, however, the statute prescribes the sum to be received for [services rendered the county], or if the sum is fixed by a binding contract, the board is bound to allow the bill according to the requirements of the statute or contract. They have no discretion over it, and if they refuse

to allow the claim a mandamus will lie to compel them to allow it. Where a claim is disallowed by the board because the bill was not made out and presented in proper form, or for any other reason not involving a decision upon the merits, the court might, in such a case, compel a subsequent board by mandamus to again consider it and audit the account."

⁹⁸ *State v. City of Phillipsburg*, 23 Mont. 16; s. c. 57 Pac. 405.

⁹⁹ *People v. Town Board &c.*, 59 N. Y. S. 248; *People v. Board of Auditors &c.*, 59 N. Y. S. 615; *Wyker v. Francis*, 120 Ala. 509; s. c. 24 So. 895; *People v. Coler*, 54 N. Y. S. 639; *Bacon v. City of Tacoma*, 19 Wash. 674; s. c. 54 Pac. 609.

¹⁰⁰ *People v. Roberts*, 163 N. Y. 70; s. c. 57 N. E. 98.

¹⁰¹ *Hunter v. Mobley*, 26 S. C. 192; s. c. 1 S. E. 670.

¹⁰² *Board &c. v. McManus*, 54 Ark. 446; s. c. 15 S. W. 897. See also, *People v. Tremain*, 17 How. Pr. (N. Y.) 142; *Commonwealth v. Commissioners*, 6 Binn. (Pa.) 5; *Commonwealth v. Commissioners*, 1 Whart. (Pa.) 1; *Clay Co. v. McAleer*, 115 U. S. 616; s. c. 6 S. Ct. 199.

paid by him in that capacity, where the record and pleadings fail to show that the services in question were necessary and proper, and that the board had passed upon the same.¹⁰³ The statute of Texas provides that the amount due to jurors and bailiffs for services in criminal cases shall be paid by the county treasurer upon the certificate of the district or county court in which such services were rendered. Another statute provides that such certificates shall be transferable by delivery. It has been held that it not being the duty of the clerk of a district or county court to pass upon the validity of a transfer by a juror or bailiff of such claim against a county, the clerk could not be compelled by mandamus to issue to an assignee of such claim the certificate designated in the said statute, although evidencing only the right of the assignor to compensation.¹⁰⁴

§ 1578. For payment of claims.—The supreme court of New Jersey has held that a peremptory writ of mandamus issued to enforce a judgment and execution against a municipal corporation will not be quashed unless it clearly changes or enlarges in a material matter the terms of the alternative writ or rule absolute by which it was issued.¹⁰⁵ And where the writ was served on the assessors of taxes, after the duties of the assessors were completed by statute for that year, the writ will not be quashed, but the time for return extended.¹⁰⁶ In mandamus to a municipal officer against a municipality, the petition must not only show that defendant is such officer, and as such has funds in his hands applicable to the judgment, but also that it is his duty, or within his power, to apply the funds in his hands to the judgment.¹⁰⁷ In Washington Territory it was held that mandamus would not lie against the mayor and clerk of a city to pay an attorney's lien which had been filed on a judgment obtained for a client against the city, which the client had assigned and satisfaction of which had been entered of record, where no judicial proceedings had been had to determine the amount or validity of the lien as against the attorney, the assignee, or the city, or to set the assignment or satisfaction aside.¹⁰⁸ Where, as far as it appeared, a petition for mandamus to compel a county board to consider and pass upon a claim of the petitioner showed that the same claim had been presented to a former board and was then examined and disallowed, and that this board

¹⁰³ *People v. Case*, 19 N. Y. S. 625.
The remedy is by certiorari.

¹⁰⁶ *State v. Assessors &c.*, *supra*.

¹⁰⁷ *People v. Soucy*, 26 Ill. App.

¹⁰⁴ *Pace v. Ortiz*, 72 Tex. 437; s. c. 505.
10 S. W. 541.

¹⁰⁸ *Chambers v. Territory*, 3 Wash.

¹⁰⁵ *State v. Assessors &c.*, 51 N. J. T. 280; s. c. 13 Pac. 664.
L. 279; s. c. 17 Atl. 122.

was a newly elected one, but failed to show anything with reference to the grounds of disallowance by the former board or any fact which would place the claim in any better light before the new board, the supreme court of South Carolina held that the petitioner had no clear legal right, required for the foundation of the extraordinary proceeding by mandamus.¹⁰⁹ In North Carolina mandamus will lie to compel a board of county commissioners to examine plaintiff's claim for commissions as county treasurer, and report what, if anything, he is entitled to, where under the statute the compensation of the treasurer is fixed by the county board.¹¹⁰ Mandamus will not issue to enforce the payment of a claim against a county when there has been a delay of eight years in demanding payment of the claim by suit.¹¹¹ If a board of supervisors of a county refuse to give persons an opportunity to establish their claims against the county, mandamus lies to compel them to do so.¹¹² But a party filing his claim with the county clerk can not put the board of supervisors in default for not passing upon the same, and obtain a mandamus compelling such action, without appearing before the board or its committee and requesting such action and offering to submit proof of the correctness of his claim.¹¹³ Where money has been collected by an incorporated village for liquor licenses, on refusal of the village treasurer to pay over the amount belonging to a school district within the limits of the village, the district may by mandamus compel him to pay the same.¹¹⁴

§ 1579. To compel payment of claims continued.—Under the California statute which provides that any person may appeal from the rejection of his claim by the county auditor to the county board, whose decision thereon shall be final, a writ of mandate will issue against the auditor to pay a claim allowed by the county board on appeal from its rejection by him, though the rejection may have been justified on its first presentation.¹¹⁵ Mandamus will lie to compel the payment of orders given by the district council for material for public improvements without action, when it appears that the fund out of which payment is sought is a special fund set aside for the special purpose for which the orders were given, and the expenditure of which is expressly given by statute of Rhode Island to the district

¹⁰⁹ *State v. County Com'rs*, 28 S. C. 258; s. c. 5 S. E. 622.

¹¹⁰ *Koonce v. Board &c.*, 106 N. C. 192; s. c. 10 S. E. 1038.

¹¹¹ *State v. Appleby*, 25 S. C. 100.

¹¹² *Hickey v. Board &c.*, 62 Mich. 94; s. c. 28 N. W. 771.

¹¹³ *Hickey v. Board &c.*, *supra*.

¹¹⁴ *State v. White*, 29 Neb. 288; s. c. 45 N. W. 631.

¹¹⁵ *Falk v. Strother*, 84 Cal. 544; s. c. 24 Pac. 110.

council.¹¹⁶ The writ will lie to compel a county board to appropriate from the county treasury a sum sufficient to meet one-half the expense of a proposed bridge, when it is shown that all the conditions imposed by the Illinois statute authorizing such appropriation have been complied with.¹¹⁷ It has been held in Georgia that where a judgment had been obtained against a county for injuries to a horse by reason of a defective bridge, which the county was chargeable with maintaining, the county commissioners might be compelled by mandamus to pay the judgment, because they had been granted by the legislature, under the authority of the constitution, power to levy taxes to build and repair bridges, and as incidental to this the power and duty to raise money to pay such a judgment.¹¹⁸

§ 1580. To compel public boards to reverse their decisions.—The supreme court of Michigan, as to writs of mandamus, said:—"It is within the province of courts to restrain public bodies and officers of the municipal divisions of the state from exceeding their jurisdiction, and to require them to perform such specific duties as the law imposes upon them."¹¹⁹ And the writ has often been used to compel such bodies or officers to reverse their decisions.¹²⁰ The writ, however, is a discretionary one, and will not be awarded in all cases, even where a *prima facie* right to relief is shown. We must have regard to the exigency which calls upon us to exercise our discretion, the nature and extent of the wrong or injury which would follow its refusal and other facts which have a bearing upon the particular case."¹²¹ Acting upon this principle the court declined to grant a writ of mandate to compel the mayor of a city to reverse his decision in declaring a resolution authorizing the purchase of certain land carried and to declare it lost, inasmuch as it appeared upon the records that the resolution was not carried, and that therefore no valid contract could be entered into for such purchase for want of authority on the part of the mayor and clerk, and that no injury could arise to the city on account of the action complained of.¹²²

§ 1581. To compel subordinate officials to recognize board.—The supreme court of the United States has held that on petition for a

¹¹⁶ *Portland Stone-Ware Co. v. Taylor*, 17 R. I. 33; s. c. 19 Atl. 1086.

¹¹⁷ *Board &c. v. People*, 24 Ill. App. 410.

¹¹⁸ *Dearing v. Shepherd*, 78 Ga. 28.

¹¹⁹ *Attorney-General v. Board &c.*, 64 Mich. 607; s. c. 31 N. W. 539;

Coll v. City Board &c., 83 Mich. 367; s. c. 47 N. W. 227.

¹²⁰ *People v. Supervisors &c.*, 3 Mich. 475; *People v. Board &c.*, 13 Mich. 233.

¹²¹ *Tennant v. Crocker*, 85 Mich. 328, 339; s. c. 48 N. W. 577.

¹²² *Tennant v. Crocker*, *supra*.

writ of mandamus by a board of county commissioners to compel the clerk of the board to recognize them as such and to perform his duties, the clerk's answer that petitioners were not duly elected commissioners, but that other persons were, does not so involve their title to office as that the writ should be refused on the ground that there is an adequate remedy at law in quo warranto proceedings.¹²³ The court said:—"This was not a proceeding to try the title to office. The direct purpose and object was to compel the defendant to discharge his duties as clerk, and to forbid him to assume to determine any contest between rival commissioners. It is true the pleadings disclose the existence of a contest between these petitioners and other parties, and it is true that the answer would tend to show that the others were the commissioners de facto; but that was a question of fact to be determined by the court hearing this application, and it is, as must be assumed from the decisions, found that these petitioners rather than their contestants were the commissioners de facto. It was proper for it then to issue a mandamus to compel the defendant to recognize them as the commissioners of the county, and this irrespective of the question whether or no the petitioners were also commissioners de jure."¹²⁴

§ 1582. Removal of obstructions in streets.—It has been held in Pennsylvania that mandamus is not the appropriate remedy to compel a borough to remove poles erected by a street railway company upon the sidewalks of a street. Indictment would seem to be the proper remedy. Nor has the court power by mandamus to revise or reverse the exercise of the discretion of municipal authorities granting permission to place poles on the sidewalks.¹²⁵ On the power to revise the decision of the authorities the court said:—"We have no such power. We might have compelled [the borough authorities] to consider the question; but we could not then have directed their conclusions, nor can we revise them after they have been reached. As long ago as 1812, and frequently since, the supreme court of this state has held that 'when a person or body is clothed with judicial, deliberative or discretionary powers and he or it has exercised such powers according to its discretion, mandamus will not lie to compel a revision or modification of the decision resulting from the exercise

¹²³ *In re Delgado*, 140 U. S. 586; s. 1420; *Page v. Hardin*, 8 B. Mon. c. 11 S. Ct. 874; affirming *Delgado v. (Ky.)* 648; *State v. Mayor &c.*, 52 N. Chavez, 5 N. M. 646; s. c. 25 Pac. J. L. 332; s. c. 19 Atl. 780; *Williams v. Clayton*, 6 Utah 86; s. c. 21 Pac. 948.

¹²⁴ *In re Delgado*, supra. See also, 398.
City of Putnam v. Langley, 133
Mass. 204; *Rex v. Harris*, 3 Burrow 9 Pa. Co. Ct. 542.

¹²⁵ *Commonwealth v. West Chester*,

of such discretion, although in fact the decision may have been wrong, provided such decision was devoid of fraud or corruption.'"¹²⁶ A complaint in an action to compel a city by mandamus to remove an obstruction from an alley placed therein by a railroad company with the consent of the city must, in order to be sufficient, make it affirmatively appear that an unlawful use is made of the alley.¹²⁷ A railroad company can be compelled by mandatory injunction to restore a public street which it had torn up in constructing its crossing to its former state of usefulness where such restoration was a statutory condition of the right to build the crossing; and the injunction could not be objected to on the ground that the city might repair the injury and recover damages of the railroad company.¹²⁸ It is not necessary that the city establish a permanent grade of the streets before calling on the railway company to repair, as the company needed only to repair the injury which it had done.¹²⁹ Allegations in the petition of the city for this relief against a railway company that the latter had obstructed a street by raising an embankment in many places therein eighteen inches above the former grade; that it was impracticable to drive over the railroad between one end of a long block and another; that it was impossible to turn with an ordinary team on the street or to drive in and out of the lots and premises with teams and heavy loads, it was held, sufficiently showed an obstruction of the street to entitle the city to an injunction.¹³⁰

§ 1583. **The same subject continued—Control of discretion.**—The supreme court of Illinois has held that the writ of mandamus, since

¹²⁶ *Commonwealth v. West Chester*, 9 Pa. Co. Ct. 542. The court said:—"A mandamus is a commandatory writ. It lies where there is a clear legal right in the relator, a corresponding duty in the defendant and a want of any other adequate, appropriate and specific remedy. It is invoked for the enforcement of duties to the public by officers and others who either neglect or refuse to perform them. He or they who demand it must in all cases establish a specific legal right to it as well as show the duty of the defendants to do what is demanded, and demonstrate the want of any legal remedy:" citing *Commonwealth v. Select &c. Councils*, 34 Pa. St. 496; *Commonwealth v. Commissioners*

&c., 37 Pa. St. 277. See also, *Commonwealth v. Cochran*, 5 Binn. (Pa.) 87; *Commonwealth v. Perkins*, 7 Pa. St. 42; *Commonwealth v. Mitchell*, 82 Pa. St. 343, 350; *Runkle v. Commonwealth*, 97 Pa. St. 328; *Dechert v. Commonwealth*, 113 Pa. St. 229, 241; s. c. 6 Atl. 229.

¹²⁷ *State v. City of New Albany*, 127 Ind. 221; s. c. 26 N. E. 791.

¹²⁸ *City of Oshkosh v. Milwaukee &c. R. Co.*, 74 Wis. 534; s. c. 43 N. W. 489. See also, *Town of Jamestown v. Chicago &c. R. Co.*, 69 Wis. 648; s. c. 34 N. W. 728.

¹²⁹ *City of Oshkosh v. Milwaukee &c. R. Co.*, *supra*.

¹³⁰ *City of Oshkosh v. Milwaukee &c. R. Co.*, *supra*.

the revision of the statutes relating to that remedy, is only issued in a clear case and in the discretion of the court. When it is doubtful whether the act sought to be coerced will or will not make the party liable for a trespass, the court, in the exercise of its discretion, will refuse the writ. The ground that there is another remedy equally convenient and effectual, and therefore mandamus will not lie, has been abrogated by these statutes in relation to mandamus. In case of an abuse in the exercise of a discretionary power, so that injustice will result, it is admissible that the exercise of the power shall be controlled by mandamus. In a case of an application for mandamus to compel highway commissioners to remove an obstruction in a highway, they held that the most recent statute as to highways in that state had given to the commissioners of highways, after having given reasonable notice to the person obstructing the highway to remove the obstruction, power to remove the same and to recover the cost of such removal from the party so obstructing the same, and that the provisions "that the commissioners, after having given reasonable notice, etc., may remove any fence or other obstruction," etc., were intended to impose upon the commissioners the imperative duty of removing obstructions from the public highway. But while it was their imperative duty, they have a discretion as to the length of the notice they may first give the offending party to remove the same. And it is as much their duty to exercise this incidental discretion for the public good by determining what is a reasonable notice in the particular case, and by giving it, as it is to remove the obstruction. The word "may" in a statute, they held, will be construed to mean "shall" whenever the rights of the public or third persons depend upon the exercise of the power, or the performance of the duty to which it refers; and such is its meaning in all cases where the public interests and rights are concerned, or a public duty is imposed upon public officers, and the public or third persons have a claim *de jure* that the power shall be exercised.¹³¹ The issuing of a peremptory mandamus rests in the sound discretion of the court.¹³² The issue of a writ to compel an officer having jurisdiction in the matter to remove obstructions in a street can be properly prayed for only on the ground that their removal is part of the public duty of such officer, and that the improper failure

¹³¹ *Brokaw v. Commissioners &c.*, 130 Ill. 482; *s. c.* 22 N. E. 596, reversing the court below, which had dismissed the petition for mandamus. See also, *Kane v. Footh*, 70 Ill. 587; *Fowler v. Perkins*, 77 Ill. 271; *Schuyler Co. v. Mercer Co.*, 9 Ill. 20; *Council &c. v. People*, 78

Ill. 382; *Tapping Mandamus* (Am. ed.), 66; *People v. Weber*, 86 Ill. 283.

¹³² *People v. Contracting Board*, 27 N. Y. 378, 381; *People v. Supervisors &c.*, 12 Johns. (N. Y.) 414; *People v. Supervisors &c.*, 15 Barb. (N. Y.) 607.

to perform that public duty works special damage to the relator.¹³³ In a case where it was sought to compel the commissioner of public works of the city of New York to remove structures erected by an elevated railway company in the streets, it was held that mandamus was not the proper remedy, the alleged obstructions being erected by a corporation under color of legislative authority in a comparatively uninhabited part of the city and causing no present substantial loss to the relator.¹³⁴

§ 1584. To appoint school trustees.—It has been held in Texas that parents of children within the school ages, residents in a school district, may prosecute a suit for mandamus against the county judge, who, under the statutes of that state, is the administrator of the public school finances, as well as certain other matters connected with the public schools, for refusal to appoint trustees for the district, when it is his duty under the school laws to do so. To a petition for a peremptory mandamus to compel a county judge to appoint trustees for a school district formed by the county commissioners from part of another district, the judge can not answer that the action of the commissioners' court was impolitic. The county judge may be, in such proceedings, compelled to appoint trustees and to apportion the school funds to a newly ordered school district. The court also held that the order to him to apportion the school funds pro rata to the new district, including funds realized from a special school tax assessed upon property in the original district, was proper.¹³⁵

§ 1585. Apportionment, etc., of school moneys.—Mandamus is the appropriate remedy to compel county commissioners to pay over without diminution the full amount of taxes levied for school purposes.¹³⁶ Town auditors were authorized by a New York statute to apportion certain town funds among the school districts of the town in the same manner "as the public school moneys of the state are apportioned." After the town auditors in this case had made such apportionment, the previous apportionment of the state moneys was, on appeal to the superintendent of public instruction, declared erroneous, and ordered to be corrected; and on a subsequent appeal to him, he ordered the town auditors to correct their apportionment to correspond therewith. It was held that, even if the superintendent had jurisdiction to re-

¹³³ *People v. Supervisors*, 11 N. Y. 563; *People v. Hayt*, 66 N. Y. 606; *People v. Contracting Board*, 33 N. Y. 382; *People v. Croton Aqueduct Board*, 49 Barb. (N. Y.) 259.

¹³⁴ *People v. Manhattan R. Co.*, 20 Abb. N. C. (N. Y.) 393.

¹³⁵ *Porter v. State*, 78 Tex. 591; s. c. 14 S. W. 794.

¹³⁶ *Board &c. v. Gantt*, 73 Md. 521; s. c. 21 Atl. 548.

view the action of the town auditors, they should not be compelled by mandamus to make such correction, as their statutory power to apportion the town moneys as the state moneys were in fact apportioned did not extend to the correction of a previous apportionment, it appearing, also, that the right of the relators was doubtful, as such corrected apportionment was alleged to be informal, irregular and false.¹³⁷ A school district entitled under the laws of Nebraska by reason of being within the limits of a village to its proper share of the moneys received by the corporate authorities of such incorporated village for liquor licenses, upon a refusal to pay on demand by the village treasurer may by mandamus compel him to pay the same.¹³⁸ In mandamus against the trustees of a school district to compel the restoration of a pupil, the validity of the organization of the district can not be called in question.¹³⁹

§ 1586. To restore school funds.—Where a common council which had no control over a school fund, by resolution directed the treasurer of a town to retain a portion of a school fund and apply it to the payment of certain special assessments against school property, such resolution was held a nullity; and where the treasurer had applied a portion of this fund, as directed, against the protest of the board of education, it was held that a mandamus should issue directing him to restore it to the school account. The charter of the town in this case provided that the money voted by the people to be raised for school purposes should be paid by the collector of taxes directly to the town treasurer and by him should be paid out upon warrants signed by the president of the board of education.¹⁴⁰ But in the absence of any duty on the part of the board of council in respect to that fund, no writ of mandamus would go to them compelling any action relating to it.¹⁴¹

§ 1587. To compel signing of teacher's warrant.—A peremptory mandamus will issue to compel the comptroller of a city to countersign a teacher's warrant in payment of the teacher's services for one month, where the board of commissioners have contracted with the teacher for a year, beginning at a stated time, "provided there be suffi-

¹³⁷ *People v. Board &c.*, 12 N. Y. S. 165; s. c. 35 N. Y. St. 324.

¹³⁸ *State v. White*, 29 Neb. 288; s. c. 45 N. W. 631. It was urged that the remedy was to bring action against the village. See also, *State v. Roderick*, 23 Neb. 505; s. c. 37 N. W. 77; *State v. Wilcox*, 17 Neb. 219;

s. c. 22 N. W. 458; *School District v. Board &c.*, 9 Neb. 405; s. c. 2 N. W. 877.

¹³⁹ *State v. School Dist.*, 31 Neb. 552; s. c. 48 N. W. 393.

¹⁴⁰ *State v. Board &c.*, 52 N. J. L. 69; s. c. 18 Atl. 571.

¹⁴¹ *State v. Board &c.*, *supra*.

cient money properly set apart to pay * * * for that period, and if there be not sufficient money for that purpose, for such portion of that period as the moneys so set apart shall be sufficient," there being money in the treasury of the city appropriated to the payment of salaries of school-teachers. The court of appeals of New York, in rendering this opinion, held that provision in the statute that the board of school commissioners of this city shall not contract to pay teachers a gross amount in excess of that allowed by the board of estimate for the school year did not operate, so long as the board kept within such restriction, to prevent them from contracting with teachers at a rate which would exhaust the appropriation made in pursuance of such estimate before the end of the school year, the effect thereof being merely to shorten the school year and not to exceed the appropriation.¹⁴² Under the by-laws of the board of education of New York city adopted in pursuance to the consolidation act, which by-laws provide that the salaries of school-teachers shall be paid on pay-rolls to be approved and certified by the school trustees and inspectors, and then audited and certified by the board of education and finance department of the city, mandamus will not lie to the board of education to pay the salary of relator, a teacher alleged to have been wrongfully dismissed; relator's only remedy being to have his name put on the pay-roll that his salary might be paid in the regular way.¹⁴³

§ 1588. To dissolve an injunction against a city.—In granting a writ of mandamus to compel a circuit judge to dissolve an injunction restraining a city from making a contract for the lighting of its streets, the supreme court of Michigan declared these rules:—The circuit court has no jurisdiction to restrain the exercise of corporate powers by a city, unless the action complained of is beyond its legal discretion. A city (as a corporation) is a single legal person, and in proper cases subject to legal coercion; and where so liable, it is not irregular to restrain any city functionary who is engaged in carrying out the illegal purpose. Whether mandamus is the proper remedy to remove an injunction which ought not to stand depends entirely on the conditions of its issue. Usually, if the mischief can be as well settled by appeal, that is the proper resort. Where a preliminary injunction operates in such a way as to do violence to vested rights and interests, and to prevent the proper authorities from exercising their legal functions, it is such an invasion of right as entitles the aggrieved parties to a prompt redress, which is better for the public peace and

¹⁴² *People v. Coffee*, 131 N. Y. 569; ¹⁴³ *People v. Board &c.*, 15 N. Y. S. s. c. 30 N. E. 64; affirming s. c. 62 308; s. c. 60 Hun (N. Y.) 486. Hun (N. Y.) 86; 16 N. Y. S. 501.

order than encouraging an open disregard of the legal tribunals where it can be avoided. While the action of an inferior court, within its discretion, is to be reached by other appellate process, yet, when the action complained of is beyond any proper discretionary power, or is an abuse of discretion which can not be justified on legal principles, the court may and will interfere by mandamus, if there is urgency or pressing occasion to do so.¹⁴⁴

§ 1589. **To compel approval of official bond.**—Mandamus, it has been held in Indiana, will lie to compel a county auditor to accept and approve the official bond of a township trustee duly elected.¹⁴⁵ Where a board of county commissioners in Colorado adjudge the bond of a justice of the peace insufficient and refuse to approve the same, mandamus will not lie to control the board's discretion in the matter, the board being authorized by the statutes of that state to judge of the sufficiency of official bonds of that character.¹⁴⁶ Mandamus will not lie to compel county commissioners to approve a bond of a county school superintendent where the ground of their refusal is that the bond was not filed within the time provided by the statute, and that therefore the office is vacant.¹⁴⁷ Nor will the writ lie to compel the approval of a liquor bond which has been refused because of the insufficiency of the sureties, where it appears there was evidence to war-

¹⁴⁴ *City of Detroit v. Hosmer*, 79 Mich. 384; s. c. 44 N. W. 622. See also, *People v. Judge &c.*, 31 Mich. 456; *Tawas &c. R. Co. v. Circuit Judge*, 44 Mich. 479; s. c. 7 N. W. 65; *Van Norman v. Circuit Judge*, 45 Mich. 204; s. c. 7 N. W. 796; *MacLean v. Speed*, 52 Mich. 257; s. c. 13 N. W. 396; *Barnum &c. Iron Works v. Speed*, 59 Mich. 272; s. c. 26 N. W. 802, 805.

¹⁴⁵ *Copland v. State*, 126 Ind. 51; s. c. 25 N. E. 866. See also, *Gulick v. New*, 14 Ind. 93, in which it was held that mandamus will lie to compel a county clerk to approve the bond of a sheriff. In *Board &c. v. Johnson*, 124 Ind. 145; s. c. 24 N. E. 148, the same court distinguish *Gulick v. New*, supra, by saying:—"The decision in that case may be sustained upon the ground that the clerk was a ministerial officer and that no appeal could be taken from his action in refusing to approve the

bond. But where the officer is a judicial one and there is a right of appeal, the question is essentially different." They then say:—"There is, however, a decision directly declaring that mandate will lie to compel a board of commissioners to approve the bond of a public officer or show cause for refusing to approve it:" Citing *Board &c. v. State*, 61 Ind. 379, the soundness of which decision the court doubted. Cf. as to the duty in such cases being a judicial and not a ministerial one, *State v. Dunnington*, 12 Md. 340; *Ex parte Harris*, 52 Ala. 87; s. c. 23 Am. R. 559; *Tomason v. Justices*, 3 Humph. (Tenn.) 233; *Swan v. Gray*, 44 Miss. 393; *Bay Co. v. Brock*, 44 Mich. 45; s. c. 6 N. W. 101.

¹⁴⁶ *Board &c. v. Crotty*, 9 Colo. 318; s. c. 12 Pac. 151.

¹⁴⁷ *Board &c. v. Johnson*, 124 Ind. 145; s. c. 24 N. E. 148; distinguish *Board &c. v. State*, 61 Ind. 379.

rant such a finding.¹⁴⁸ Mandamus has been held to lie to compel a village to review, and if sufficient to approve, a bond duly filed, as a preliminary step to the granting of a license to keep a saloon before the passage of an ordinance suppressing saloons.¹⁴⁹

§ 1590. **To compel execution of tax deed.**—By the statute of Nebraska the production of a tax certificate to the treasurer of a county, together with proof that proper notice of the expiration of the time to redeem has been legally given, are conditions precedent to the right of the treasurer to execute a tax deed. The provisions of the statute as to the time and manner of giving notice are mandatory and must be substantially complied with, or the holder of such a tax certificate will not be entitled to a treasurer's deed for lands purchased at a tax sale. So the court in Nebraska sustained the dismissal of a proceeding in mandamus to compel a county treasurer to execute a tax title, the petitioner not having complied with the requirements of the statute, as a peremptory mandamus will only issue against a public officer to enforce the performance of a present duty imposed upon him by law where he is in default in the discharge of such duty.¹⁵⁰ And mandamus will not lie to compel a county treasurer to issue tax deeds of land for which a relator has paid, if the return of the treasurer shows that the money paid was tendered back to the relator the same day and accepted by him, and that the lands had been conveyed to other persons before relator again tendered the money under the Michigan statute relating to tax sales and titles.¹⁵¹ But the state land tax book being a public record, it has been held in Michigan that a dealer in tax titles has the same right as any other citizen to inspect and examine it, and may enforce his right, if necessary, by a writ of mandate.¹⁵²

§ 1591. **To compel approval of contract.**—Upon application for a writ of mandamus to a city council to compel an approval of a contract, where it was determined that the objection upon which the council had rejected relator's contract was merely technical and without foundation, still, as the contract had been let to another party, and the work done, the court, in its discretion, declined to grant the writ.¹⁵³ In a similar case the New York court of appeals said:—

¹⁴⁸ *Post v. Township Board &c.*, 63 Mich. 323; s. c. 29 N. W. 721.

¹⁴⁹ *Warner v. Board &c.*, 62 Mich. 251; s. c. 28 N. W. 844.

¹⁵⁰ *State v. Gayhart*, 34 Neb. 192; s. c. 51 N. W. 746.

¹⁵¹ *Aitcheson v. Huebner*, 90 Mich. 643; s. c. 51 N. W. 634.

¹⁵² *Aitcheson v. Huebner*, *supra*.

¹⁵³ *Talbot Paving Co. v. Common Council &c.*, 91 Mich. 262; s. c. 51 N. W. 933. See also, *State v. Board &c.*, 24 Wis. 683; *People v. Contracting Board*, 27 N. Y. 378.

"As an action may be maintained against the city, if the right of the relator is clear and unquestioned, according to the authorities to which we have referred, he must be left to pursue his remedy in that forum. If his claim is not well founded and his right to the same is not entirely clear, then he occupies no better position; and even if he had no other remedy besides the writ of mandamus, the application might very properly be denied upon that ground."¹⁵⁴ A board of public works of a city having made a contract for paving a street pursuant to instructions from the common council, the common council may reject the contract; and having done so, in the absence of fraud or violation of law in respect to the lowest bidder, mandamus will not issue on relation of the contractors to enforce the contract.¹⁵⁵

§ 1592. To a county treasurer to refund taxes.—In Iowa it has been held that where taxes in aid of a railroad company had been collected by a county treasurer and paid to the assignee of the company after the tax had been declared illegal, but the funds had never been mingled with those of the county and were not in the treasury when a mandamus was applied for, mandamus would not lie against such treasurer after the expiration of his term, to compel him to refund the taxes so paid, nor against his successor who never received any of the moneys thus paid, nor against the board of supervisors to require them to issue a warrant ordering the ex-treasurer to refund the taxes illegally collected.¹⁵⁶

§ 1593. Abatement of public nuisance—Canvass of election—To police commissioners to enforce law.—An application for a mandamus can not be sustained by a private person in his own name, against pub-

¹⁵⁴ *People v. Campbell*, 72 N. Y. 496, a proceeding by mandamus to compel the commissioner of public works of the city of New York to enter into a contract with relator, as the lowest bidder for work under an advertisement for proposals for a street improvement and his proposal accepted. The court held that if the relator established a clear legal right to the contract, he had a remedy at law against the city to recover damages, and so was not entitled as of right to a mandamus. See also, *People v. Hawkins*, 46 N. Y. 9; *Ex parte Lynch*, 2 Hill (N. Y.) 45; *Ex parte Firemen's Ins. Co.*, 6 Hill (N. Y.) 243; *Shipley v. Me-*

chanics' Bank, 10 Johns. (N. Y.) 484; *People v. Croton Aqueduct Board*, 49 Barb. (N. Y.) 259.

¹⁵⁵ *Grant v. Common Council &c.*, 91 Mich. 274; s. c. 51 N. W. 997.

¹⁵⁶ *Eyerly v. Board of Supervisors*, 81 Iowa 189; s. c. 46 N. W. 986. Cf. *Eyerly v. Jasper Co.*, 72 Iowa 149, 150; *Eyerly v. Jasper Co.*, 77 Iowa 470; s. c. 42 N. W. 374. See also, *Barnes v. Marshall Co.*, 56 Iowa 20, 22; s. c. 8 N. W. 677; *Butler v. Board &c.*, 46 Iowa 326; *Merrill v. Marshall Co.*, 74 Iowa 24; s. c. 36 N. W. 778; *Cedar Rapids &c. R. Co. v. Cowan*, 77 Iowa 535; s. c. 42 N. W. 436; *Minneapolis &c. R. Co. v. Becket*, 75 Iowa 183; s. c. 39 N. W. 260.

lic officers, for the abatement of a public nuisance, unless he is specially and peculiarly injured by the nuisance over and above and independent of the injury he receives as a member of the public. Public injuries must be redressed by public officers, but private injuries, occasioned by public nuisances, may be redressed if the parties are thus specially and peculiarly injured.¹⁵⁷ Where the return of a township board to an application for mandamus to compel the approval of a druggist's liquor bond disclosed nothing showing that the discretionary power of the board was not exercised reasonably and in good faith, the supreme court of Michigan held it proper to deny the mandamus.¹⁵⁸ In a case involving the election of a mayor and city officials the supreme court of Florida held that the exercise of judgment, in canvassing the votes, in refusing to count a certain ballot for the relator because his name as it appeared thereon was scratched, the marks being such as to call for this exercise of judgment, could not be controlled by mandamus.¹⁵⁹ Mandamus requiring the police commissioners of a city to enforce the New York statute forbidding the sale of liquor during certain hours and declaring it the duty of every sheriff, constable, policeman, etc., to enforce the law, it has been held, will not lie unless it appears that the officers mentioned in the statute do not intend to enforce it.¹⁶⁰ A mandamus in such a case may be applied for by any citizen or class of citizens taking an interest in the enforcement of the part of the law requiring the officers to enforce it.¹⁶¹

§ 1594. Obstructions in streets—Contract for improvement.—An allegation in the complaint in a suit to compel a city by mandamus to remove an obstruction from a certain alley that the obstruction was placed in the alley by a certain railroad company with the consent of the city, and that it was extremely dangerous to pass along the alley on account of the constant and swift motion of large bodies of iron, steel and wood which were constantly and rapidly moved along said alley, has been held not sufficient to rebut the presumption of the lawful use of the alley by the city.¹⁶² Mandamus to compel the com-

¹⁵⁷ *Atwood v. Partree*, 56 Conn. 80; s. c. 14 Atl. 85. See also, *Wheeler v. Bedford*, 54 Conn. 244; s. c. 7 Atl. 22.

¹⁵⁸ *McHenry v. Township Board &c.*, 65 Mich. 9; s. c. 31 N. W. 602. See also, *Post v. Township Board &c.*, 63 Mich. 323; s. c. 29 N. W. 721; *Wolfson v. Township Board &c.*, 63 Mich. 49; s. c. 29 N. W. 486; *Vincent v. Board &c.*, 52 Mich. 340; s. c. 17

N. W. 938; *Potter v. Common Council &c.*, 59 Mich. 8; s. c. 26 N. W. 208; *Parker v. Board &c.*, 54 Mich. 308; s. c. 20 N. W. 55.

¹⁵⁹ *State v. Deane*, 38 Fla. 121; s. c. 1 So. 698.

¹⁶⁰ *In re Whitney*, 33 N. Y. S. 838.

¹⁶¹ *In re Whitney*, supra. See also, *People v. Daley*, 37 Hun (N. Y.) 461.

¹⁶² *State v. City of New Albany*, 127 Ind. 221; s. c. 26 N. E. 791.

mon council of a village to commence proceedings to remove obstructions in a street claimed to be a public highway will not lie where the person obstructing the street in good faith denies that it is a highway and asserts title thereto.¹⁶³ In proceedings where relator was the lowest bidder for work for a municipality and his proposal had been accepted, to compel a commissioner of public works to enter into a contract with him, the New York court of appeals held that if the relator had a clear legal right to the contract he had a remedy at law by an action against the municipality to recover damages, and so was not entitled as of right to a mandamus; that, if the right was not clear, the writ was properly denied on that ground; and that under the circumstances the granting or refusal of the writ was a matter of discretion in the court below, with the exercise of which the appellate court would not interfere.¹⁶⁴

§ 1595. **Title to office and custody of records.**—In Indiana it has been held that mandamus is not available to settle the title to an office as between adverse claimants; but where a person holds a prima facie and uncontested title to the office, or where his title has been adjudicated and finally established by a competent tribunal, a writ of mandate may be issued to put him in possession.¹⁶⁵ In another case this court has held that mandamus was the proper remedy to compel a retiring officer to turn over to his successor the records and furniture pertaining to the office, and that it was not necessary to allege in the application that such successor is eligible to the office as in quo warranto, where the claimant instituting the information to oust an incumbent and gain admission himself must aver and prove his eligibility.¹⁶⁶ Also that without regard to whether the votes of a majority of all the school trustees are necessary to the valid appointment of a county superintendent of schools, where such trustees recognize the appointment as valid, and the appointee qualifies and enters upon the duties of the office with the acquiescence of all others, the latter may compel his predecessor by mandamus to deliver to him the records of the office.¹⁶⁷ In an action similar to that in the case last cited the supreme court of Illinois held that the petition for

¹⁶³ French v. Common Council &c., 85 Mich. 135; s. c. 48 N. W. 174.

¹⁶⁴ People v. Campbell, 72 N. Y. 496. See also, People v. Thompson, 99 N. Y. 641; s. c. 1 N. E. 542; People v. Green, 11 Hun (N. Y.) 56; People v. Board &c., 5 N. Y. S. 392.

¹⁶⁵ Mannix v. State, 115 Ind. 245; s. c. 17 N. E. 565.

¹⁶⁶ McGee v. State, 103 Ind. 444; s. c. 3 N. E. 139. See also, State v. Bieler, 87 Ind. 320; State v. Kilroy, 86 Ind. 118; Weir v. State, 96 Ind. 311.

¹⁶⁷ McGee v. State, supra. See also, High Extra. Rem. 73; Wood Mandamus, 17.

the mandamus having alleged that at the time of the election of petitioner to the office of supervisor the defendant "had possession and control of all the books, papers and moneys belonging to the said commissioners," but having failed to state that there were any books, papers and moneys belonging to the commissioners, it was bad on demurrer.¹⁶⁸

§ 1596. License to sell liquors.—Mandamus will not lie to compel municipal officers to issue a liquor license to an applicant whose existing license has more than three months to run.¹⁶⁹ The supreme court of Indiana sustained in the case cited the right of the treasurer to decline to embarrass or complicate action by receiving the money tendered him, as he had no authority to receive it prior to the expiration of the license. They discuss the question of license to sell liquors as follows:—"The grant of a license would not preclude action by the municipal authorities, for a license is not a contract. A license may be changed or even annulled by the supreme legislative power of the state whenever the public welfare demands it.¹⁷⁰ A license is a restrictive special tax, imposed for the public good, and in the exercise of the police power of the state.¹⁷¹ As the power to grant, withhold or annul licenses to sell liquor is an exercise of the police power, it follows that no limitation can be placed upon its exercise by any statutory provision. It is a power incapable of surrender or annihilation.¹⁷² It is evident that no right of the relator was invaded by the refusal of the [treasurer] to accept the money tendered, since he could have acquired no legal right by securing the coveted license."¹⁷³

§ 1597. Hearing of complaint.—The statutes of Georgia place the power of granting liquor licenses or refusing them in county commissioners. It has been held that mandamus would not lie to compel commissioners to issue a license.¹⁷⁴ Under the statutes of New York the board of excise of any city may, and upon the complaint of any resident of the city "shall," summon before them any person licensed

¹⁶⁸ *Lavalle v. Soucy*, 96 Ill. 467.

¹⁶⁹ *State v. Bonnell*, 119 Ind. 494; s. c. 21 N. E. 1101.

¹⁷⁰ *McKinney v. Town of Salem*, 77 Ind. 213; *Martin v. State*, 23 Neb. 371; s. c. 36 N. W. 554; *Brown v. State*, 82 Ga. 224; s. c. 7 S. E. 915; *State v. Isabel*, 40 La. An. 340; s. c. 4 So. 1.

¹⁷¹ *Emerich v. City of Indianapolis*, 118 Ind. 279; s. c. 20 N. E. 795; *Mugler v. Kansas*, 123 U. S. 623; s. c. 8

S. Ct. 273; *Burnside v. Lincoln Co. Court*, 86 Ky. 423; s. c. sub nom. *Ex parte Burnside*, 6 S. W. 276; *State v. Mullenhoff*, 74 Iowa 271; s. c. 38 N. W. 514.

¹⁷² *McKinney v. Town of Salem*, 77 Ind. 213; *State v. Woodward*, 89 Ind. 110; *Stone v. Mississippi*, 101 U. S. 814.

¹⁷³ *State v. Bonnell*, 119 Ind. 494; s. c. 21 N. E. 1101.

¹⁷⁴ *Eve v. Simon*, 78 Ga. 120.

to sell intoxicating liquors, and, if satisfied that he has violated any provision of the act, cancel his license. *Mandamus*, it has been held, will lie to compel commissioners of excise of a city in New York to decide a complaint presented to them by a resident of their city against a saloon-keeper for keeping his saloon open on election day in violation of the statutes.¹⁷⁵ In this case there had been unreasonable delay in rendering a decision, and the license of the person complained against was about to expire by limitation. The court held that the facts justified the inference that the delay was equivalent to a refusal to act and warranted the issuance of a peremptory writ. As to the contention that there was in the proposed issuing of a writ of *mandamus* an interference with the discretion of the excise commissioners, the court presented this as its position in the matter:—It was not intended by the issuing of the writ to interfere with the board in the exercise of its discretion or judgment in the granting or refusal of licenses. The court could not direct the board to act in a specific manner, but it could command the board to exercise the discretion and judgment vested in it.¹⁷⁶

§ 1598. **By taxpayer to compel investment of funds.**—A writ of *mandamus*, it has been held in New York, will issue upon the application of a taxpayer to compel a county treasurer, who has received the amount of taxes collected from a railroad during several years and made no application thereof, permitting the same to remain in the general fund, to apply the same for the purchase of bonds for a sinking fund for the redemption and payment of bonds issued by a city in aid of the railroad as required by the statutes of the state in relation thereto.¹⁷⁷ Where it does not appear in such a case that the county treasurer has made any disposition of such funds the court will not assume their misappropriation, but they will be regarded as embraced in the existing general fund, it appearing that that fund contains more than the aggregate amount. Where there has been no misappropriation of the money, the duty to invest it according to law is a continuing one, and the statute of limitations does not apply to defeat the taxpayer's application.¹⁷⁸ In order to make out a case it is not necessary to establish the identity of the particular fund.¹⁷⁹ The fact that the respondent did not personally receive all of the

¹⁷⁵ *People v. Meakim*, 56 Hun (N. Y.) 626; s. c. 24 Abb. N. C. (N. Y.) 477; 10 N. Y. S. 161.

¹⁷⁶ *People v. Meakim*, *supra*.

¹⁷⁷ *Spaulding v. Arnold*, 125 N. Y. 194; s. c. 26 N. E. 295; 34 N. Y. St. 980. See also, *Clark v. Sheldon*, 106 N. Y. 104; s. c. 12 N. E. 341.

¹⁷⁸ *Spaulding v. Arnold*, 125 N. Y. 194; s. c. 26 N. E. 295; 34 N. Y. St. 980; distinguishing *Strough v. Supervisors of Jefferson*, 119 N. Y. 212; s. c. 23 N. E. 552.

¹⁷⁹ *Spaulding v. Arnold*, *supra*.

money, part thereof having been paid to his predecessor in office, the respondent having the fund as successor, will not prevent the issuance of a mandamus compelling him to make the proper investment.¹⁸⁰

§ 1599. To levy tax to pay a judgment—Previous demand.—In a mandamus proceeding to compel the authorities of a city to levy a tax to pay a judgment the supreme court of Florida declared these rules:—Where the writ alleges a power in a municipal body to levy taxes, and such power is limited by statute to a certain percentage upon the value of the taxable property, it is not necessary to allege in the writ that the power has not been exhausted. The exhaustion of the power by a previous exercise of it is properly matter of defense to be set forth by the officers who are called upon to exercise the power. Where a levy of taxes is desired by a judgment creditor of a municipality for the payment of his claim and his right is based upon the ordinary status of a judgment creditor and the power of the board of aldermen to make a levy, a demand upon the proper officers for a levy to pay the judgment must be made before relief by mandamus can be had. It is not necessary that the demand shall be to levy a *special* tax. A definite request or demand to levy a tax to pay the judgment is sufficient. A return to an allegation in an alternative writ of a request to provide for the payment of a judgment and a refusal to comply with the request that no demand was made to levy a *special* tax was held to be evasive and insufficient.¹⁸¹ A return to a writ of mandamus to compel a levy of tax alleging an exhaustion of a power of taxation by a board of aldermen, and referring to an annexed resolution passed by them as showing an exhaustion of such power, the resolution not showing clearly and with certainty that the purposes for which the levy was made were of a character which entirely exhausts the power, there being no limitation upon the taxing power as to certain purposes, was held to be insufficient. Where a return to an

¹⁸⁰ Spaulding v. Arnold, 125 N. Y. 194; s. c. 26 N. E. 295; 34 N. Y. St. 980.

¹⁸¹ State v. Mayor &c., 22 Fla. 21. As to demand being necessary before the writ should issue, the California court said:—"It was not a duty of the public, or special official duty prescribed by statute. The demand is held necessary, as it is due to the defendant that he should have the option of either doing or refusing to do what is required of him

before application is made to the court to compel him. Where the act to be performed is a public official duty, specially prescribed by law, no demand is necessary to give the option; the officer knows it is his duty to act and when." See People v. Romero, 18 Cal. 89, 92; Tapping Mandamus, 282; Crandall v. Amador Co., 20 Cal. 72; Oroville &c. R. Co. v. Supervisors &c., 37 Cal. 354, 362, 363; State v. Davis, 17 Minn. 429.

alternative writ of mandamus shows only a partial exhaustion by respondents of the power of taxation for the year pending its issue, as to such year they will be required to levy only the amount to which the power is shown not to be exhausted. The writ of mandamus does not confer any additional power on a board or officers to whom it may be addressed.¹⁸² But if such a levy proved insufficient to pay the relator's claim, whether the respondents would be compelled to make additional levies, not beyond their power, in subsequent years, the court expressed no opinion.¹⁸³

§ 1600. Peremptory and alternative.—The filing of opposing affidavits, on an application for a writ of mandamus by a discharged veteran to restore him to his position, that he gave no notice of his veteran rights till the commencement of legal proceedings after the discharge, raises a question of fact, preventing the issue of a peremptory mandamus.¹⁸⁴ Allegations that at an election held for the purpose of choosing a permanent county seat the town to which it is sought to have county records moved received a majority of all the votes cast on that question, in a petition to compel the county clerk to move the records to that town, have been held to be traversable facts, and that an alternative, and not a peremptory, writ of mandamus should issue thereon.¹⁸⁵ Where upon a petition in mandamus an alternative writ is issued commanding a number of acts, either separate or connected, to be done by the defendant, the relator is entitled to a peremptory writ for such distinct acts or parts of connected acts as he may show a right to have performed, where there is not such mutual dependence between the several acts, or parts of acts, that they can not be separated or divided.¹⁸⁶ Where a relator applied to the supreme court of Florida for a writ of mandamus to compel a board of county commissioners to act on his application for a license to sell liquor from one period of time to another, which time had expired before the case was reached by the court, the writ was ordered dismissed for the reason that a peremptory writ would be without beneficial result, and it was useless to pass upon relator's rights.¹⁸⁷

¹⁸² *State v. Mayor &c.*, 22 Fla. 21. See also, *Coy v. City Council &c.*, 17 Iowa 1; *United States v. Clark Co.*, 95 U. S. 769; *Board &c. v. Churchill*, 21 Fla. 578.

¹⁸³ *State v. Mayor &c.*, 22 Fla. 21. See as to writ making out a *prima facie* case, *People v. Hatch*, 33 Ill. 9; *Silver v. People*, 45 Ill. 224; *High Extra. Rem.*, §§ 448, 449.

¹⁸⁴ *In re Shay*, 15 N. Y. S. 488; s. c. 39 N. Y. St. 856.

¹⁸⁵ *State v. Grace*, 20 Or. 154; s. c. 25 Pac. 382.

¹⁸⁶ *State v. Crites*, 48 Ohio St. 142; s. c. 26 N. E. 1052.

¹⁸⁷ *State v. Board &c.*, 27 Fla. 438; s. c. 8 So. 749.

§ 1601. **Practice—Parties.**—A distinguished authority says:—“When the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator at whose instigation the proceedings are instituted need not show that he has any special interest in the result, it being sufficient that he is a citizen and as such interested in the execution of the laws.”¹⁸⁸ The Connecticut supreme court said:—“[The above] is the rule when a private citizen on his own account and without the intervention of any public officer moves for a writ of mandamus. On the other hand, some cases hold that in matters of public concern it is for the public officer exclusively to apply for the writ.”¹⁸⁹ The practice in Connecticut permits the state’s attorney to prosecute in his own name alone.¹⁹⁰ Where proceedings by mandamus against municipal officers to compel the performance of their official duties have been begun, a change in the membership of the office does not so change the parties as to abate the proceedings.¹⁹¹ So, too, where a mandamus has been brought against a municipal officer in his official capacity, upon whom service of process has been made, it may be continued against his successor without compelling the parties aggrieved to begin *de novo*.¹⁹²

§ 1602. **Parties further considered.**—Mandamus proceedings to compel a railroad company to reconstruct a public road which it has taken may be begun in Pennsylvania by the road commissioners acting officially without the consent of the attorney-general.¹⁹³ One who has furnished the means to a contractor for the erection of water-works for a city, and who has contracted to purchase the works, which contract has not been completed because of the city’s refusal to accept the works, it has been held in Nebraska, has such interest as entitles him to apply for mandamus to compel the city to comply with

¹⁸⁸ High Extra. Rem., § 431.

¹⁸⁹ Doolittle v. Selectmen &c., 59 Conn. 402; s. c. 22 Atl. 336. See also, Sanger v. County Com’rs &c., 25 Maine 291; People v. Tracy, 1 Denio (N. Y.) 617; Willington, Petitioner, 16 Pick. (N. Y.) 87; Linden v. Board &c., 45 Cal. 6; Heffner v. Commonwealth, 28 Pa. St. 108.

¹⁹⁰ Doolittle v. Selectmen &c., 59 Conn. 402; s. c. 22 Atl. 336.

¹⁹¹ Dillon Munic. Corp. (4th ed.), § 874, n. 3.

¹⁹² Dillon Munic. Corp. (4th ed.), § 184; High Extra. Rem., § 443; Moses Mandamus, 200; Maddox v. Graham, 2 Met. (Ky.) 56; City of Louisville v. Kean, 18 B. Mon. (Ky.) 9, 13; State v. Common Council &c., 15 Wis. 30; People v. Supervisors &c., 100 Ill. 332; Pegram v. Commissioners &c., 65 N. C. 114.

¹⁹³ Commonwealth v. New York &c. R. Co., 138 Pa. St. 58; s. c. 20 Atl. 951.

its contract.¹⁹⁴ And under the California statute which provides for the issuance of a writ of mandate "on the application of the party beneficially interested," a taxpayer of the district whose children attend the school is a proper party to apply for a writ of mandate to compel the compliance of the officers of the district with a vote of the electors as to the location of the schoolhouse site.¹⁹⁵ The fact that persons are residents and taxpayers of a county under the Oregon statute authorizing the allowance of the writ of mandamus on the petition of a "party beneficially interested" entitles them to apply for mandamus to compel the county clerk to move the records, and keep his office in the town alleged to have been chosen as the permanent county seat at an election held for that purpose.¹⁹⁶ The creditor and not the district council is the proper party to petition for mandamus to the district treasurer to compel the payment of orders given by the district council for material for public improvements, even though his refusal to pay impedes the public work.¹⁹⁷ Where it is *res judicata* that the removal of a police sergeant from office by a city council was unlawful, it has been held in New Jersey that the subsequent incumbent was not a necessary party to a mandamus proceeding to restore the former to the office.¹⁹⁸ A person appointed to the office of crier being in possession of the office can not be ousted by mandamus against the judge appointing him, without being made a party to the proceeding.¹⁹⁹ A county taxpayer has such a practical interest in the collection of the county taxes that a court will entertain his petition for an alternative mandamus against a tax collector who has refused to accept poll taxes tendered by, and to deliver receipts to, attorneys in fact of certain taxables.²⁰⁰

§ 1603. **Pleading.**—The Missouri supreme court has held that the alternative writ in their practice is the first pleading in a mandamus proceeding, and stands in the place of the declaration in an ordinary common law action, and as to sufficiency of the same has declared these rules:—While the alternative writ in a proceeding under their statutes to compel an incorporated town to levy a tax to satisfy an execution against it should show that the relator has no other remedy, it is not necessary that it be alleged that an execution had been issued and

¹⁹⁴ *State v. Mayor &c.*, 32 Neb. 568; s. c. 49 N. W. 272.

¹⁹⁵ *Eby v. Board &c.*, 87 Cal. 166; s. c. 25 Pac. 240; overruling *Linden v. Board &c.*, 45 Cal. 6.

¹⁹⁶ *State v. Grace*, 20 Or. 154; s. c. 25 Pac. 382.

¹⁹⁷ *Portland Stone-Ware Co. v. Taylor*, 17 R. I. 33; s. c. 19 Atl. 1086.

¹⁹⁸ *State v. Mayor &c.*, 52 N. J. L. 332; s. c. 19 Atl. 780.

¹⁹⁹ *People v. Wendell*, 57 Hun (N. Y.) 362; s. c. 10 N. Y. S. 587.

²⁰⁰ *Hawkins v. Dougherty*, 9 Houst. (Del.) 156; s. c. 18 Atl. 951.

proved unavailing. It would be sufficient for the alternative writ to state that the town has no property whereon to levy an execution, and has no money in its treasury subject to the payment of the judgment. An allegation that the treasurer had refused to pay the judgment was held insufficient. It should also appear by the pleadings that the town is incorporated, and that the town officers against whom the proceeding is invoked have the power to levy the tax to satisfy the execution. The alternative writ must state facts in an issuable form which show that the relator is entitled to the relief sought at the hands of the respondents.²⁰¹ A petition for a mandamus to compel a city to lower a sidewalk which based petitioner's right to the writ upon a certain ordinance not set forth except by reference to a certain section of a municipal code has been held fatally defective.²⁰²

§ 1604. Enforcement of public duties.—It has been held in Florida that though county commissioners will not be controlled by mandamus in the exercise of any discretion as to the character or style of a courthouse or jail they should erect, or of the offices they should provide, yet when the duty of erecting such buildings is imposed by law, and these or other officers refuse to act, a writ of mandamus may issue to compel them to execute the duties imposed upon them.²⁰³ Where the act sought to have performed by the governing board is a public duty in which the people of the whole municipal corporation are interested, any citizen of the corporation has the right to become relator and institute the proceeding. It would be unnecessary for the relators to show that they had any other interest in the object of the writ than that of mere private citizens interested in common with the public in the performance of the act.²⁰⁴

²⁰¹ *Hambleton v. Town of Dexter*, 89 Mo. 188; s. c. sub nom. *State v. Bolche*, 1 S. W. 234. See also, *State v. Fletcher*, 39 Mo. 388; *State v. Everett*, 52 Mo. 89; *City of Hopkins v. Kansas City & Co.*, 79 Mo. 98.

²⁰² *People v. City of Chicago*, 27 Ill. App. 217.

²⁰³ *State v. County Com'rs*, 22 Fla. 29. See also, *Commonwealth v. Justices &c.*, 2 Pick. (Mass.) 414; *People v. Board &c.*, 84 Ill. 303; *Manor v. McCall*, 5 Ga. 522; *High Extra. Rem.*, § 34; *Dillon Munic. Corp.*, § 832. In *State v. County Com'rs*, supra, the court said:—"Statutes imposing such public duties would become of little moment

if the officers appointed to execute them could say that the execution of them was a mere matter of their discretion."

²⁰⁴ *Hall v. People*, 57 Ill. 307. See also, *County Com'rs v. People*, 11 Ill. 202, where the court said that "where the object is the enforcement of a public right the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed and the right in question enforced." Approved in *City of Ottawa v. People*, 48 Ill. 233.

§ 1605. **When mandamus will lie—General.**—A person illegally discharged under civil service law and rules may be reinstated by mandamus.²⁰⁵ Mandamus lies to compel a city council and civil service commissioners to determine eligibles for office.²⁰⁶ Where a statute provides that honorably discharged Union soldiers if properly qualified shall be preferred for appointment or employment, it does not confer a right to an office or position in the public service which may be enforced by mandamus, in the absence of statute.²⁰⁷ Mandamus is proper to determine the right of a veteran to continued employment, and also to be employed.²⁰⁸ A veteran appointed as painter for an indefinite term who was disabled for a time, on recovery is not entitled to be restored by mandamus, where he neglected to notify the proper department of his intention to return to work on recovery and failed to show that there was work that should be done and which he could do.²⁰⁹ Mandamus will lie to transfer a veteran soldier whose office has been abolished to another position which he is competent to fill.²¹⁰ Mandamus will lie to compel the members of a municipal assembly to issue bonds given for water supply;²¹¹ to compel police commissioners to recognize those legally on the police force;²¹² to compel a city council to canvass returns and issue proper certificates of election;²¹³ to compel a treasurer to deposit public funds in a depository designated by ordinance;²¹⁴ to compel a treasurer to deposit funds in a bank selected by the council for a depository;²¹⁵ to compel payment of rentals where the city repudiates the contract but continues to use the water furnished;²¹⁶ to compel the detaching of territory from city jurisdiction where the requirements of the statute have been complied with;²¹⁷ to compel the mayor and council to order an election to fill a vacancy in the council provided for by law;²¹⁸ to

²⁰⁵ *People v. Hertle*, 60 N. Y. S. 23; s. c. 61 N. Y. S. 965; 46 App. Div. (N. Y.) 505.

²⁰⁶ *People v. Scannell*, 59 N. Y. S. 950; s. c. 28 Misc. (N. Y.) 401.

²⁰⁷ *People v. Common Council &c.*, 57 N. Y. S. 617; s. c. 26 Misc. (N. Y.) 522.

²⁰⁸ *State v. Copeland*, 74 Minn. 371; s. c. 77 N. W. 221.

²⁰⁹ *McCloskey v. Willis*, 44 N. Y. S. 682; s. c. 15 App. Div. (N. Y.) 594; *Potter v. Collis*, 46 N. Y. S. 471; s. c. 19 App. Div. (N. Y.) 392; *In re Reynolds*, 42 N. Y. S. 1; s. c. 10 App. Div. (N. Y.) 415.

²¹⁰ *People v. Scannell*, 62 N. Y. S. 682; s. c. 48 App. Div. (N. Y.) 69.

²¹¹ *People v. Guggenheimer*, 62 N. Y. S. 11; s. c. 47 App. Div. (N. Y.) 9.

²¹² *People v. York*, 53 N. Y. S. 947; s. c. 33 App. Div. (N. Y.) 573.

²¹³ *State v. Trimbell*, 12 Wash. 440; s. c. 41 Pac. 183.

²¹⁴ *People v. Gibler*, 78 Ill. App. 193.

²¹⁵ *People v. Gibler*, *supra*.

²¹⁶ *State v. Mayor &c.*, 19 Mont. 518; s. c. 49 Pac. 15.

²¹⁷ *Young v. Carey*, 184 Ill. 613; s. c. 56 N. E. 960.

²¹⁸ *State v. Mayor &c.*, 52 La. An. 1604; s. c. 28 So. 116.

compel a common council to examine the sufficiency and approve a bond if sufficient.²¹⁹ Where a charter requires providing for a sinking fund and interest mandamus lies to compel the same.²²⁰ Where the charter requires the mayor to sign all ordinances and the duty is not discretionary, he may be compelled to do so by mandamus.²²¹ Where the law requires a contract to be given to the lowest bidder mandamus lies to compel such award.²²² If a board of education exclude colored children unlawfully with the consent and approval of the city authorities and under a well understood plan to separate white and colored children, mandamus will lie to compel the admission of such children.²²³ Where the levy and collection of taxes by the proper authorities is mandatory mandamus lies.²²⁴ Where a city has an option to fund its indebtedness but does not do so it may be compelled to levy taxes to pay the same if within the limitation allowed for indebtedness.²²⁵ A tax board may be required by mandamus to include in its return an amount it has erroneously omitted.²²⁶ A person entitled to a mandamus to compel the levy and collection of taxes is entitled to all the proceedings necessary to the assessment and collection of the tax.²²⁷ Mandamus lies to compel the levy of a tax for payment of claims authorized by law.²²⁸ It will lie in favor of the holders of warrants against a fund which has been diverted and exhausted by the county officers to compel the levy and collection of a tax to pay the warrants.²²⁹ Where a special assessment is made and a contractor has performed his work which has been accepted under contract and the assessment is set aside for some defect and the city refuses to go further it may be compelled to make a new assessment.²³⁰ Mandamus lies to compel a county treasurer to pay over taxes that should have been paid to the city treasurer.²³¹

²¹⁹ *Hawkins v. Common Council &c.*, 120 Mich. 390; s. c. 79 N. W. 570.

²²⁰ *Wright v. City of San Antonio* (Tex. Civ. App.), 50 S. W. 406. An officer charged with the issuance of bonds may refuse where the election authorizing their issuance is illegal, even if the result of the election has been declared.

²²¹ *Daniels v. Long*, 111 Mich. 562; s. c. 69 N. W. 1112.

²²² *Dreyfus v. Lonergan*, 73 Mo. App. 336.

²²³ *State v. Commissioners &c.*, 17 Ohio C. C. 275.

²²⁴ *People v. Mayor &c.*, 179 Ill. 615; s. c. 54 N. E. 421; *Phelps v.*

Lodge, 60 Kan. 122; s. c. 55 Pac. 840; *Fleming v. Dyer*, 20 Ky. L. 689; s. c. 47 S. W. 444.

²²⁵ *Phelps v. Lodge*, 60 Kan. 122; s. c. 55 Pac. 840.

²²⁶ *People v. Molloy*, 54 N. Y. S. 1084; s. c. 35 App. Div. (N. Y.) 136.

²²⁷ *Marion Co. v. Coler*, 75 Fed. 352.

²²⁸ *County Com'rs &c. v. Melvin*, 89 Md. 37; s. c. 42 Atl. 910.

²²⁹ *State Sav. Bank v. Davis*, 22 Wash. 406; s. c. 61 Pac. 43.

²³⁰ *People v. City of Pontiac*, 185 Ill. 437; s. c. 56 N. E. 1114.

²³¹ *Webster v. Wheeler*, 119 Mich. 601; s. c. 78 N. W. 657.

§ 1606. **When mandamus will not lie—General.**—Mandamus will not lie to keep in repair an abandoned road;²³² to compel the mayor to execute a contract;²³³ to compel a forfeiture of a contract between a city and a railway company—the relator was not the proper one to institute such writ;²³⁴ to compel delivery of a check;²³⁵ to compel a city council to do what it has not been demanded to do;²³⁶ to compel a levy to pay a consent judgment entered by town authorities where the judgment was rendered on a void agreement;²³⁷ to compel a levy to pay a judgment unless the debt on which judgment was rendered was a necessary expense, where the constitution prohibits the levy of taxes except for necessary expenses unless authorized by a vote of the majority of voters;²³⁸ to compel a police board to reinstate a policeman where his dismissal was not in violation of the rules of the board;²³⁹ to compel the police board to reinstate a policeman where his dismissal was not in violation of the resolutions of the board;²⁴¹ against a civil service commission to compel it to reinstate an employe who has been discharged—the commissioners have no power to direct an employe to be placed in a certain position;²⁴² to compel village trustees to pass an ordinance disconnecting certain territory, which action is discretionary in the trustees;²⁴³ to compel trustees to pass an ordinance disconnecting certain territory which the board had previously acted on adversely;²⁴⁴ to grant an appeal where a rule and attachment will accomplish the same purpose;²⁴⁵ to compel the mayor to approve an officer's bond when his right to the office is in question and an action is pending to determine it;²⁴⁶ to compel adjoining counties to erect a bridge at a particular site where the power to select a site is conferred on their respective county boards;²⁴⁷ to try the title to an office;²⁴⁹ to compel a police

²³² *Gilmer v. Hunnicutt*, 57 S. C. 166; s. c. 35 S. E. 521.

²³³ *People v. Aldridge*, 31 N. Y. S. 920; s. c. 83 Hun (N. Y.) 279.

²³⁴ *State v. Atkinson*, 65 N. J. L. 171; s. c. 46 Atl. 690.

²³⁵ *Anderson v. City of Detroit*, 124 Mich. 471; s. c. 83 N. W. 145.

²³⁶ *People v. Common Council &c.*, 57 N. Y. S. 617.

²³⁷ *Union Bank v. Commissioners &c.*, 119 N. C. 214; s. c. 25 S. E. 966; 34 L. R. A. 487.

²³⁸ *Bear v. Commissioners &c.*, 124 N. C. 204; s. c. 32 S. E. 558.

²³⁹ *State v. Police Board &c.*, 51 La. An. 941; s. c. 25 So. 935.

²⁴¹ *State v. Police Board &c.*, 51 La. An. 941; s. c. 25 So. 935.

²⁴² *Civil Service Com'rs v. Kenyon*, 86 Ill. App. 547.

²⁴³ *Young v. Carey*, 80 Ill. App. 601.

²⁴⁴ *Young v. Carey*, *supra*.

²⁴⁵ *Tyler v. Township Board &c.*, 75 Mo. App. 561.

²⁴⁶ *State v. Mayor &c.*, 49 La. An. 1322; s. c. 22 So. 354.

²⁴⁷ *Attorney-General v. Boards &c.*, 120 Mich. 357; s. c. 79 N. W. 567.

²⁴⁹ *Kokes v. State*, 55 Neb. 691; s. c. 76 N. W. 467.

commissioner to remove a picture from the rogues' gallery—it is not a duty imposed by law;²⁵⁰ to compel the removal of an obstruction in a street erected under a valid license from the city;²⁵¹ nor to compel the issuing of an order for the payment of salary due an officer where it has not been provided for by statute or ordinance, or is anywise discretionary.²⁵² It is now settled by the great weight of authority that the lowest bidder can not compel the issue of a writ of mandamus to force the officers of a municipality to enter into a contract with him;²⁵³ nor can an action at law be maintained in such case;²⁵⁴ and the principle is as fatal to a suit in equity as at law.²⁵⁵ In the absence of fraud mandamus will not lie to compel the letting of a contract to the lowest responsible bidder.²⁵⁶ And so a person claiming a right to public work can not compel municipal officers to make a contract with him where a contract has already been executed to another person.²⁵⁷ Where the legality of a removal depends on the construction of a statute mandamus is not the proper remedy to restore a person to office.²⁵⁸ Where it is the duty of commissioners to fund an indebtedness mandamus will not lie to compel municipal authorities to order the commissioners to fund the indebtedness.²⁵⁹ Under act of congress of June 25, 1890, it is the duty of loan commissioners to fund indebtedness on the application of the holders of warrants, and hence mandamus by the latter against the municipal authorities to compel them to order the commissioners to fund the indebtedness will not be maintained.²⁶⁰ The building of a court-house can not be compelled by mandamus pending a proceeding to remove the county seat.²⁶¹ A mandamus against a city to allow a telephone company to lay its wires in the streets should be refused where the city is considering a plan to

²⁵⁰ *People v. York*, 59 N. Y. S. 418; s. c. 27 Misc. (N. Y.) 658.

²⁵¹ *People v. Mayor &c.*, 45 N. Y. S. 900; s. c. 20 Misc. (N. Y.) 189.

²⁵² *Richmond City v. Epps*, 98 Va. 235; s. c. 35 S. E. 723.

²⁵³ *State v. Board &c.*, 24 Wis. 683; *Commonwealth v. Mitchell*, 82 Pa. St. 343; *Kelly v. City of Chicago*, 62 Ill. 279; *State v. McGrath*, 91 Mo. 386; s. c. 3 S. W. 846; *Douglass v. Commonwealth*, 108 Pa. St. 559; *Madison v. Harbor Board*, 76 Md. 395; s. c. 25 Atl. 337.

²⁵⁴ *Talbot Pav. Co. v. City of Detroit*, 109 Mich. 657; s. c. 67 N. W.

979; *East River &c. Co. v. Donnelly*, 93 N. Y. 557.

²⁵⁵ *Colorado Pav. Co. v. Murphy*, 78 Fed. 28.

²⁵⁶ *Board &c. v. People*, 78 Ill. App. 586.

²⁵⁷ *Capital Printing Co. v. Hoey*, 124 N. C. 767; s. c. 33 S. E. 160.

²⁵⁸ *Kimball v. Olmsted*, 20 Wash. 629; s. c. 56 Pac. 377.

²⁵⁹ *Bravin v. City of Tombstone (Ariz.)* 56 Pac. 719.

²⁶⁰ *Bravin v. City of Tombstone*, supra.

²⁶¹ *State v. County Court &c.*, 47 W. Va. 672; s. c. 35 S. E. 959.

ground all overhead wires with the least interference with the streets.²⁶²

(b) QUO WARRANTO.

§ 1607. **Scope of proceeding—Title to office—Policeman.**—The question passed upon in quo warranto proceedings against one holding an office, which holding is claimed to be a usurpation, is the election of the respondent and not the relator. Quo warranto lies to remove the illegal incumbent of an office, and not to put the legal officer in his place.²⁶³ The supreme court of Michigan has held that the position of policeman of a city was not such an office as authorized the attorney-general to file an information by quo warranto in that court to test the title to the position.²⁶⁴ In the same case it was held that the four respondents could not properly be joined in one information. The title of one did not depend upon the title of any other, and if it were a case of procedure by quo warranto each would be entitled to be proceeded against singly.²⁶⁵

§ 1608. **Validity of incorporation—Evidence.**—In a proceeding in the nature of quo warranto to determine the validity of the incorporation of a village under the Illinois statute, parol testimony has been held admissible to show that the territory sought to be incorporated had not at the time the petition for incorporation was filed the population required by the statute. And where the petition for incorporation is introduced in evidence in such a suit by the plaintiff for the purpose of contradicting its recitals as to population, the plaintiff is not thereby estopped by such recitals.²⁶⁶ On quo warranto against a water company for furnishing impure and unwholesome water, judgment of ouster is properly denied where the water furnished is wholesome, though impure. The word "pure," in the Pennsylvania statute requiring water companies to furnish pure water, should be construed to mean wholesome or ordinarily pure.²⁶⁷

²⁶² *State v. Towers*, 71 Conn. 657; s. c. 42 Atl. 1083. The petition for mandamus held sufficient in *Board &c. v. Hayden*, 13 Colo. App. 46; s. c. 56 Pac. 201. It is not a proper answer that there are no funds to pay a claim when there has been a misappropriation of such funds: *First Nat'l Bank v. Arthur*, 12 Colc. App. 90; s. c. 54 Pac. 1107.

²⁶³ *State v. Lane*, 16 R. I. 620; s. c.

18 Atl. 1035. See also, *Strong*, Petitioner, 20 Pick. (Mass.) 484, 497.

²⁶⁴ *Attorney-General v. Cain*, 84 Mich. 223; s. c. 47 N. W. 484. See also, *People v. De Mill*, 15 Mich. 164; *People v. Langdon*, 40 Mich. 673.

²⁶⁵ *Attorney-General v. Cain*, 84 Mich. 223; s. c. 47 N. W. 484.

²⁶⁶ *Kamp v. People*, 141 Ill. 9; s. c. 30 N. E. 680.

²⁶⁷ *Commonwealth v. Towanda Water-works (Pa.)*, 15 Atl. 440.

§ 1609. **Against municipal officers under void organization.**—Quo warranto has been held to be a proper remedy against persons acting as supervisors of a township which had been formed by the division of a township by the county supervisors without authority of law and without jurisdiction as was claimed, in laying out the same, and whose acts were, therefore, null and void.²⁶⁸

§ 1610. **Usurpation of franchise by a city—Parties.**—It has been held in California that where the facts show that a city is a municipal corporation and as such claims and exercises the right and power to govern and tax the inhabitants of certain territory in addition to that described in its charter, the right and power thus claimed and exercised is a franchise, in addition to and distinct from that of being a corporation.²⁶⁹ And the exercise of such power by a municipal corporation over the inhabitants of territory outside of its charter limits is a usurpation of a franchise for which the attorney-general is authorized by the statutes of California to bring an action in the name of the people in the nature of quo warranto.²⁷⁰ In an information questioning the legality of the incorporation of a town or city, and where the theory of an attack upon the right of city officials to exercise their offices is that there is no such corporation, the supreme court of Texas held, it would seem, that the pretended corporation should not be made a party. It is sufficient to proceed against the persons assuming to compose the governing body. And it is of no consequence that one of the relators in such an action resided in the pretended city. Though the pretended corporation is not a party, as in order to oust the respondents, the governing board, under the information it would be necessary to establish the fact that the attempted incorporation of the corporation was void from the beginning, it was not error to so declare in the judgment.²⁷¹ It was urged that rendering judgment dissolving the corporation was error

²⁶⁸ *Territory v. Armstrong*, 6 Dak. 226; s. c. 50 N. W. 832. See also, *State v. Bradford*, 32 Vt. 50; *People v. Clark*, 70 N. Y. 518; *Cheshire v. People*, 116 Ill. 493; s. c. 6 N. E. 486; *State v. Mayor &c.*, 49 N. J. L. 515; s. c. 10 Atl. 377; *High Extra. Rem.*, § 684; *People v. La Rue*, 67 Cal. 526; s. c. 8 Pac. 84; *State v. Board*, 50 N. J. L. 457; s. c. 14 Atl. 560; *People v. Riordan*, 73 Mich. 508; s. c. 41 N. W. 482; *State v. Parker*, 25 Minn. 215; *Renwick v. Hall*, 84 Ill. 162; *People v. Carpenter*, 24 N. Y. 86.

²⁶⁹ *San Jose Gas Co. v. January*, 57 Cal. 614; *Spring Valley Water-works v. Schottler*, 62 Cal. 69, 106-109; *Memphis &c. R. Co. v. Railroad Com'rs*, 112 U. S. 619; s. c. 5 S. Ct. 299; *Pierce v. Emery*, 32 N. H. 484; *Willamette Mfg. Co. v. Bank &c.*, 119 U. S. 191; s. c. 7 S. Ct. 187.

²⁷⁰ *People v. City of Oakland*, 92 Cal. 611; s. c. 28 Pac. 807.

²⁷¹ *Ewing v. State*, 81 Tex. 172; s. c. 16 S. W. 872.

because the city was not made a party defendant to the suit. To this the court said:—"If the city had even been legally incorporated, and if the object of the suit had been to dissolve the corporation for non-user or misuser, or to oust it from the exercise of franchises not conferred by its charter, it should have been made a respondent in the information."²⁷²

§ 1611. Common council as judge of election.—It was urged in an Ohio case that by the provision of the statutes of that state that "the council, and when of two branches, each branch shall be the judge of the election, returns and qualifications of its own members," a common council of a municipal corporation was made the exclusive judge of the right of its members to seats in the council, and that a writ of quo warranto would not lie in any such case. But the supreme court held that while under the statute the council was the exclusive judge of the election of its members, quo warranto might be maintained against a person who assumed the exercise of the office of member of the council from a ward which had no legal existence, or under an election held without lawful authority, the attempt by him under such circumstances to exercise its functions being a mere usurpation.²⁷³

§ 1612. Mandamus and quo warranto distinguished.—Mandamus, it has been held in Kansas, will not lie to compel one of the members of a board of county commissioners and the county clerk to recognize a person as county commissioner who has had a judgment rendered against him in a contest proceeding, instituted to determine who was elected to such office, and who has also been ousted from the office by a judgment of the district court in proceedings in quo warranto.²⁷⁴ When an office is already filled by a person who has been admitted and sworn and is in by color of right, a mandamus is never issued to admit another person. The proper remedy for the applicant is

²⁷² *Ewing v. State*, 81 Tex. 172; s. c. 16 S. W. 872.

²⁷³ *State v. O'Brien*, 47 Ohio St. 464; s. c. 25 N. E. 121; distinguishing *State v. Berry*, 47 Ohio St. 232; s. c. 24 N. E. 266. See also, *Commonwealth v. Leech*, 44 Pa. St. 332; *Commonwealth v. Meeser*, 44 Pa. St. 341 (where the court, in holding that quo warranto was the proper remedy, said:—"The supreme court can not inquire whether the election was regularly conducted, for that

duty belongs to the branch of the council in which the seat is claimed; but they can decide the question whether there was an office or vacancy to be filled"); *Commonwealth v. Fowler*, 10 Mass. 290; *People v. Holihan*, 29 Mich. 116; *People v. Riordan*, 73 Mich. 508; s. c. 41 N. W. 482; *People v. Gartland*, 75 Mich. 143; s. c. 42 N. W. 687; *Commonwealth v. Allen*, 70 Pa. St. 465.

²⁷⁴ *Swartz v. Large*, 47 Kan. 304; s. c. 27 Pac. 993.

by proceedings in quo warranto.²⁷⁵ It has been held that where the county court has found, as appears by its records, that proper petitions have been presented to it for the formation of a drainage district upon proper notice, and the commissioners have been appointed, such commissioners, even though proper notices were not given, will become a corporation de facto under the drainage act of Illinois, and its existence can not be questioned collaterally, as in an attempt to defeat an application for judgment upon unpaid special assessments made by the corporate authorities. Their authority to act can only be questioned by quo warranto.²⁷⁶

§ 1613. Florida decisions on quo warranto—Council as judges of election.—The supreme court of Florida has considered the constitutional provision in relation to the matter and held that the power to issue writs of quo warranto given to the supreme court therein embraces information in the nature of quo warranto. They also sustained the constitutionality of the statute which authorizes any person claiming title to any office exercised by another to file an information in the name of the state against the person exercising the same, and to set up therein his own claim upon the refusal of the attorney-general to do so; and that an allegation in an information that a specified town “is a municipal corporation, duly incorporated under the laws of the state of Florida and pursuant to the statutes of the state of Florida in that behalf, and was such municipal corporation” on a particular day designated, was a sufficient allegation of the incorporation of the town under the general law for the incorporation of cities and towns, there being no special statute incorporating the town referred to; and that the provision of the general municipal corporation law of the state, that the “city or town council shall have the power and authority to judge of the election, returns and qualifications of its own members,” did not of itself vest the council with exclusive jurisdiction to try the right of a person to the office of councilman or alderman, and thereby deprive the courts of power to try the same in a proceeding by information in the nature of a quo warranto.²⁷⁷

²⁷⁵ *Swartz v. Large*, 47 Kan. 304; s. c. 27 Pac. 993. See also, *Bonner v. State*, 7 Ga. 473; *People v. Scrugham*, 20 Barb. (N. Y.) 302; *King v. Mayor &c.*, 2 T. R. 259; *Moses Mandamus*, 150.

²⁷⁶ *Blake v. People*, 109 Ill. 504. See also, *Coles Co. v. Allison*, 23 Ill. 383, 437; *President &c. v. Thompson*, 20 Ill. 197; *Tisdale v. President &c.*,

46 Ill. 9; *Kettering v. Jacksonville*, 50 Ill. 39; *Town of Geneva v. Cole*, 61 Ill. 397; *Aldermen v. School Directors*, 91 Ill. 179; *Osborn v. People*, 103 Ill. 224; *Trumbo v. People*, 75 Ill. 561.

²⁷⁷ *State v. Anderson*, 26 Fla. 240; s. c. 8 So. 1. See also, *State v. Gleason*, 12 Fla. 190. As to the question of exclusive jurisdiction of councils,

§ 1614. **Practice in Massachusetts—Contest of elections.**—Where there is a dispute as to the incumbency of a public office, the Massachusetts supreme court has declared regarding their practice as follows:—"When the title to an office can be tried on quo warranto, a judgment of ouster is conclusive evidence that the defendant does not lawfully hold the office, although he may have duly received the certificate of election. Under our practice, when there is a contest concerning the election of a member of a board composed of more than one person, mandamus has been used to compel the members of the board to admit the petitioner, if he is found by the court to have been elected a member, and also to compel the person who, instead of the petitioner, has intruded himself into the office, to refrain from performing the duties of the office. The use of the writ of mandamus to try the title to an office, and to put one person out of and another person into an office is undoubtedly unusual, and opposed to the weight of authority in other jurisdictions. But the nature of proceedings in mandamus under our statutes seems well adapted to accomplish these results in a case like the present. The title of the incumbent to the office is involved in the determination of the title of the petitioner; the hearing on the application for the writ may be had upon the petition, the court may summon in 'any person having or claiming a right or interest in the subject-matter,' and if an alternative writ is issued the petitioner may traverse 'any material facts contained in' the return.²⁷⁸ The reported cases in which this remedy appears to have been used related to the election of a town officer who was but one of a board.²⁷⁹ In each of these cases, as we infer from the published report, the office claimed by the petitioner was claimed by another person, who had intruded himself into the office, and was performing its duties with the assent of the other members of the board. This question of remedy was considered in [the case cited in the note],²⁸⁰ and the court expressed the opinion that mandamus would lie to place one in an office which was actually filled by another, although the incumbent had not been removed by a quo warranto. This opinion, however, was not necessary to the decision."²⁸¹

see *McCrary Elections*, § 345; *State v. Kempf*, 69 Wis. 470; s. c. 34 N. W. 226; 2 Am. St. 753; *People v. Hall*, 80 N. Y. 117; *Kendall v. City Council &c.*, 47 N. J. L. 64; *State v. Fitzgerald*, 44 Mo. 425; *Ex parte Heath*, 3 Hill (N. Y.) 42.

²⁷⁸ *Public Stat. Mass.*, ch. 186, §§ 13-16.

²⁷⁹ *Putnam v. Langley*, 133 Mass. 204; *Conlin v. Aldrich*, 98 Mass. 557.

²⁸⁰ *Strong, Petitioner*, 20 Pick. (Mass.) 484, 496.

²⁸¹ *Luce v. Board &c.*, 153 Mass.

§ 1615. **Quo warranto against municipal corporation.**—The information by quo warranto will lie directly against a de facto or pretended municipal corporation for the usurpation of corporate franchises, or to oust it from the enjoyment of the privileges thereof. The question in such a case goes directly to the rights of such corporation to exercise the corporate franchises, and its lawful existence is not admitted by naming the corporation as respondents and bringing the proceeding directly against it.²⁸² The supreme court of Minnesota said:—"Municipal as well as private corporations can only exist by the authority of the state. They derive their franchises from the state, and it is therefore the peculiar province of the state to inquire into the misuser or usurpation of such franchises. Assuming the existence of a corporation, a private citizen, if he has sufficient interest to support the application, may by this proceeding be allowed to contest the right of an alleged intruder to an office of such corporation. But where the object is to test the right of a corporation to exercise the corporate franchise, a privilege derived from the sovereign, the information must be filed by the attorney-general on behalf of the state. The proceeding is necessarily one of a public nature and must be prosecuted by and in behalf of the public. In such cases it is not instituted for the redress of private grievances or the enforcement of private rights."²⁸³

§ 1616. **Jurisdiction of court.**—In Nebraska it has been held, upon an information in the nature of quo warranto, wherein it was claimed that the relator and plaintiff was elected to the office of county attorney, and the defendant had, during the term, intruded and usurped the office, that the provisions of the election law in that state entitled "Contesting Elections" were cumulative, and were not an exclusive remedy. In such an action the information may be filed by the complaining party, when, if brought in the supreme court, the attorney-

108; s. c. 26 N. E. 419; followed in *Keough v. Board &c.*, 156 Mass. 403; s. c. 31 N. E. 387.

²⁸² *State v. Tracy*, 48 Minn. 497; s. c. 51 N. W. 613, quo warranto proceedings to test the validity of the incorporation of a village. See also, *State v. Village of Bradford*, 32 Vt. 50; *People v. Clark*, 70 N. Y. 518; *State v. Board &c.*, 50 N. J. L. 457; s. c. 14 Atl. 560; 1 *Dillon Munic. Corp.*, § 265; 2 *Dillon Munic. Corp.*, § 1080.

²⁸³ *State v. Tracy*, 48 Minn. 497; s.

c. 51 N. W. 613, discharging the writ for not being in the name of the attorney-general though indorsed with his approval. See also, *Heard's Short Extra. Rem.*, 717, 719; *State v. Vickers*, 51 N. J. L. 180; s. c. 17 Atl. 153; *State v. Paterson &c. Tpk. Co.*, 21 N. J. L. 9; *Murphy v. Farmers' Bank &c.*, 20 Pa. St. 417; *Regina v. Staples*, 9 Best & S. 928, n.; *People v. Grand River Bridge Co.*, 13 Colo. 11; s. c. 21 Pac. 898; *Commonwealth v. Union &c. Ins. Co.*, 5 Mass. 230.

general, or, if in the district court, the county attorney, having been requested, shall refuse to appear and file it. Under the statutes of Nebraska the supreme court has original jurisdiction in an action of quo warranto to determine conflicting claims to a public office.²⁸⁴ In Nebraska it has been held that an information in the nature of quo warranto, filed against the incumbent of an office for the sole purpose of having a judicial determination as to who possessed the power of appointment to that office, it being apparent that the defendant would remain in office whatever might be the decision, should be dismissed.²⁸⁵

§ 1617. Election contests—Rules in Colorado.—As to the jurisdiction of courts in quo warranto proceedings to determine rights to office the supreme court of Colorado have declared the rules governing in their state to be as follows: Unless the legislative intent to take away the jurisdiction of courts by information in the nature of quo warranto is so clearly expressed as to be practically beyond a reasonable doubt, it remains undisturbed. When the constitution commands the legislature to provide a method and form for the trial of "election contests," the statute passed in obedience to such command is exclusive as to such contests, though no exclusive words be employed. But a proceeding by the people in the nature of quo warranto, for the purpose of trying the incumbent's title to office, regardless of the claimant's right, is not an "election contest" within the meaning of this phrase in the constitution. And statutes passed by the legislature in obedience to the constitutional mandate relating to contested elections do not deprive the courts of jurisdiction to inquire by quo warranto into usurpations and unlawful holding of office. Nor does the constitutional provision extending the right at the trial of "election contests" to open ballot-boxes and examine the ballots found therein forbid the exercise of this privilege in quo warranto proceedings. And one possessing the qualifications of "freeholder, resident and elector" is not disqualified from acting as relator in quo warranto proceedings by reason of having been the opposing candidate for the office in question.²⁸⁶

²⁸⁴ State v. Frazier, 28 Neb. 438; s. c. 44 N. W. 471.

²⁸⁵ State v. McCullough, 20 Nev. 154; s. c. 18 Pac. 756.

²⁸⁶ People v. Londoner, 13 Colo. 303; s. c. 22 Pac. 764. See also, as to the remedies being cumulative, Darrow v. People, 8 Colo. 417; s. c.

8 Pac. 661; State v. City Council &c., 47 N. J. L. 64; State v. Kempf, 69 Wis. 470; s. c. 34 N. W. 226; People v. Hall, 80 N. Y. 117; Hardin v. Colquitt, 63 Ga. 588; State v. Shay, 101 Ind. 36; State v. Adams, 65 Ind. 393; Commonwealth v. Allen, 70 Pa. St. 465; State v. Francis, 88 Mo. 557.

§1618. **Title to office—Practice in Michigan.**—In a well-considered case the Michigan supreme court has declared as fixed by the decisions of that state certain principles as to the impropriety of allowing litigation by a private relator of the title of his adversary to office in mandamus proceedings and as to quo warranto proceedings which may be summarized as follows: The only way to try titles to office finally and conclusively is by quo warranto. Even when mandamus is issued to seat a person who produces the proper evidence of title to an office, it does not settle the title at all. A bill in equity will not lie to determine between two municipal bodies asserting the same power of appointment, but the boundaries of their franchises must be determined by quo warranto. A bill in equity only lies in aid of quo warranto where expressly authorized by statute, and never to determine the usurpation of office or franchises. Under the system in Michigan, while a private person may have a valuable interest in an office, the courts have always treated it as a public trust, in which the public interest is paramount.²⁸⁷ Although a relator may be brought into the record in quo warranto cases as a claimant of an office, yet he is not a necessary party and has no control over the litigation. The proceeding, although of a mixed character, is technically an information for misdemeanor, and ouster of the usurper is not its only purpose. It may continue after his tenure expires, and the court may, if it chooses, punish him by fine.²⁸⁸ The default of a defendant in a quo warranto case leads to his ouster but not to judgment for relator.²⁸⁹ The relator in a quo warranto case can not withdraw and influence the prosecution in favor of defendant or any one else.²⁹⁰ Quo warranto cases begun at the circuit can not be brought to the supreme court of Michigan without the intervention of the attorney-general as the representative of the state.²⁹¹

²⁸⁷ Frey v. Michie, 68 Mich. 323; s. c. 36 N. W. 184.

²⁸⁸ People v. Hartwell, 12 Mich. 506; People v. Miller, 16 Mich. 205.

²⁸⁹ People v. Connor, 13 Mich. 238; People v. Molitor, 23 Mich. 341.

²⁹⁰ People v. Knight, 13 Mich. 230.

²⁹¹ Babcock v. Hanselman, 56 Mich. 27; s. c. 22 N. W. 99.

CHAPTER XXXVIII.

INJUNCTION AND CERTIORARI.

(a) INJUNCTION.	SECTION
SECTION	
1619. Equitable jurisdiction in municipal affairs.	1626. Restraining the collection of assessments.
1620. Rights and remedies of abutting owners.	1627. Restraining the vacation or grading of streets.
1621. Restraining power of equity in municipal affairs.	1628. Restraint of railroads in streets.
1622. Injunction in matters of special assessment.	1629. When injunction sustained—Illustrations.
1623. To restrain the enforcement of an ordinance.	1630. When injunction not sustained—Illustrations.
1624. To restrain the passage of an ordinance.	(b) CERTIORARI.
1625. Restraining the execution of contra	1631. Jurisdiction in.
	1632. Miscellaneous.

(a) INJUNCTION.

§ 1619. **Equitable jurisdiction in municipal affairs.**—The jurisdiction of a court of equity in municipal affairs where large interests are frequently involved, and a large number of citizens are interested in expenditures, has been too much circumscribed. Where the rights of a limited number of persons are involved, the remedy afforded in ordinary common law proceedings may be entirely adequate, but a multiplicity of suits, as well as many other similar grounds of jurisdiction, may frequently invoke the aid of equity in the administration of municipal affairs, and much more satisfactory remedies be applied than is possible under other procedures where the rules are more rigid and less pliable than in equity. Equitable jurisdiction administered by an upright and able chancellor will afford adequate, ample and complete justice to all parties in interest, and particularly the public, where resort to other modes of procedure, so far as general results are concerned and the conservation of public interests is involved, would be inadequate. The trend is in the direction of an enlarged equitable jurisdiction in municipal affairs. Where a municipality is charged with a public trust, and where it is about to

commit an act clearly illegal, the necessary effect of which will be to impose heavy burdens upon the property of citizens and taxpayers, it becomes amenable to the jurisdiction of equity for a breach of trust, and such court may interfere by injunction for the prevention of such act. But where the controversy is between two parties only, or where but few persons are involved, unless complainant's rights have been established at law, equity will not interfere.¹ The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of law, and there are special circumstances bringing the case under some recognized head of equity jurisdiction.² It is not within the jurisdiction of a court of equity to interfere with the duties of the departments of government. Its jurisdiction pertains only to questions of the maintenance of civil rights—property rights as contradistinguished from political rights,³—and hence can not determine political questions between the mayor and council.

§ 1620. Rights and remedies of abutting owners.—Where a petition is filed by an abutting property owner to enjoin the vacation of a street, and it is not alleged that petitioner's property abutted on the portion proposed to be vacated, nor such facts as would warrant such inference, and it is not stated that petitioner would suffer injury not common to other property owners abutting on the street, the injunction will not issue.⁴ An abutting owner may enjoin the

¹ *City of Chicago v. Collins*, 175 Ill. 445; s. c. 51 N. E. 907; *Poyer v. Village of Des Plaines*, 123 Ill. 111; s. c. 13 N. E. 819; *Chicago &c. R. Co. v. City of Ottawa*, 148 Ill. 397; s. c. 36 N. E. 85; *Yates v. Village of Batavia*, 79 Ill. 500.

² *Pittsburg &c. R. Co. v. Board &c.*, 172 U. S. 32, 37. Cf. *Dows v. City of Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 547; *State Railroad Tax Cases*, 92 U. S. 575; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516; s. c. 5 S. Ct. 601; *Milwaukee v. Koeffler*, 116 U. S. 219; s. c. 6 S. Ct. 372; *Shelton v. Platt*, 139 U. S. 591; s. c. 11 S. Ct. 646.

³ *Heffran v. Hutchins*, 160 Ill. 550; s. c. 43 N. E. 709; *Chicago Pub.*

Stock Ex. v. McClaughry, 148 Ill. 372; s. c. 36 N. E. 88; *City of Chicago v. Wright*, 69 Ill. 318; *Delahanty v. Warner*, 75 Ill. 185; *Sheridan v. Colvin*, 78 Ill. 237.

⁴ *Knapp, Stout & Co. v. St. Louis*, 153 Mo. 560; s. c. 55 S. W. 104; *Glasgow v. St. Louis*, 107 Mo. 198; s. c. 17 S. W. 743; *Van De Vere v. Kansas City*, 107 Mo. 83; s. c. 17 S. W. 695; *Rude v. City of St. Louis*, 93 Mo. 408; s. c. 6 S. W. 257; *Fairchild v. City of St. Louis*, 97 Mo. 85; s. c. 11 S. W. 60; *Sherlock v. Kansas City &c. Co.*, 142 Mo. 172; s. c. 43 S. W. 629; *Schulenberg &c. Co. v. St. Louis &c. R. Co.*, 129 Mo. 455; s. c. 31 S. W. 796; *Grand Ave. R. Co. v. People's R. Co.*, 132 Mo. 34; s. c. 33

use of a street by a street-railroad company under an ordinance passed granting such right, but where the consent of abutting owners is not obtained as required;⁵ he may maintain injunction to restrain changes in a street improvement where he has had no notice or opportunity for a hearing.⁶ County commissioners may be enjoined, at the instance of resident property owners and taxpayers, from erecting a county court-house on a city park, even if the city council has consented thereto.⁷ A resident taxpayer of a school district may enjoin the officers of a school district from removing a schoolhouse to another location where such removal would involve a waste and an unwarranted expenditure of money.⁸ A taxpayer can not enjoin the board of public improvements from approving a contract submitted to it for such approval, by the water supply commissioners, on the alleged ground that the act of approval would be illegal and cause him grievous and irreparable injury.⁹ In such case the contract becomes binding only when authorized by ordinance of the municipal assembly, and hence no injury could result to a taxpayer by the illegal act.¹⁰ A resident and taxpayer may enjoin a diversion by the original proprietor of land appropriated for a town site, and which was dedicated as a public park when the town was laid out and platted, and has since been maintained as such.¹¹ A taxpayer may enjoin consummation of a contract where it is awarded in violation of a statute and ordinance requiring it to be let to the lowest bidder, although he may be a bidder.¹² And so, a suit will lie by a taxpayer to enjoin the levy of taxes to pay principal or interest on void bonds.¹³ A taxpayer's suit in the matter of a local improvement is brought too late where he has voluntarily paid his taxes assessed or to be assessed for that purpose.¹⁴ An action by a tax-

S. W. 472; *Knapp, Stout & Co. v. St. Louis &c. R. Co.*, 126 Mo. 26; s. c. 28 S. W. 627; *Lockwood v. Railway Co.*, 122 Mo. 86; s. c. 26 S. W. 698; *Schopp v. City of St. Louis*, 117 Mo. 131; s. c. 22 S. W. 898; *Heinrich v. City of St. Louis*, 125 Mo. 424; s. c. 28 S. W. 626; *Christian v. City of St. Louis*, 127 Mo. 109, 114; s. c. 29 S. W. 996.

⁵ *Beeson v. City of Chicago*, 75 Fed. 880.

⁶ *Buchanan v. Borough of Beaver*, 171 Pa. St. 567; s. c. 33 Atl. 115.

⁷ *McIntyre v. Board of Com'rs &c.*, 15 Colo. App. 78. Cf. *Davenport v. Buffington*, 38 C. C. A. 453; s. c. 97 Fed. 234; *Rowzee v. Pierce*, 75 Miss.

846; s. c. 23 So. 307; *Crampton v. Zabriskie*, 101 U. S. 601; *Cummings v. City of St. Louis*, 90 Mo. 259, 261; s. c. 2 S. W. 130.

⁸ *McLain v. Mariche*, 60 Neb. 353, 359; s. c. 83 N. W. 85.

⁹ *Press Pub. Co. v. Holahan*, 62 N. Y. S. 872; s. c. 29 Misc. (N. Y.) 684.

¹⁰ *Keator v. Dalton*, 62 N. Y. S. 878; s. c. 29 Misc. (N. Y.) 692.

¹¹ *Davenport v. Buffington*, 97 Fed. 234.

¹² *Holden v. City of Alton*, 179 Ill. 318; s. c. 53 N. E. 556.

¹³ *Morton v. Carlin*, 51 Neb. 202; s. c. 70 N. W. 966.

¹⁴ *State v. Bader*, 56 Ohio St. 718; s. c. 17 N. E. 564.

payer against the fiscal officers of a city will not be maintained to restrain the payment of salaries to persons alleged to have been appointed in violation of civil service rules.¹⁵ The right of a resident taxpayer to restrain an illegal expenditure of money does not depend on objection on his part to previous illegal expenditures for the same object.¹⁶ A taxpayer has no right to intervene to prevent the expenditure of money which has already been collected, on the ground that the tax was illegal, though he may do so to prevent a levy.¹⁷ A suit can not be maintained by a citizen and taxpayer in behalf of the municipality against third persons unless the bringing of the action is a duty resting on them in which they have no discretion, and which they have refused to perform.¹⁸ An unauthorized contract involving the expenditure of taxes may be enjoined at the suit of a taxpayer;¹⁹ and so, a contract for public improvements stipulating that union labor only shall be employed by the contractor, may be enjoined by a taxpayer.²⁰ A court of equity will enjoin and set aside an illegal general tax, whether it is personal, or a lien upon property, at the suit of a taxpayer, where a multiplicity of suits is avoided.²¹ A taxpayer may maintain a suit to enjoin a board of education from appropriating a school fund to a purpose not warranted by law. Taxpayers in such case are in equity the owners of the fund, and the board can only hold and apply it for the legitimate purposes of the trust.²² A taxpayer of a city may, in a court of equity, prevent by injunction an illegal and unauthorized diversion of public funds, or the execution of illegal contracts, or the incurring of illegal indebtedness,²³ and in such case the amount of taxes paid by plaintiff is immaterial.²⁴ A suit by a taxpayer to restrain an illegal appropriation is not within the general equity powers.²⁵ A taxpayer is one who owns property entered for taxation, and on which he is liable

¹⁵ *Chittenden v. Wurster*, 152 N. Y. 345; s. c. 46 N. E. 857.

¹⁶ *Savidge v. Village of Spring Lake*, 112 Mich. 91; s. c. 70 N. W. 425.

¹⁷ *Seligman v. City of Santa Rosa*, 81 Fed. 524; *Kilbourne v. St. John*, 59 N. Y. 21.

¹⁸ *Dunn v. Long Beach & Co.*, 114 Cal. 605; s. c. 46 Pac. 607.

¹⁹ *Mooney v. Clark*, 69 Conn. 241; s. c. 37 Atl. 506, 1080.

²⁰ *Adams v. Brenan*, 177 Ill. 194; s. c. 52 N. E. 314.

²¹ *City of Chicago v. Collins*, 175

Ill. 445; s. c. 51 N. E. 907; *Allwood v. Cowen*, 111 Ill. 481; *Searing v. Heavysides*, 106 Ill. 85; *Kimball v. Merchants & Co.*, 89 Ill. 611.

²² *Adams v. Brenan*, 177 Ill. 194; s. c. 52 N. E. 314.

²³ *City of Chicago v. Nichols*, 177 Ill. 97; s. c. 52 N. E. 359.

²⁴ *City of Chicago v. Nichols*, supra. Cf. *City of Springfield v. Edwards*, 84 Ill. 626; *Wright v. Bishop*, 88 Ill. 302.

²⁵ *Prince v. Crocker*, 166 Mass. 347; s. c. 44 N. E. 446.

to pay as soon as collectible.²⁶ Where property owners sold to the city a strip of land abutting on a public park, on the condition that the city would make a street of such strip and forever, at its own expense, keep the street in repair, an injunction will be granted at the instances of the grantors, or their assigns, restraining the city from assessing against such grantors the cost of repairs.²⁷ Injunction will lie at the suit of a landowner to restrain the laying of a switch track in a street used by the public for thirty years.²⁸ A taxpayer may enjoin the funding of bonds which are invalid.²⁹ Injunction may issue to restrain the levy of taxes to pay an illegal indebtedness at the suit of a taxpayer.³⁰

§ 1621. **Restraining power of equity in municipal affairs.**—It is impossible in the limits of a chapter to give more than casual attention to the restraining jurisdiction exercised by courts in municipal matters, and all that will be attempted will be by way of illustration, rather than a statement and analysis of the principles and their application. Injunction is the proper and appropriate remedy to enjoin an unauthorized diversion of public funds. The city in most of its relations occupies a position of trust in behalf of the public, and the general principles applicable to a trust relationship are applicable. Injunction is the proper remedy to enjoin an unauthorized diversion of public funds,³¹ and to prevent proceedings imposing an unconstitutional debt,³² but a mere allegation that the corporate authorities will misapply the funds is not sufficient.³³ The general rule is that a wasting of public property or funds may be enjoined.³⁴ Where a valid tax for a specific purpose has been levied and collected, it is impressed with a trust the performance of which may be enforced in equity, and the county may be enjoined from misappropriating it to other purposes.³⁵ Taxes collected for paving a certain street form a trust fund and can not be lawfully appropriated to pay

²⁶ *Alexander v. Johnson*, 144 Ind. 82; s. c. 41 N. E. 811.

²⁷ *City of Omaha v. Megeath*, 46 Neb. 502; s. c. 64 N. W. 1091.

²⁸ *Illinois Cent. R. Co. v. Thomas*, 75 Miss. 54; s. c. 21 So. 601. Will not lie by landowner, when,—*Erwin v. Central Union Tel. Co.*, 148 Ind. 365; s. c. 46 N. E. 667; 47 N. E. 663.

²⁹ *Myers v. City of Jeffersonville*, 145 Ind. 431; s. c. 44 N. E. 452.

³⁰ *Bradford v. City of San Francisco*, 112 Cal. 537; s. c. 44 Pac. 912.

³¹ *City of Chicago v. Nichols*, 177 Ill. 97; s. c. 52 N. E. 359.

³² *Flynn v. Little Falls &c. Co.*, 74 Minn. 180; s. c. 77 N. W. 38; 78 N. W. 106.

³³ *Bardick v. Dillon*, 7 Okl. 535; s. c. 54 Pac. 785.

³⁴ *Gerlach v. Brandreth*, 54 N. Y. S. 479.

³⁵ *Coler v. Board &c.*, 89 Fed. 257; *Willis v. Board &c.*, 86 Fed. 872; *McKee v. Lamon*, 159 U. S. 317; s. c. 16 S. Ct. 11.

for paving another street.³⁶ When the charter provides that in case of any excess in a particular fund it may be applied on a deficiency existing in any other fund, the deficiency means such as may arise from the non-payment of taxes or inadequacy of a particular fund to meet reasonable demands.³⁷ Where a county, its officers and contractors, unlawfully attempt to expend more money for road purposes than the statute permits, in anticipation of a levy, they may be enjoined.³⁸ The law is established beyond doubt or controversy that a bill will lie to enjoin public officers, who hold funds in trust, from misappropriating the funds in their charge. Courts of chancery will interfere to restrain such authorities from a misuse of the fund entrusted to them, or its appropriation to a purpose not warranted by law.³⁹

§ 1622. Injunction in matters of special assessment.—An injunction lies to enjoin the enforcement of a special tax against premises where the ordinance providing for same is unreasonable and oppressive,⁴⁰ and also where there was a want of authority to make the assessment,⁴¹ or where the assessment is illegal,⁴² but is not sustained where there is an adequate common law or statutory remedy.⁴³ Injunction will be sustained, after the work has been completed, to prevent a lien for an assessment where notice was given before the commencement of the work to the contractors that the legality of the assessment would be contested.⁴⁴ An injunction against the collection of an assessment will not be sustained where the objection could have been urged on the application for judgment.⁴⁵ But where an assessment is invalid, and the effect of the assessment is to create a

³⁶ *Allen v. City of Davenport*, 107 Iowa 90; s. c. 77 N. W. 532.

³⁷ *In re Taxpayers &c.*, 51 N. Y. S. 512.

³⁸ *Webster v. Douglas Co.*, 102 Wis. 181; s. c. 77 N. W. 885; 78 N. W. 451.

³⁹ *Adams v. Brennan*, 177 Ill. 194; s. c. 52 N. E. 314; *Colton v. Hanchett*, 13 Ill. 615; *Perry v. Kinnean*, 42 Ill. 160; *Beauchamp v. Board &c.*, 45 Ill. 274; *Jackson v. Norris*, 72 Ill. 364; *Board &c. v. Weider*, 64 Ill. 427; *Chestnutwood v. Hood*, 68 Ill. 132; *Wright v. Bishop*, 88 Ill. 302; *Board &c. v. Arnold*, 112 Ill. 11; *Stevens v. St. Mary's Training*

School, 144 Ill. 336; s. c. 32 N. E. 962.

⁴⁰ *Skinker v. Heman*, 148 Mo. 349; s. c. 49 S. W. 1026.

⁴¹ *Dietz v. City of Neenah*, 91 Wis. 422; s. c. 64 N. W. 299. And see *Steinmuller v. City of Kansas City*, 3 Kan. App. 45; s. c. 44 Pac. 600.

⁴² *Kerr v. City of Corsicana* (Tex. Civ. App.), 35 S. W. 694.

⁴³ *Hilliard v. City of Asheville*, 118 N. C. 845; s. c. 24 S. E. 738.

⁴⁴ *Verdin v. City of St. Louis*, 131 Mo. 26; s. c. 33 S. W. 480.

⁴⁵ *Hewes v. Village of Winnetka*, 60 Ill. App. 654.

cloud upon the title to property, injunction will issue.⁴⁶ A court of equity has jurisdiction to set aside and cancel proceedings that already form a cloud upon plaintiff's title, and to enjoin one which is being prosecuted and will, if not prevented, result in creating a cloud.⁴⁷ A bill will not lie when based on a slight change in the direction of the sewer, where the property owner is not injured by the change.⁴⁸ If, however, the deviation renders the improvement less beneficial to the property assessed, though the alteration be slight, injunction will lie.⁴⁹ Sometimes the statute limits the time in which such suit may be brought.⁵⁰ Where an assessment is void, no matter from what cause, its enforcement may be enjoined, as when there is no legal authority for the assessment;⁵¹ and so, a bill to enjoin the enforcement of a void assessment is not demurrable.⁵²

§ 1623. To restrain the enforcement of an ordinance.—The enforcement of an ordinance which will be in effect the impairment of a contract may be enjoined in a court of equity, where the injury threatened will be irreparable, or the damage can not be adequately compensated.⁵³ The enforcement of a void city ordinance may be enjoined in a court of equity in order to prevent a multiplicity of suits, at the instance of a person whose rights are impaired by it. A court of equity will not, however, determine whether an ordinance has been violated, but merely whether it is void.⁵⁴ Where an ordinance has been enacted by the proper authorities, a court of equity will not interfere by injunction to restrain its enforcement in appropriate courts upon the ground that it is illegal; nor will it enjoin proceedings for the enforcement of such ordinance in order to determine its validity where there is an adequate remedy at law.⁵⁵ But it is well settled that there are two exceptions to this rule: first, to prevent irreparable injury, and second, to prevent a multiplicity of suits. And so, where it appeared that the plaintiff suffered a special

⁴⁶ *Bolton v. Gillman*, 105 Cal. 244; s. c. 38 Pac. 881.

⁴⁷ *Shepardson v. Supervisors &c.*, 28 Wis. 593; *Mitchell v. City of Milwaukee*, 18 Wis. 99; *Johnson v. City of Milwaukee*, 40 Wis. 315; *Roe v. Lincoln Co.*, 56 Wis. 66; s. c. 13 N. W. 887.

⁴⁸ *Rossiter v. City of Lake Forest*, 157 Ill. 489; s. c. 38 N. E. 359.

⁴⁹ *Rossiter v. City of Lake Forest*, supra.

⁵⁰ *Doran v. Barnes*, 54 Kan. 238; s. c. 38 Pac. 300.

⁵¹ *City of Terre Haute v. Mack*, 139 Ind. 99; s. c. 38 N. E. 468.

⁵² *Beaser v. City of Ashland*, 89 Wis. 28; s. c. 61 N. W. 77; *Lieberman v. City of Milwaukee*, 89 Wis. 336; s. c. 61 N. W. 1112.

⁵³ *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 12; s. c. 19 S. Ct. 77.

⁵⁴ *City of Chicago v. Collins*, 175 Ill. 445; s. c. 51 N. E. 907.

⁵⁵ *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 31; s. c. 51 N. E. 758.

damage different in kind and degree from that suffered by the general public, and also that plaintiff had suffered irreparable injury, equity will interfere.⁵⁶ Stated in general terms, it may be said that the enforcement of an ordinance may be enjoined. But injunction will not lie to enjoin the enforcement of an ordinance passed in the exercise of the discretionary power of the council.⁵⁷ It has been held, as elsewhere seen, that the enforcement of a void ordinance will not be enjoined, on the theory that in such case there is an adequate remedy at law, but the enforcement of an ordinance which seriously affects property rights, and hinders a water company in the collection of its lawful compensation, may be enjoined, although the city is not active in enforcing it,⁵⁸ and where a special injury is shown, injunction will lie.⁵⁹ It will not issue to restrain the enforcement of an ordinance on the ground that it is unreasonable and oppressive, there being in such case an adequate remedy at law.⁶⁰ Where it is sought to restrain a town from enforcing an illegal ordinance, the bill must show a special injury different in kind and degree from that suffered by the general public.⁶¹

§ 1624. To restrain the passage of an ordinance.—Courts will not enjoin the passage of an ordinance upon a matter within the legislative discretion of the corporation; but they may, after its passage, annul it as unconstitutional.⁶² Where the functions of a city council are purely legislative or political, there can be no interference with its action by a co-ordinate branch of the government. When it will act or refrain from acting is discretionary.⁶³ Where an ordinance threatened to be adopted by a mayor and council is prejudicial to the rights of an individual, injunction may issue against the officers, but

⁵⁶ *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9; s. c. 51 N. E. 758.

⁵⁷ *Sylvester Coal Co. v. City of St. Louis*, 130 Mo. 323; s. c. 32 S. W. 649; *City of Chicago v. Ferris Wheel Co.*, 60 Ill. App. 384; *Rosenbaum v. City of Newbern*, 118 N. C. 83; s. c. 24 S. E. 1.

⁵⁸ *Los Angeles City Water Co. v. City of Los Angeles*, 88 Fed. 720.

⁵⁹ *City of Austin v. Austin City Cem. Ass'n.*, 87 Tex. 330; s. c. 28 S. W. 528; *Deems v. Mayor &c.*, 80 Md. 164; s. c. 30 Atl. 648.

⁶⁰ *Field v. Village of Western Springs*, 181 Ill. 186; s. c. 54 N. E. 929.

⁶¹ *City of Chicago v. Union B'd'g Ass'n*, 102 Ill. 379; *Barrows v. City of Sycamore*, 150 Ill. 588; s. c. 37 N. E. 1096; *Field v. Barling*, 149 Ill. 556; s. c. 37 N. E. 850; *Smith v. McDowell*, 148 Ill. 51; s. c. 35 N. E. 141; *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9; s. c. 51 N. E. 758.

⁶² *Los Angeles Water Co. v. City of Los Angeles*, 88 Fed. 720.

⁶³ *State v. Superior Courts &c.*, 105 Wis. 651; s. c. 81 N. W. 1046; *Des Moines Gas Co. v. City of Des Moines*, 44 Iowa 505; *New Orleans W. W. Co. v. New Orleans*, 164 U. S. 471; s. c. 17 S. Ct. 161; *City of Chicago v. Evans*, 24 Ill. 52, 57.

not against the city;⁶⁴ its enforcement will be enjoined if it is invalid, if private rights are invaded.⁶⁵ It has been held, however, that injunction will lie to restrain the passage of an ordinance which, if enacted, will be *ultra vires*.⁶⁶

§ 1625. Restraining the execution of contracts.—Injunction will not issue to enjoin the execution of a contract by the board of public works, on the ground that it acted conjointly with committees of the common council, in the absence of proof that it was influenced by such committees.⁶⁷ Injunction will lie to restrain the enforcement of an assessment for a violation of the contract, where the work was grossly inadequate to the requirements of both the ordinance and contract, and in utter disregard of the interests of property owners.⁶⁸ The provision in a charter requiring all contracts to be let to the lowest reliable and responsible bidder is for the benefit of taxpayers and property holders, and not competitive bidders, and the latter are not entitled to enjoin the letting of the contract.⁶⁹ It is the proper remedy for a threatened violation of a contract by the city.⁷⁰

§ 1626. Restraining the collection of assessments.—Probably as a general rule injunction will not lie to restrain the collection of an assessment, and is usually based on the ground that the plaintiff has had, or might have had, a valid legal objection and asserted such right in a court of law.⁷¹ The rule, however, has many exceptions. Injunction is proper where an assessment is larger than allowed by

⁶⁴ *Wabaska Electric Co. v. City of Wymore*, 60 Neb. 199; s. c. 82 N. W. 626. But see *Des Moines Gas Co. v. City of Des Moines*, 44 Iowa 505.

⁶⁵ *New Orleans W. W. Co. v. New Orleans*, 164 U. S. 471; s. c. 17 S. Ct. 161; *Page v. Mayor &c.*, 34 Md. 558, 564; *Mayor &c. v. Radecke*, 49 Md. 217, 231.

⁶⁶ *Trading Stamp Co. v. City of Memphis*, 101 Tenn. 181; s. c. 47 S. W. 136.

⁶⁷ *Ricketson v. City of Milwaukee*, 105 Wis. 591; s. c. 81 N. W. 864.

⁶⁸ *Haisch v. City of Seattle*, 10 Wash. 435; s. c. 38 Pac. 1131.

⁶⁹ *Colorado Pav. Co. v. Murphy*, 78 Fed. 28; s. c. 23 C. C. A. 631.

⁷⁰ *Chesapeake &c. Co. v. Mayor &c.*, 89 Md. 689; s. c. 43 Atl. 784; 44 Atl. 1033.

⁷¹ Will not issue to enjoin the collection of a tax on the ground that the county board has fraudulently contracted liabilities in excess of the authorized limit: *Bardrick v. Dillon*, 7 Okl. 535; s. c. 54 Pac. 785. Injunction will not be sustained against an improvement on the ground of inequality of the assessment where, by the charter, the right to a new assessment is given in case any court shall adjudge a special assessment illegal: *Bogert v. Jackson* Circuit Judge, 118 Mich. 457; s. c. 76 N. W. 983. Will not lie to vacate an assessment (see *New York consolidation act*, 1882, ch. 410, § 897): *Scudder v. Mayor &c.*, 146 N. Y. 245; s. c. 40 N. E. 734.

law, and already a sufficient amount has been paid to make the amount equal to what is allowed by law.⁷² Before a person is entitled to an injunction to restrain the enforcement of a tax under an ordinance requiring a license, he must clearly show the character of his business, as well as his exemption from the tax.⁷³ An injunction will not issue to restrain the collection of an entire assessment on the ground that the assessment is excessive by reason of the omission of persons liable.⁷⁴

§ 1627. Restraining the vacation or grading of streets.—The vacation of a street without authority may be enjoined at the suit of an abutting owner who would be injured thereby.⁷⁵ The vacation of a street by a city council, in the absence of fraud, would seem to be an exercise of legislative discretion. Public interests may be conserved by the vacation of a street, although an abutting individual property owner may be injured thereby. Private individuals may enjoin the appropriation of a street without authority.⁷⁶ The abandonment of a public park may be enjoined by an adjacent property owner, though he is not an abutting owner.⁷⁷ Injunction will not lie to prevent a change of the grade of a street.⁷⁸ The question of the necessity of an improvement is not the subject of review,⁷⁹ and it is only where there is an abuse of the discretion that courts will interfere.⁸⁰ Courts will not restrain the establishment of the grade of streets.⁸¹

§ 1628. Restraint of railroads in streets.—Where an additional use of a street has been granted by the city to build and operate

⁷² *City of Cincinnati v. Janes*, 55 Ohio St. 180; s. c. 44 N. E. 925.

⁷³ *Price Co. v. City of Atlanta*, 105 Ga. 358; s. c. 31 S. E. 619.

⁷⁴ *Regenstein v. City of Atlanta*, 98 Ga. 167; s. c. 25 S. E. 428. Injunction will not lie to restrain the collection of an assessment on the ground of irregularities in the proceedings after the adoption of the ordinance: *Rickords v. City of Hammond*, 67 Fed. 380.

⁷⁵ *Texarkana v. Leach*, 66 Ark. 40; s. c. 48 S. W. 807. The fact that the vacation of a street by ordinance will damage a person does not entitle him to an injunction against its passage: *Atkinson v. Wycoff*, 58 Mo. App. 86. The court will not enjoin the vacating of a street where

there is no allegation of fraud in the passage of the ordinance. The vacation is purely a matter of expediency to be decided by the municipal assembly: *Knapp, Stout & Co. v. St. Louis*, 153 Mo. 560; s. c. 55 S. W. 104.

⁷⁶ *Louisville &c. R. Co. v. Sonne*, 21 Ky. L. 848; s. c. 53 S. W. 274.

⁷⁷ *Douglass v. City Council &c.*, 118 Ala. 599; s. c. 24 So. 745.

⁷⁸ *Leonard v. Cassidy*, 8 Ohio C. C. 529.

⁷⁹ *Shimmons v. City of Saginaw*, 104 Mich. 511; s. c. 62 N. W. 725.

⁸⁰ *Coburn v. Bossert*, 13 Ind. App. 359; s. c. 40 N. E. 281.

⁸¹ *McHale v. Easton &c. Tr. Co.*, 169 Pa. St. 416; s. c. 32 Atl. 461.

a street-railroad, an injunction will not be granted to restrain the construction and operation of the railroad at the suit of an abutting owner.^{81a} Where the fee is in the city, such damages as an abutting owner may suffer from the laying of a railroad track in the street are merely consequential. In such case there is no physical taking of the land, and injunction will not lie, there being an adequate remedy at law.⁸² There must be something more than an invasion of a legal right. In order that a court of equity may interpose, where there is no actual taking, the threatened damage must be substantial and a remedy at law in fact inadequate.⁸³ Stated in other words, the mere diminution of the value of property without irreparable mischief will not furnish any foundation for equitable relief.⁸⁴ A strong case must be presented and the impending danger must be imminent to justify the issuing of an injunction as a precautionary and preventive remedy.⁸⁵ Where the use of the street has not been legally authorized, the remedy is an information in chancery by the attorney-general or state's attorney on behalf of the people, or by a bill for an injunction by the city.⁸⁶ Where the ordinance permitting the work is alleged to be invalid, an injunction will not lie to restrain the erection of an elevated railroad in the street, where the fee is in the city, as in such case the property owner has an action at law.⁸⁷

§ 1629. **When injunction sustained—Illustrations.**—Injunction will lie to restrain proceedings of a municipal corporation to remove an alleged nuisance where private rights are encroached upon and irreparable injury will ensue.⁸⁸ Where an ordinance deprives a person

^{81a} *Doane v. Lake St. El. R. Co.*, 165 Ill. 510; s. c. 46 N. E. 520; *Moses v. Pittsburg &c. R. Co.*, 21 Ill. 515; *Murphy v. City of Chicago*, 29 Ill. 279.

⁸² *Doane v. Lake St. El. R. Co.*, 165 Ill. 510; s. c. 46 N. E. 520; *Stetson v. Chicago &c. R. Co.*, 75 Ill. 74; *Patterson v. Chicago &c. R. Co.*, 75 Ill. 588; *Chicago &c. R. Co. v. McGinnis*, 79 Ill. 269; *Peoria &c. R. Co. v. Schertz*, 84 Ill. 135; *Pennsylvania Mutual L. Ins. Co. v. Heiss*, 141 Ill. 35; s. c. 31 N. E. 138; *Coreoran v. Chicago &c. R. Co.*, 149 Ill. 291; s. c. 37 N. E. 68; *White v. Metropolitan &c. R. Co.*, 154 Ill. 620; s. c. 39 N. E. 270.

⁸³ *Osborne v. Missouri Pac. R. Co.*, 147 U. S. 248, 253; s. c. 13 S. Ct. 299.

Cf. In re Debs, 158 U. S. 564, 591; s. c. 15 S. Ct. 900.

⁸⁴ *Morris &c. R. Co. v. Pruden*, 20 N. J. Eq. 530; *Zabriskie v. Jersey City &c. R. Co.*, 13 N. J. Eq. 314.

⁸⁵ *Drake v. Hudson River R. Co.*, 7 Barb. (N. Y.) 508; *Truesdale v. Peoria Grape Sugar Co.*, 101 Ill. 561.

⁸⁶ *McCartney v. Chicago &c. R. Co.*, 112 Ill. 611; *Hunt v. Chicago &c. R. Co.*, 121 Ill. 638; s. c. 13 N. E. 176; *Chicago &c. R. Co. v. City of Quincy*, 136 Ill. 489; s. c. 27 N. E. 232; *Metropolitan City R. Co. v. City of Chicago*, 96 Ill. 620. *Cf. Heilman v. Lebanon &c. St. R. Co.*, 175 Pa. St. 188; s. c. 34 Atl. 647.

⁸⁷ *Doane v. Lake St. &c. R. Co.*, 165 Ill. 510; s. c. 46 N. E. 520.

⁸⁸ *Bristol &c. Co. v. City of Bristol*, 97 Va. 304; s. c. 33 S. E. 588.

of his property without due process of law, and impairs contract rights, its enforcement may be enjoined by a court of equity.⁸⁹ But it has been held that the enforcement of an alleged illegal ordinance will not be enjoined until its illegality has been determined in an appropriate action at law.⁹⁰ It is proper to restrain a city from holding an election in a new ward alleged to be illegally created and expending public money in such election.⁹¹ Where part of an ordinance for an improvement is ultra vires, that part of the improvement covered by the ultra vires resolution may be enjoined.⁹² And so may the erection of a building by an individual on land dedicated to public use.⁹³ A city will be enjoined from ejecting a tenant occupying a building on park premises where the covenants of the lease have been partly performed and the tenant has expended large sums of money under it;⁹⁴ and where a city has no power to take possession of a water-works plant rightfully, it may properly be enjoined from doing so forcibly.⁹⁵ A taxpayer may enjoin the issuing of refunding bonds for debts contracted in violation of the constitution.⁹⁶ As to a bill to enjoin the delivery of bonds illegally issued and in aid of a private enterprise, it is not to be said there is an adequate remedy at law.⁹⁷ A city may enjoin an interference with the natural flow of streams which injures its levees,⁹⁸ and it and its officers may be enjoined by a neighboring property owner from granting a permit to remove a wooden building into a block based on the consent of property owners obtained by fraud.⁹⁹ Injunction will lie to prevent the construction of a plank road of material different from that required by statute,¹⁰⁰ and will lie at suit of a landowner where the evidence of dedication was conflicting,¹⁰¹ and may issue by the owner of a hotel to restrain the occupation of the street by hacks which prevent access

⁸⁹ *Cleveland City R. Co. v. City of Cleveland*, 94 Fed. 385.

⁹⁰ *Schultz v. City of Albany*, 57 N. Y. S. 963; s. c. 27 Misc. (N. Y.) 51.

⁹¹ *Cascaden v. City of Waterloo*, 106 Iowa 673; s. c. 77 N. W. 333.

⁹² *Adams v. City of Shelbyville*, 154 Ind. 467; s. c. 57 N. E. 114.

⁹³ *City of Pittsburg v. Epping Carpenter Co.*, 194 Pa. St. 318; s. c. 45 Atl. 129.

⁹⁴ *Gushee v. City of New York*, 56 N. Y. S. 1002; s. c. 26 Misc. (N. Y.) 287.

⁹⁵ *City of Los Angeles v. Los Angeles City Water Co.*, 124 Cal. 368; s. c. 57 Pac. 210, 571.

⁹⁶ *Dunbar v. Board &c. (Idaho)*, 49 Pac. 409.

⁹⁷ *Dodge v. Van Buren Circuit Judge*, 118 Mich. 189; s. c. 76 N. W. 315.

⁹⁸ *City of Dayton v. Robert*, 8 Ohio C. C. 649.

⁹⁹ *Griswold v. Brega*, 160 Ill. 490; s. c. 43 N. E. 864. Cf. *First Nat'l Bank v. Sarlls*, 129 Ind. 201; s. c. 28 N. E. 434; *King v. Davenport*, 98 Ill. 305.

¹⁰⁰ *Detroit &c. Plank-Road Co. v. Macomb Circuit Judge*, 109 Mich. 371; s. c. 67 N. W. 531.

¹⁰¹ *Murphy v. Southern R. Co.*, 99 Ga. 207; s. c. 24 S. E. 867.

to the hotel,¹⁰² and lies to prevent the shutting off of water by a water company for the non-payment of rates which are arbitrary.¹⁰³ A city is not exempt as a public corporation from a temporary injunction for infringement of a patent.¹⁰⁴

§ 1630. **When injunction not sustained—Illustrations.**—A municipal incorporation will not be enjoined from discharging its sewage into a natural watercourse, where it is free from negligence, where there is no other natural or reasonable means of drainage.¹⁰⁵ But it has been held that a lower riparian owner can maintain a common law action where the sewers are emptied into a natural stream that flows through private property to the injury of the owner, and this though sewers are necessary to the city, and the statute directs that sewers shall follow as near as possible the natural drainage of the country.¹⁰⁶ And it has also been held that a riparian owner has a common law right of action against a municipality for a continuous and tortious diversion of the waters of a private stream where it has not exercised its right of eminent domain.¹⁰⁷ The issuance of bonds, in the absence of fraud or abuse of discretion, will not be enjoined where they do not increase the municipal debt, but merely change its form and reduce the interest.¹⁰⁸ Injunction will lie to restrain village trustees from changing a road-bed of a street where they are about to enter upon complainant's property, remove his fences, cut his standing trees and plow up his fields, and permanently damage his property. This is based on irreparable injury.¹⁰⁹ Where a municipality has power to open streets, etc., it can not be enjoined from raising a sidewalk along its streets, although an adjoining lot is injured thereby.¹¹⁰ The general rule may be stated that a court of equity will not relieve a party against an assessment for taxation unless he tenders or offers to pay what he admits or what is seen to be due.¹¹¹ This rule, however, does not apply to a case where the assessment is under a rule or system in violation of the constitution, as where the entire cost of an improvement is imposed upon abutting

¹⁰² *City Council &c. v. Parker*, 114 Ala. 118; s. c. 27 So. 452.

¹⁰³ *Smith v. Birmingham W. Co.*, 104 Ala. 315; s. c. 16 So. 123.

¹⁰⁴ *Pelzer v. City of Binghamton*, 95 Fed. 823.

¹⁰⁵ *City of Valparaiso v. Hagen*, 153 Ind. 337; s. c. 54 N. E. 1062.

¹⁰⁶ *Smith v. City of Sedalia*, 152 Mo. 283; s. c. 53 S. W. 907.

¹⁰⁷ *Irving's Executors v. Burgess &c.*, 194 Pa. St. 648; s. c. 45 Atl. 482.

¹⁰⁸ *Snyder v. Kantner*, 190 Pa. St. 440; s. c. 42 Atl. 884.

¹⁰⁹ *Village of Itasca v. Schroeder*, 182 Ill. 192; s. c. 55 N. E. 50.

¹¹⁰ *Town of Harrisonburg v. Roller*, 97 Va. 582; s. c. 34 S. E. 523.

¹¹¹ *Norwood v. Baker*, 172 U. S. 269, 291; s. c. 19 S. Ct. 187; *National Bank v. Kimball*, 103 U. S. 732; *State Railroad Tax Cases*, 92 U. S. 575.

property by the front foot, without any reference to special benefits.¹¹² And so, no payment or tender is required where the entire tax fails by reason of an illegal assessment.¹¹³ A tender of the assessment is not necessary as a ground of relief where the assessment is void.¹¹⁴ But if there are several assessments, and one is void, the valid assessments must be tendered.¹¹⁵ An injunction enjoining a town and county from enforcing an illegal tax is conclusive against a subsequent certifying of such tax for collection.¹¹⁶ Where an ordinance has been enacted by the proper authorities, a court of equity will not interfere by injunction to restrain its enforcement in appropriate courts upon the ground that such ordinance is illegal, nor for the purpose of determining its validity where there is an adequate remedy at law.¹¹⁷ But where the bill shows a special injury different in kind and degree from that suffered by the general public, or that irreparable injury will result, as where a person, by the enforcement of an ordinance, will be shut off from his place of business, injunction will issue.¹¹⁸ Injunction will not issue to enjoin the payment for water already consumed, even if the contract for the full period is void.¹¹⁹ A water or light company, having franchises from and contracts with the city, is not entitled to enjoin the city from constructing plants of its own for supplying water and light for municipal purposes, where it does not appear that contract rights will be violated thereby.¹²⁰ An injunction will not issue to restrain the issue of bonds on the ground that the ordinance does not definitely provide for levying taxes to pay interest and provide a sinking fund for the principal, where such action may be taken subsequently.¹²¹ Equity will enjoin a municipality from holding an election to determine whether certain territory shall be annexed to the city, when the holding of such election is ultra vires and without authority of law.¹²² The construction of a sidewalk in a thinly settled part of a village, where it might in the end be better to wait until the population increases, and where no pressing demand for a sidewalk exists, will not be enjoined as being oppressive. It must clearly appear that the

¹¹² *Norwood v. Baker*, 172 U. S. 269; s. c. 19 S. Ct. 187.

¹¹³ *Norwood v. Baker*, *supra*.

¹¹⁴ *Kerr v. City of Corsicana (Tex. Civ. App.)*, 35 S. W. 694.

¹¹⁵ *Yates v. City of Milwaukee*, 92 Wis. 352; s. c. 66 N. W. 248.

¹¹⁶ *Stone v. Bank of Commerce*, 174 U. S. 412; s. c. 19 S. Ct. 747.

¹¹⁷ *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9; s. c. 51 N. E. 758.

¹¹⁸ *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9; s. c. 51 N. E. 758.

¹¹⁹ *Dawson & Co. v. Carver*, 95 Ga. 565; s. c. 20 S. E. 502.

¹²⁰ *Little Fall Electric & Co. v. City of Little Falls*, 102 Fed. 663.

¹²¹ *Cleveland v. City Council & Co.*, 54 S. C. 83; s. c. 31 S. E. 871.

¹²² *Mayor & Co. v. Hughes*, 110 Ga. 795; s. c. 36 S. E. 247.

ordinance for the improvement is unjust and oppressive.¹²³ The mere fact of additional taxation in the issue of bonds for a water-works, where there is a private water-works already, does not warrant courts in interfering.¹²⁴ Inasmuch as an easement to lay tracks and operate a street railway in a street does not convey title to the street, another street-railway may lay its tracks across those of the former without condemnation or paying damages, proper municipal authority having been given.¹²⁵ Riparian owners, who have no title in the bed of a stream of water, can not enjoin the city for polluting the stream.¹²⁶ Courts can not control by injunction the discretionary power vested in municipal corporations in the matter of the improvement of streets and alleys, either as to the kind of improvements or the necessity therefor.¹²⁷ Injunction will not issue to restrain the chief of police from preventing a person maintaining his business without a license when the statute requires him to arrest a person for violating an ordinance in his presence,¹²⁸ nor to restrain a city from disposing of its sewage as it sees fit.¹²⁹ A city is not entitled to enjoin the stringing of wires twenty feet above the ground on poles already erected.¹³⁰ A corporation is not entitled to an injunction to protect its franchise from the enforcement of a valid license tax, where it refuses to pay such tax.¹³¹ A court of equity will not enjoin a prosecution under an alleged void ordinance.¹³² In an action to enjoin a street improvement, questions as to the manner the work was done under the contract are not to be considered, as such questions do not go to the jurisdiction.¹³³ An injunction restraining the officers of a city from paying a claim is not a defense by the city when neither the owner nor the city was a party to the injunction suit.¹³⁴ Under a bill for an injunction to restrain a sale under a special assessment, where the matters alleged as fraudulent were of record before judgment, relief will not be granted. An allegation

¹²³ *Walker v. Village of Morgan Park*, 175 Ill. 570; s. c. 51 N. E. 636. See, as to oppressiveness, *Hawes v. City of Chicago*, 158 Ill. 653; s. c. 42 N. E. 373.

¹²⁴ *Thomas v. City of Grand Junction*, 13 Colo. App. 80; s. c. 56 Pac. 685.

¹²⁵ *Southern R. Co. v. Atlanta R. & Co.*, 111 Ga. 679; s. c. 36 S. E. 873.

¹²⁶ *Grey v. Mayor &c.*, 60 N. J. Eq. 385; s. c. 45 Atl. 995.

¹²⁷ *Cason v. City of Lebanon*, 153 Ind. 567; s. c. 55 N. E. 768.

¹²⁸ *Coykendall v. Hood*, 55 N. Y. S. 718; s. c. 36 App. Div. (N. Y.) 552.

¹²⁹ *Fisk v. City of Hartford*, 69 Conn. 375; s. c. 37 Atl. 983.

¹³⁰ *Mayor &c. v. Holland Tr. Co.*, 20 N. J. L. J. 214; s. c. 37 Atl. 438.

¹³¹ *Nashville &c. R. Co. v. City of Attalla*, 118 Ala. 362; s. c. 24 So. 450.

¹³² *City of Denver v. Beede*, 25 Colo. 172; s. c. 54 Pac. 624.

¹³³ *Cason v. City of Lebanon*, 153 Ind. 567; s. c. 55 N. E. 768.

¹³⁴ *Hill v. City of Indianapolis*, 92 Fed. 467.

that plaintiff did not know of such matters is of no avail.¹³⁵ It is necessary that the complaint demand an injunction.¹³⁶ In a suit for injunction by a taxpayer, the defense that the plaintiff is not the real party in interest and is not prosecuting the suit in good faith, must be determined by proof on the trial, and not by affidavits on a preliminary motion to dissolve the restraining order.¹³⁷ On dissolving an injunction against a city, it is not entitled to damages for counsel fees where its attorney is employed on an annual salary.¹³⁸

(b) CERTIORARI.

§ 1631. **Jurisdiction in.**—The common law writ of certiorari was issued from a superior to an inferior court, commanding the latter to send up its record of proceedings for the purpose of determining whether it had exceeded its jurisdiction, and whether its acts were legal and where there was no mode of review.¹³⁹ The purpose of it was to bring up the entire record of the inferior tribunal for inspection and judgment.¹⁴⁰ It is the validity of the proceedings appearing on the face of the record that is cognizable.¹⁴¹ The condition on which the jurisdiction is based is that there is no appeal on writ of error provided for, or that there is no other speedy, adequate and plain remedy.¹⁴² This remedy, as it existed at common law, has been enlarged by statute in some states. It does not lie to review action of a board of aldermen in an election contest, where the relator's protest is referred to a committee on elections, which fixes a time and place for hearing, of which he has notice but fails to appear.¹⁴³ The action of a body having no legal powers to exercise and no legal duties to perform can not be reviewed by certiorari,¹⁴⁴ and it is not used to determine title to an office,¹⁴⁵ or to

¹³⁵ *Smith v. Kocherspergen*, 180 Ill. 527; s. c. 54 N. E. 614. *Under Burns R. S. Ind.* 1901, §§ 4288-4299, injunction will not lie to enjoin the making of improvements after the officers have made a contract for the improvement and the work has been commenced where the officers have jurisdiction of the subject matter: *Everett v. Deal*, 148 Ind. 90; s. c. 47 N. E. 219.

¹³⁶ *Wilson v. City of Boise City (Idaho)*, 60 Pac. 84.

¹³⁷ *Ricketson v. City of Milwaukee*, 105 Wis. 591; s. c. 81 N. W. 864.

¹³⁸ *Nixon v. City of Biloxi*, 76 Miss. 810; s. c. 25 So. 664.

¹³⁹ *Chicago &c. R. Co. v. Fell*, 22 Ill. 333.

¹⁴⁰ *Donahue v. Will Co.*, 100 Ill. 94; *Edgar v. Greer*, 14 Iowa 211.

¹⁴¹ *State v. Ellis*, 43 La. An. 825; s. c. 9 So. 639.

¹⁴² *State v. Maniteau Co. Court*, 45 Mo. App. 387.

¹⁴³ *People v. Woods*, 57 N. Y. S. 715; s. c. 39 App. Div. (N. Y.) 660.

¹⁴⁴ *Gouldley v. City Council &c.*, 63 N. J. L. 537; s. c. 42 Atl. 852.

¹⁴⁵ *State v. Board &c.*, 63 N. J. L. 55; s. c. 42 Atl. 843.

review action of a municipal board where the board act within their authority,¹⁴⁶ or to review action of a board of fire commissioners, the action of the board not being a judicial function.¹⁴⁷ This action does not lie where the purpose is to review an act of officers who, in doing an act, are permitted to exercise discretion. In the nature of things, officers are often necessarily vested with a certain amount of discretion; if this discretion was subject to judicial control, the purpose would be defeated by the arbitrary action, frequently of a co-ordinate department of the government.¹⁴⁸ The same rule applies where the action is legislative.¹⁴⁹ Action of a board of auditors may be reviewed by certiorari where its action has not been completed and it has not lost jurisdiction.¹⁵⁰ Certiorari only applies to inferior courts, or officers or bodies exercising judicial functions.¹⁵¹ The actions of municipal authorities in the matter of assessments, contracts therefor, etc., are ministerial acts, and can not be reviewed by certiorari.¹⁵² But where the acts are judicial, certiorari will lie to correct errors of law.¹⁵³ Where a policeman has ceased to be a member of the police force by reason of dismissal, he is not entitled to have the action of the police commissioners reviewed by certiorari.¹⁵⁴ It does not lie to review an act of trustees declaring vacant an office.¹⁵⁵ The action of a city council removing a member whose term has not expired, and placing in his stead another person, may be reviewed by certiorari.¹⁵⁶ Certiorari is the proper remedy to test the validity of an assessment for any reason disclosed by the record,

¹⁴⁶ *Brown v. Board &c.*, 124 Cal. 274; s. c. 57 Pac. 82.

¹⁴⁷ *Frasher v. Rader*, 124 Cal. 132; s. c. 56 Pac. 797.

¹⁴⁸ *Mayor &c. v. Dean*, 62 Ill. App. 41; *Townsend v. Copeland*, 56 Cal. 612; *Iske v. City of Newton*, 54 Iowa 586; *Tiedt v. Carstensen*, 61 Iowa 334; s. c. 16 N. W. 214; *Board &c. v. Auditor*, 27 Mich. 165; *Benton v. Taylor*, 46 Ala. 388.

¹⁴⁹ *Pine Bluff W. & L. Co. v. City of Pine Bluff*, 62 Ark. 196; s. c. 35 S. W. 227; *Brown v. Board &c.*, 124 Cal. 274; s. c. 57 Pac. 82.

¹⁵⁰ *People v. Sutphin*, 66 N. Y. S. 49; s. c. 53 App. Div. (N. Y.) 613.

¹⁵¹ *People v. Van Alstyne*, 65 N. Y. S. 451; s. c. 58 App. Div. (N. Y.) 1.

¹⁵² *Quinchard v. Board &c.*, 113 Cal. 664; s. c. 45 Pac. 856.

¹⁵³ *Bowditch v. Superintendent &c.*,

168 Mass. 239; s. c. 46 N. E. 1026. Certiorari lies only to review acts judicial, and not those which are ministerial or legislative: *Mayor &c. v. Dean*, 62 Ill. App. 41; *Hyslop v. Finch*, 99 Ill. 171; *Commissioners &c. v. Griffin*, 134 Ill. 330; s. c. 25 N. E. 995; *Miller v. Trustees &c.*, 88 Ill. 26. See contra, *Treasurer &c. v. Mulford*, 26 N. J. L. 49.

¹⁵⁴ *People v. York*, 59 N. Y. S. 333; s. c. 43 App. Div. (N. Y.) 138.

¹⁵⁵ *Lorbeer v. Hutchinson*, 111 Cal. 272; s. c. 43 Pac. 896. In Tennessee the circuit court may require a city council to send up for revision the record of its proceedings for the removal of a member: *Hayden v. Memphis*, 100 Tenn. 582; s. c. 47 S. W. 182.

¹⁵⁶ *State v. City of Camden*, 63 N. J. L. 186; s. c. 42 Atl. 848.

or on the ground of its unconstitutionality.¹⁵⁷ Where the question is whether an assessment for local improvements is invalid for any reason disclosed by the record, or because of the unconstitutionality of the statute under which it is made, certiorari is the proper remedy.¹⁵⁹

§ 1632. **Miscellaneous.**—An attorney has no power to bind his client by a stipulation made before a suit has been commenced, or before he has been retained to commence one, and if he assumes to do so he does so as agent, and his authority must appear.¹⁶¹ In suits actually pending, however, he may agree that one suit shall abide the event of another, where the same questions are involved.¹⁶² Habeas corpus can not be resorted to for the purpose of obtaining a speedy action of the court on the validity of an ordinance where the imprisonment terminates on the date of the hearing, or where there is in fact no imprisonment.¹⁶³ When the power to open and widen streets is vested in the council, where the costs are assessed against the city at large, and where the city opened and widened a street, a petition not being required in such case, courts will not interfere, except in cases where there has been gross abuse of authority. In such case the propriety of action is a matter of legislative action rather than judicial.¹⁶⁴ A charter providing that no action shall be maintained against the city for gross negligence in the matter of its streets, sewers, etc., unless the same shall have remained out of repair for ten days or special notice in writing has been given to the mayor or engineer, does not apply to a case of a break in the sewer caused by another break which had existed two months.¹⁶⁵ An ordinance does not render the city liable to garnishment.¹⁶⁶

¹⁵⁷ *Weed v. Mayor &c.*, 172 Mass. 28; s. c. 51 N. E. 204; 42 L. R. A. 642.

¹⁵⁹ *Weed v. Mayor &c.*, 172 Mass. 28; s. c. 51 N. E. 204; 42 L. R. A. 642. Certiorari to review a tax ordinance by a city council where the application is not made until after the taxes are assessed and confirmed,—see *Carling v. Mayor &c.*, 64 N. J. L. 223; s. c. 44 Atl. 950.

¹⁶¹ *Stone v. Bank of Commerce*, 174 U. S. 412; s. c. 19 S. Ct. 747.

¹⁶² *Ohlquest v. Farwell*, 71 Iowa 231; s. c. 32 N. W. 277; North Mis-

souri R. Co. v. Stephens, 36 Mo. 150; *Eidam v. Finnegan*, 48 Minn. 53; s. c. 50 N. W. 933; *Gilmore v. American &c. Ins. Co.*, 67 Cal. 366; s. c. 7 Pac. 781.

¹⁶³ *Ex parte Henion* (Cal.), 55 Pac. 326.

¹⁶⁴ *City of New Orleans v. Steinhart*, 52 La. An. 1043; s. c. 27 So. 586.

¹⁶⁵ *City of Dallas v. McAllister* (Tex.), 39 S. W. 173.

¹⁶⁶ *Hamilton v. Gambell*, 31 Or. 328; s. c. 48 Pac. 433.

CHAPTER XXXIX.

TAXPAYERS' ACTIONS.

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§ 1633. **Introductory.**—The rights and remedies of taxpayers have received incidental attention in connection with the treatment of taxation, special assessments and other topics previously considered. The remedy of a taxpayer must in all cases be governed very largely by the local statutes, charters, and methods of procedure, and only rights and remedies of a general nature or principles of general application will be considered herein. The constitutional guarantee that no man shall be deprived of his property except by due process of law has peculiar application in the matter of taxation. And it is clearly and universally established that proper legislation imposing taxation and providing summary methods of collecting these taxes without recourse to judge or jury is constitutional.¹ The proper exercise of the tax-levying

¹ *Cooley Taxation*, 47, 48; citing *Cruikshanks v. City Council*, 1 McCord (S. C.) 360; *State v. Mayhew*, 2 Gill (Md.) 487, 497; *Harper v. Commissioners &c.*, 23 Ga. 566; *State v. Frazier*, 48 Ga. 137; *Hagar v. Board &c.*, 47 Cal. 222; *Cowles v. Brittan*, 2 Hawks (N. C.) 204; *Board &c. v. Morrison*, 22 Minn. 178; *Davis v. City of Clinton*, 55 Iowa 549; s. c. 8 N. W. 423; *Howe v. City of Cambridge*, 114 Mass. 388; *Harris v. Wood*, 6 T. B. Mon. (Ky.) 641; *Doe v. Deavors*, 11 Ga. 79, 86; *Kelly*

v. Pittsburgh, 104 U. S. 78; *Hagar v. Reclamation Dist.*, 111 U. S. 701; s. c. 4 S. Ct. 663. In the case last cited it was said by Mr. Justice Field, referring to that clause of the fourteenth amendment which provides that no state shall deprive any person of life, liberty or property without due process of law:—"The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either without the observance of

power is not therefore unconstitutional even though the tax acts prescribe a summary method of procedure for the collection of the taxes. The taxes collected by such legislation are collected by the "law of the land" and by "due process of law."² But it is equally well established that the law will permit no abuse of this constitutional power either on the part of legislatures or on the part of the ministerial officers charged with the collection of the tax.³ And further it is a well-

those general rules established in our system of jurisprudence for the security of private rights: *Hurtado v. People*, 110 U. S. 516, 536; s. c. 4 S. Ct. 111. The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him and without his being afforded any opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty or property. Undoubtedly where life and liberty are involved due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so also where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley in his concurring opinion in *Davidson v. New Orleans*,

96 U. S. 97:—"In judging what is "due process of law" respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case it will be adjudged "due process of law;" but if found to be arbitrary, oppressive and unjust, it may be declared to be not "due process of law." The power of taxation possessed by the state may be exercised upon any subject within its jurisdiction and to any extent not prohibited by the constitution of the United States. As said by this court:—"It may touch property in every shape in its natural condition, in its manufactured form and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in profession, in commerce, in manufactures or in transportation. Unless restrained by provisions of the federal constitution, the power of the state as to the mode, form and extent of taxation is unlimited where the subjects to which it applies are within her jurisdiction;" citing *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319.

² See authorities cited in preceding section.

³ *Cooley Taxation*, 746.

settled principle that a taxpayer has a limited property right in the proceeds of taxation and can invoke the aid of the courts to prevent or redress the wrong suffered by him as a taxpayer by the wrongful or illegal use of those proceeds on the part of the public officials.⁴ It will be seen, therefore, that the objects for which the citizen has a right of action as a taxpayer naturally resolve themselves into two classes:—(1) To prevent or redress wrongs arising from the wrongful and illegal imposition and collection of taxes. (2) To prevent or redress wrongs arising from the wrongful or illegal use of the proceeds of taxation. It is the intention of the writer to follow this classification in the following discussion of taxpayers' actions.

§ 1634. Remedies for illegal taxation—In general.—There are in all the states statutes providing for the revision and correction of erroneous and illegal taxation, and it is to these statutes that the individual taxpayer must look for redress in the case of such taxation. It is quite beyond the scope of this chapter to treat even generally the subject of relief in individual cases of wrongful taxation. For the discussion of these intricate and interesting questions the reader is referred to the several excellent monographs which treat of the subject of taxation.⁵ The writer will attempt to discuss only those cases in which the taxpayer acts not alone as an individual but as the representative of a class of taxpayers, and seeks to prevent or redress wrongful and illegal taxation on behalf of that class. It is obvious that such cases will arise almost exclusively before the actual collection of the tax. After the tax has been collected each taxpayer must in general take individual action to recover his proportion of the tax.⁶

⁴ *Crampton v. Zabriskie*, 101 U. S. 601, and authorities cited under succeeding sections.

⁵ See Judge Cooley's thorough and philosophic work on Taxation, and also Mr. Desty's able and exhaustive "American Law of Taxation," in the preface of which he states that he has examined about ten thousand cases and has exhausted the reports of the courts of last resort in all the states and territories to the date of publication (1884). The tax laws of the different states are also treated in various works relating to the statutes of individual states, as, for example, the useful treatise of Mr. Davies on the New York statutes concerning taxation.

⁶ This action will be in general in assumpsit for money had and received: *City of Grand Rapids v. Blakeley*, 40 Mich. 367. The courts regard these actions with disfavor, and in order that they may be maintained successfully the following conditions must co-exist:—"1. The authority to levy the tax or to levy it upon the property in question must be wholly wanting or the tax itself wholly unauthorized, in which cases the assessment is not simply irregular but absolutely void. 2. The money sued for must have been actually received by the defendant corporation and received by it for its own use and not as an agent or instrument to assess and collect

§ 1635. **Injunctions against taxes.**^{6a}—This is of course the most natural and the most usual method of procedure to be adopted by a taxpayer to prevent the collection of an illegal tax. The law, however, hedges about with many restrictions the use of this remedy, as will be seen. It may be stated as a general principle that the interference of the courts with the collection of public taxes is to be exercised with the greatest caution through obvious reasons of public policy, and that except in extreme cases a court of equity will not interfere by injunction with the collection of taxes.⁷ There are, however, exceptions to the general rule that equity will not interfere by injunction to prevent the collection of a tax. These exceptions are well stated by Mr. Desty:—"The general rule that equity will not interfere is subject to three exceptions:—First, where the proceedings will necessarily lead to a multiplicity of suits; second, where they lead to the commission of irreparable injury to the freehold; third, where the claim of the adverse party is valid on its face."⁸ In order,

money for the benefit of the state or other public corporation or person. And 3, the payment by the plaintiff must have been made upon compulsion, as, for example, to prevent the immediate seizure of his goods or the arrest of his person, and not voluntarily. Unless these conditions concur, paying under protest will not, without statutory aid, give a right of recovery." 2 Dillon Munic. Corp., § 940. It has been held by the supreme court of the United States that the payment of taxes under a general protest in writing, where no special or active steps had been taken and no immediate seizure threatened, was not compulsory in the necessary sense, and that the taxes so paid could not be recovered: *Railroad Co. v. Dodge Co. Com'rs*, 98 U. S. 541.

^{6a} See ch. 38, ante.

⁷ *Allen v. Baltimore &c. R. Co.*, 114 U. S. 311; s. c. 5 S. Ct. 925, 962; *State Railroad Tax Cases*, 92 U. S. 575; *Dows v. City of Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 547; *King v. Wilson*, 1 Dill. C. C. 555; *Union Pacific R. Co. v. Lincoln Co.*, 3 Dill. C. C. 300; *The Liberty Bell*, 23 Fed. 843; *Town of*

Lemont v. Singer &c. Co., 98 Ill. 94; *First Nat'l Bank v. Cook*, 77 Ill. 622; *Willard v. Comstock*, 58 Wis. 565; s. c. 17 N. W. 401; *City Council &c. v. Sayre*, 65 Ala. 564; *Carrothers v. Board &c.*, 16 W. Va. 527; *Floyd v. Gilbreath*, 27 Ark. 675; *Covington v. Rockingham*, 93 N. C. 134; *Stilz v. City of Indianapolis*, 81 Ind. 582; *Savings & Loan Soc. v. Austin*, 46 Cal. 415; *Vanover v. Davis*, 27 Ga. 354; *Susquehanna Bank v. Board &c.*, 25 N. Y. 312; *City of Richmond v. Crenshaw*, 76 Va. 936; *Greene v. Mumford*, 5 R. I. 472; *Chicago &c. R. Co. v. Siders*, 88 Ill. 320; *Brooks v. Shelton*, 47 Miss. 243; *South Platte Land Co. v. City of Crete*, 11 Neb. 344; s. c. 7 N. W. 859; *Frost v. Flick*, 1 Dak. 131; s. c. 46 N. W. 508; *State v. Mutchler*, 41 N. J. L. 96; *Miller v. Gorman*, 38 Pa. St. 309; *Insurance Co. v. Yard*, 17 Pa. St. 331; *Challiss v. Board &c.*, 15 Kan. 49; *Albany &c. Mining Co. v. Auditor-General*, 37 Mich. 391, 398; *Inhabitants &c. v. Field*, 1 Conn. 279.

⁸ 2 Desty Taxation, 667; citing *Kennedy v. City of Troy*, 14 Hun (N. Y.) 308; *Clark v. Village of Dunkirk*, 12 Hun (N. Y.) 181.

however, to obtain relief by injunction from a court of equity, the taxpayer must establish a perfect case at equity. The supreme court of the United States has clearly defined the requisites for successfully maintaining a suit in equity for an injunction to restrain the collection of a tax, in *The State Railroad Tax Cases*.⁹ These were bills of injunction to restrain the collection of taxes assessed on certain railroads in Illinois. It was there said by Mr. Justice Field:—"It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice, nor its irregularity, of themselves give the right to an injunction in a court of equity."¹⁰ The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid. That there might be no misunderstanding of the universality of this principle, it was expressly enacted in 1867 that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.'¹¹ And although this was intended to apply alone to taxes levied by the United States, it shows the sense of congress of the evils to be feared if courts of justice could in any case interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded on the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice.¹² In this latter case [referring to *Dows v. Chicago*], this court, after commenting upon the necessary reliance of the state governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, says:—"No court of equity will therefore

⁹ 92 U. S. 575.

¹⁰ Citing *Mooers v. Smedley*, 6 Johns. Ch. (N. Y.) 27; *Dodd v. City of Hartford*, 25 Conn. 232; *Greene v. Mumford*, 5 R. I. 472; *Messeck v. Board &c.*, 50 Barb. (N. Y.) 190; *Dows v. City of Chicago*, 11 Wall.

108; *Hannevinkle v. Georgetown*, 15 Wall. 547.

¹¹ U. S. Rev. Stat., § 3224.

¹² Citing *Cheatham v. United States*, 92 U. S. 85; *Nichols v. United States*, 7 Wall. 122; *Dows v. City of Chicago*, 11 Wall. 108.

allow its injunction to issue to restrain their action except where it may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of law. It must appear that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked.' So in the case of *Hannevinkle v. Georgetown*,¹³ the court says:—'It has been the settled law of this country for a great many years that an injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax can not be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multitude of suits, or some cause presenting a case of equity jurisdiction.' We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes, but we may say that in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors, or excess in valuation, or hardship, or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."¹⁴

§ 1636. Requisites for injunction.—We see, therefore, that it is necessary for a good case at equity to be made out. It is essential that there should be such circumstances in the case as bring it within the jurisdiction of equity. These circumstances can not of course be exhaustively detailed. The discretion of the court, acting along the line of precedents, must determine whether the case is properly cognizable by a court of equity. Among the circumstances may be mentioned the ordinary ground for equitable jurisdiction, such as the fact that the collection of the tax would produce a multiplicity of suits;¹⁵

¹³ 15 Wall. 547.

¹⁴ *State Railroad Tax Cases*, 92 U. S. 575, 615. The learned judge further says that "another reason why a court should not thus interfere as it would in any transaction between individuals is, that it has no power to apportion the tax, or to make a new assessment, or to direct another to be made by the proper officers of the state. These officers and the manner in which they shall

exercise their functions are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise by the constitutions of all the states and by the theory of our English origin is exclusively legislative." Citing *Heine v. Levee Com'rs*, 19 Wall. 655, 660.

¹⁵ *Carrothers v. Board &c.*, 16 W. Va. 527; *George v. Dean*, 47 Tex. 73; *Guest v. City of Brooklyn*, 69 N. Y.

but if the suits have already been instituted, the injunction will not be allowed.¹⁶ Or equity may obtain jurisdiction if it be alleged and shown that irreparable injury will ensue unless the collection of the tax is restrained by injunction.¹⁷ It must not only appear by averments upon the face of the bill that such irreparable injury will ensue,¹⁸ but the facts must also be stated so that the court can judge of the truth of the averments.¹⁹ An injunction will be allowed where there is indubitable evidence of fraud in the assessment or collection of the tax; but the assessment or collection must be shown to be fraudulent and not merely irregular or erroneous.²⁰

§ 1637. No injunction against irregular taxes.—It is conceded learning that injunction will not lie to restrain the collection of a tax upon the ground of any mere irregularity in the assessment thereof.²¹ The high authority of Chancellor Kent supports this doctrine, which has been followed by the courts of nearly all the states.²² Says that learned jurist:—"I can not find that the court interferes in cases of this kind where the act complained of was done fairly and impartially, according to the best judgment and discretion of the assessors; and a precedent once set would become very embarrassing and extensive in its consequences." He continues:—"There must have been a thousand occasions and opportunities for the exercise of such an appellate jurisdiction in the history of the jurisprudence and practice of the English court of chancery, if such a jurisdiction existed, and yet we find no precedent to direct us. * * * I apprehend that it

506. It will be observed, however, that this doctrine is applied with very great circumspection.

¹⁶ *Town of Mt. Zion v. Gillman*, 14 Fed. 123.

¹⁷ *Oliver v. Memphis &c. R. Co.*, 30 Ark. 128.

¹⁸ *Ritter v. Patch*, 12 Cal. 298.

¹⁹ 1 *High Injunctions*, 377; *Ritter v. Patch*, *supra*.

²⁰ *Chicago &c. R. Co. v. Cole*, 75 Ill. 591; *Lewis v. Spencer*, 7 W. Va. 689; *Cleghorn v. Postelthwaite*, 43 Ill. 428; *Paul v. Pacific R. Co.*, 4 Dill. C. C. 35; *Town of Lemont v. Singer &c. Stone Co.*, 98 Ill. 94.

²¹ *The State Railroad Tax Cases*, 92 U. S. 575; *Le Roy v. Mayor &c.*, 4 Johns. Ch. (N. Y.) 352; *Center &c. R. Co. v. Black*, 32 Ind. 468; *Tainter*

v. Lucas, 29 Wis. 375; *Thatcher v. People*, 79 Ill. 597; *State v. Mutchler*, 41 N. J. L. 96. See also, authorities cited in § 1635, *ante*.

²² In Wisconsin the rule has been relaxed. The courts of that state concede the principle of the doctrine set forth in the text; but they have gone much further than the courts of other states in holding that irregularities of assessment render the tax void and not voidable. Acting on the theory that these irregularities wholly avoid the tax, they have allowed injunctions with greater freedom: *Salscheider v. City of Fort Howard*, 45 Wis. 519; *Marsh v. Board &c.*, 42 Wis. 502; *Hersey v. Board &c.*, 37 Wis. 75.

would require special provision by statute to authorize chancery to interfere with these assessments."²³

§ 1638. Void taxes.—On the other hand, if the tax is assessed and levied under a law absolutely void, the cases hold with considerable unanimity that relief by injunction will be allowed. Thus, in Illinois, where the legislature appointed drainage commissioners, and in contravention of the constitution attempted to give them authority to assess taxes, and lands were sold for the non-payment of such assessments, an injunction was allowed against the issuing of the tax deeds.²⁴ And if for any reason the tax law is void, injunction will lie.²⁵ So also if the tax, although levied under a valid statute, has been imposed, assessed or levied by persons who have no authority, *de facto* or *de jure*, to act, the collection of the tax may be enjoined.²⁶ And if the tax is levied on property wholly exempt, equity will enjoin its enforcement.²⁷

§ 1639. Injunctions against municipal taxation.—It is stated by Mr. High that "the courts of equity have been inclined, in cases of assessments by municipal corporations, to relax somewhat the stringency of the rule of non-interference as applied to the collection of state taxes, and relief by injunction has been more freely granted against the collection of municipal taxes than in cases affecting the collection of revenues by the state. And while it is difficult to perceive any sufficient reason for such distinction, the distinction itself remains."²⁸ The reason indicated by Mr. Justice Field in *The State Railroad Tax Cases*²⁹ seems to the author satisfactory. "Whether," he says, "the same rigid rule should be applied to taxes levied by counties, towns and cities we need not here inquire; but there is both reason and authority for holding that the control of the courts in the exercise of power over private property by these corporations is more necessary and is unaccompanied by many of the evils that belong to it when affecting the revenue of the state."

²³ *Le Roy v. Mayor &c.*, 4 Johns. Ch. (N. Y.) 352.

²⁴ *Gage v. Graham*, 57 Ill. 144; *Knowlton v. Board &c.*, 9 Wis. 410; *Bristol v. Johnson*, 34 Mich. 123; *Foote v. Linck*, 5 McLean 616. But see *Exchange Bank v. Hines*, 3 Ohio St. 1; *Crawford v. Bradford*, 23 Fla. 404.

²⁵ 2 *Desty Taxation*, 670, and cases cited.

²⁶ *Morrison v. Wasson*, 79 Ind.

477; *Union Trust Co. v. Weber*, 96 Ill. 346; *Ramsay v. Hoeger*, 76 Ill. 432; *Munson v. Minor*, 22 Ill. 595; *St. Clair v. School Board's Appeal*, 74 Pa. St. 252.

²⁷ *United States v. Lee*, 106 U. S. 196, 202; s. c. 1 S. Ct. 240; *Washington &c. Church v. New York*, 20 Hun (N. Y.) 297; *Kimball v. Merchants' &c. Co.*, 89 Ill. 611.

²⁸ 2 *High Injunctions*, § 536.

²⁹ 92 U. S. 575, 615.

§ 1640. **Taxes on personal property.**—In addition to the other restrictions on the remedy of a taxpayer by injunction, it is the uniform modern rule that where the tax the collection of which is sought to be restrained affects personal and not real property, injunction will not lie.³¹ The reason of the rule is evident. The law assumes that no irreparable damage will be done by the sale of personal property. The aggrieved taxpayer has his action to recover back the taxes illegally paid, which is an ample remedy; while in the case of real estate, a cloud upon the title produced by a tax sale may render the property permanently unmarketable.

§ 1641. **Taxes on real property.**—As a corollary to the doctrine of the preceding section may be stated the well-established rule that equity will often make an exception to the general principle that an injunction will not lie to restrain the collection of a tax where the enforcement of the tax would permanently cloud the title to real estate.³² The reason for the doctrine, as indicated in the foregoing section, lies in the fact that the enforcement of the tax would effect

³¹*Milwaukee v. Koeffler*, 116 U. S. 219; s. c. 6 S. Ct. 372; *Dows v. City of Chicago*, 11 Wall. 108; *Lockwood v. City of St. Louis*, 24 Mo. 20; *Mayor &c. v. Baldwin*, 57 Ala. 61; *Searing v. Heavysides*, 106 Ill. 85; *Baldwin v. Tucker*, 16 Fla. 258; *Bradish v. Lucken*, 38 Minn. 186; s. c. 36 N. W. 454. In *Youngblood v. Sexton*, 32 Mich. 406, Judge Cooley said:—"It was decided at an early day in this state that equity had no jurisdiction to restrain the collection of a personal tax, even conceding it to be illegal; the ordinary legal remedies being ample for the party's protection: *Williams v. Mayor &c.*, 2 Mich. 560. This principle has ever since been regarded as not open to controversy in this state, and it was applied without its soundness being contested in *Henry v. Gregory*, 29 Mich. 68, decided last year. In other states it is supported by a strong preponderance of authority: *Brewer v. City of Springfield*, 97 Mass. 152; *Durant v. Eaton*, 98 Mass. 469; *Loud v. City of Charleston*, 99 Mass. 208; *Whiting v.*

Mayor &c., 106 Mass. 89; *Hunnewell v. City of Charleston*, 106 Mass. 350; *Rockingham &c. Bank v. Portsmouth*, 52 N. H. 17; *Dodd v. City of Hartford*, 25 Conn. 232; *Ritter v. Patch*, 12 Cal. 298; *Worth v. Commissioners &c.*, Winst. Eq. (N. C.) 70; *Van Cott v. Board &c.*, 18 Wis. 247; *Greene v. Mumford*, 5 R. I. 472; *McCoy v. Corporation of Chillicothe*, 3 Ohio 370; *Conley v. Chedic*, 6 Nev. 222; *Deane v. Todd*, 22 Mo. 90; *Sayre v. Tompkins*, 23 Mo. 443; *Barrow v. Davis*, 46 Mo. 394; *McPike v. Pew*, 48 Mo. 525; *Mayor &c. v. Meserole*, 26 Wend. (N. Y.) 132; *Intendant &c. v. Pippin*, 31 Ala. 542; *Mayor &c. v. Baltimore &c. R. Co.*, 21 Md. 50; *Dows v. City of Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 547."

³²*Goring v. McTaggart*, 92 Ind. 200; *Heywood v. City of Buffalo*, 14 N. Y. 534; *Wiley v. Flournoy*, 30 Ark. 609; *Holland v. Mayor &c.*, 11 Md. 186; *Mitchell v. City of Milwaukee*, 18 Wis. 92; *City of Delphi v. Bowen*, 61 Ind. 29; *Powell v. City of Parkersburg*, 28 W. Va. 698.

a permanent cloud on the title. And applying the rule according to this principle, it has been often held that where the tax or the proceeding for its enforcement is void on its face, so that the purchaser would not acquire even a prima facie title, the reason for the interposition of equity ceases and an injunction will be refused.³³ And further, a court of equity will not listen to a taxpayer who asks for an injunction against the collection of a tax or assessment when he has already allowed, without protest, his real estate to receive the benefits for which the tax assessment is levied. He is estopped from his application for equitable relief.³⁴

§ 1642. **Certiorari.**^{34a}—For mere irregularity in levying and collecting a tax the statutory remedy is exclusive, and for wrongful or unequal taxation abatement may usually be recovered without resort to the customary legal remedies. But application for abatement must be made while the tax list or roll is in the hands of the assessor. After the assessment roll has been delivered by the assessor for collection, no abatement can be made unless by the municipal legislature itself;³⁵ but the acts other than ministerial of all officers and boards may be reviewed and corrected on certiorari. The office of the writ extends to all questions of jurisdiction, power and authority of the inferior tribunal and to all questions as to whether the inferior tribunal has exceeded its statutory authority.³⁶ Judge Cooley specifies the following cases in which action may be set aside on certiorari: "Where the assessment is erroneous in point of law, either because the

³³ *Bouton v. City of Brooklyn*, 15 Barb. (N. Y.) 375; *Van Doren v. Mayor*, 9 Paige (N. Y.) 388; *Bucknall v. Story*, 36 Cal. 67; *Heywood v. City of Buffalo*, 14 N. Y. 534; 2 High Injunctions, § 525.

³⁴ *Kellogg v. Ely*, 15 Ohio St. 64; *City of Evansville v. Pfisterer*, 34 Ind. 36; *Sleeper v. Bullen*, 6 Kan. 300; *Motz v. City of Detroit*, 18 Mich. 495; 2 *Desty Taxation*, 666.

^{34a} See ch. 38, ante.

³⁵ When a tax is illegal its collection may be resisted without an application for abatement, unless that is the statutory remedy: *Babcock v. Town of Granville*, 44 Vt. 325. The proper boards may refund any tax believed to be wrongfully or inequitably exacted, but no executive or ministerial officer may do so with-

out special authority: See *Boardman v. Board &c.*, 85 N. Y. 359; *In re Coleman*, 30 Hun (N. Y.) 544; *Peck v. Watros*, 30 Ohio St. 590; *Barnes v. Marshall Co.*, 56 Iowa 20; s. c. 8 N. W. 677.

³⁶ *People v. Supervisors &c.*, 1 Hill (N. Y.) 195; *In re Mount Morris*, 2 Hill (N. Y.) 14; *Benton v. Taylor*, 46 Ala. 388; *Western R. Co. v. Nolan*, 48 N. Y. 513; *People v. Board &c.*, 39 N. Y. 81. The only question which the court will consider on such a review is the matter of jurisdiction, according to the following New York case: *People v. Fredericks*, 48 Barb. (N. Y.) 173. The statute confers the power of review only when the assessment is erroneous, illegal or unequal: *People v. Commissioners*, 91 N. Y. 593.

assessors have adopted some inadmissible basis in making it, or because they have disregarded any of the mandatory provisions of statute on which parties assessed have a right to rely for their protection; when errors of a like character are committed by any appellate jurisdiction which is empowered by statute to review, revise or equalize the assessments; and when municipal bodies in levying assessments for local improvements exceed their authority, or lay down erroneous principles to govern the action of the assessors or commissioners who are to make them."³⁷ It may, perhaps, be easy to infer from reference to the preceding section when the writ will not lie, but it may be said that common-law certiorari will not be sustained when a remedy by writ of error or by appeal is given.³⁸ The effect of the writ is either

³⁷ Cooley Taxation (2d ed.) 758, where the following cases are cited: *Inhabitants &c. v. County Com'rs*, 12 Met. (Mass.) 211; *Heywood v. City of Buffalo*, 14 N. Y. 534; *Genesee &c. Bank v. Board &c.*, 53 Barb. (N. Y.) 223; *Hatch v. City of Buffalo*, 38 N. Y. 276; *People v. Board &c.*, 48 N. Y. 390; *Western R. Corp. v. Nolan*, 48 N. Y. 513; *Kennedy v. City of Troy*, 77 N. Y. 493; *State v. Clothier*, 30 N. J. L. 351 (where it was decided that the writ would lie though the tax had been collected by distress and sale). Cf. *National Bank v. City of Elmira*, 53 N. Y. 49; *Ohio &c. R. Co. v. Lawrence Co.*, 27 Ill. 50; *State v. McClurg*, 27 N. J. L. 253 (tax set aside for excess only); *State v. Mayor &c.*, 27 N. J. L. 185; *California &c. R. Co. v. Board &c.*, 18 Cal. 671; *Swann v. Mayor &c.*, 8 Gill (Md.) 150; *Ex parte Buckner*, 9 Ark. 73; *Carroll v. Mayor*, 12 Ala. 173; *Kelso v. City of Boston*, 120 Mass. 297; *Stone v. Viele*, 38 Ohio St. 314; *Leroy v. Mayor &c.*, 20 Johns. (N. Y.) 430; *Starr v. Trustees &c.*, 6 Wend. (N. Y.) 564; *People v. Mayor &c.*, 5 Barb. (N. Y.) 43; *People v. Mayor &c.*, 9 Barb. (N. Y.) 535; *Parks v. Mayor &c.*, 8 Pick. (Mass.) 218; *Gibbs v. Commissioners*, 19 Pick. (Mass.) 298; *Lincoln v. City of Worcester*, 8 Cush. (Mass.) 55; *State v. Felken-*

burgh, 15 N. J. L. 320; *State v. Parker*, 35 N. J. L. 575; *State v. St. Louis County Court*, 47 Mo. 595; *State v. Dowling*, 50 Mo. 134; *Floyd v. Gilbreath*, 27 Ark. 675; *State v. Mayor &c.*, 35 N. J. L. 381; *State v. Mayor &c.*, 29 N. J. L. 104, 475. The latter cases are important constructions of statutes relating to local improvements.

³⁸ *Ohio &c. R. Co. v. Lawrence Co.*, 27 Ill. 50; *Inhabitants &c. v. County Com'rs*, 12 Met. (Mass.) 211; *Dugden v. McGruder*, Walk. (Miss.) 112; *Rundle v. Mayor &c.*, 28 Md. 356; *Beasley v. Town of Beckley*, 23 W. Va. 81; *People v. Board &c.*, 51 N. Y. 442; *People v. Allen*, 52 N. Y. 538; *People v. Betts*, 55 N. Y. 600; *Wilson v. Burks*, 71 Ga. 862; *In re Pearce*, 44 Ark. 509; *Galloway v. Corbitt*, 52 Mich. 460; s. c. 18 N. W. 218; *Philips v. City of Stevens Point*, 25 Wis. 594; *Jackson v. People*, 9 Mich. 111; *Commissioners v. Supervisors &c.*, 27 Ill. 140; *Carroll v. Mayor*, 12 Ala. 173; *In re Mount Morris Square*, 2 Hill (N. Y.) 14, 27; *City of Charlestown v. Commissioners*, 109 Mass. 270; *Witkowski v. Skalowski*, 46 Ga. 41; *Leonard v. Peacock*, 8 Nev. 157, 247; *State v. Apgar*, 31 N. J. L. 358; *Farmington &c. Co. v. County Com'rs*, 112 Mass. 206; *School Dist. v. Jant Board &c.*, 27 Mich. 3; *State v. Bentley*, 23 N. J.

to quash the proceedings reviewed or to refuse to do so. The remedy is not flexible.³⁹ And it will not stay the collection of the tax. The tax should be paid under protest.⁴⁰

§ 1643. Recoveries by taxpayers of taxes paid.—A tax voluntarily paid can not be recovered back, even though the tax may be illegal or unconstitutional;⁴¹ but it is the general rule that an illegal tax paid under protest may be recovered.⁴² And protest need not be made if payment is made under duress.⁴³ It is not necessary for the taxpayer to wait for the goods to be seized, the exhibition of a warrant directing the use of force and the demand for the tax being equivalent to actual compulsion.⁴⁴ If the taxpayer notifies the collector that he thinks the tax illegal, payment is not voluntary; and when taxes were paid

L. 532; *Macklot v. City of Davenport*, 17 Iowa 379; *State v. Wakely*, 2 Nott & McC. (S. C.) 410.

³⁹ *Whitebeck v. Common Council &c.*, 50 Mich. 86; s. c. 14 N. W. 708.

⁴⁰ *Bank v. Mayor*, 43 N. Y. 184. But when a writ is brought to stay the collection of a tax the application should be made before the roll passes out of the assessor's hands: *People v. Delaney*, 49 N. Y. 655. See also, *Libby v. Town of West St. Paul*, 14 Minn. 248, where the same rule is held to apply where the claim is lack of municipal authority to levy the tax.

⁴¹ *Taylor v. Board of Health*, 31 Pa. St. 73; *Smith v. Inhabitants &c.*, 27 Maine 145; *Forbes v. Appleton*, 5 Cush. (Mass.) 115; *New York &c. R. Co. v. Marsh*, 12 N. Y. 308; *Barrett v. City of Cambridge*, 10 Allen (Mass.) 48; *Walker v. St. Louis*, 15 Mo. 563; *New Orleans &c. Co. v. City of New Orleans*, 30 La. An. 1371; *Lee v. Inhabitants &c.*, 13 Gray (Mass.) 476; *Hospital v. Philadelphia Co.*, 24 Pa. St. 229; *Philips v. Board &c.*, 5 Kan. 412; *Commissioners &c. v. Norris*, 62 Ga. 538; *Commissioners &c. v. Walker*, 8 Kan. 431; *Corkle v. Maxwell*, 3 Blatch. 413; *Elliott v. Swartwout*, 10 Pet. 137; *President &c. v. District of Columbia*, 4 MacArthur 43; *Mills v. Board &c.*, 50 Ind. 436;

Smith v. Schroeder, 15 Minn. 35; *Moore v. Board &c.*, 2 Wyo. 8; *City of Chicago v. Fidelity &c. Bank*, 11 Ill. App. 165; *McGehee v. Mayor &c.*, 69 Ga. 581; *Turner v. Althous*, 6 Neb. 54. The rule applies to interest wrongfully extorted when the tax is legal: *Maguire v. State Saving Inst.*, 62 Mo. 344. A penalty wrongfully added, but paid without protest, can not be recovered back: *Russell v. City of New Haven*, 51 Conn. 259. In Kentucky one who pays an illegal tax without knowledge of the illegality may recover it back, though paid under protest: *Underwood v. Brockman*, 4 Dana (Ky.) 309; *Ray v. Bank*, 3 B. Mon. (Ky.) 510; *City of Covington v. Powell*, 2 Met. (Ky.) 226. But in Iowa a different rule has been applied: *Kraft v. City of Keokuk*, 14 Iowa 86; *Espy v. Town of Fort Madison*, 14 Iowa 226.

⁴² *North Carolina R. Co. v. Commissioners &c.*, 77 N. C. 4; *Hays v. Hogan*, 5 Cal. 241; *McMillan v. Richards*, 9 Cal. 365, 417; *Falkner v. Hunt*, 16 Cal. 170.

⁴³ *Week v. McClure*, 49 Cal. 623, 628. See also, *Murphy v. Mayor &c.*, 6 Houst. (Del.) 108.

⁴⁴ *Atwell v. Zeluff*, 26 Mich. 118; *Amesbury &c. Co. v. Inhabitants &c.*, 17 Mass. 461.

under the belief that they were due, upon the fraudulent representations of the officers, the payment was not voluntary.⁴⁵ The proper action is assumpsit for money had and received, and this action lies only when the tax is void;⁴⁶ and the tax must have been paid over by the collector and have been received to the use of the municipality.⁴⁷

§ 1644. **Actions against officers.**—If a collector is guilty of a tort, which his warrant if void would not justify, the municipality can not be held responsible therefor.⁴⁸ A town collector or assessor is not an agent of the municipality, and can in no way bind it as to taxes collected by him, the money not having been paid into the treasury; he is a mere trustee of the city.⁴⁹ But municipal corporations existing under special charters might be held liable for the wrongs of their officers in some cases where towns would not be;⁵⁰ and assessors who act in good faith, and are not themselves by law liable, are not liable

⁴⁵ *Erschine v. Van Arsdale*, 15 Wall. 75; *Harrison v. City of Milwaukee*, 49 Wis. 247; s. c. 5 N. W. 326; *Owens v. City of Milwaukee*, 47 Wis. 461; s. c. 3 N. W. 3. The mere demand for the tax, not involving the use of force as an alternative, does not constitute compulsion so as to make the payment involuntary: *Taylor v. Board &c.*, 31 Pa. St. 73; *Lester v. Mayor &c.*, 29 Md. 415.

⁴⁶ *Wright v. City of Boston*, 9 Cush. (Mass.) 233. Excessive taxes, paid in ignorance through fraudulent representations of officers, may be recovered from the city, though the right of appeal from the assessment was given by the city: *Harrison v. City of Milwaukee*, 49 Wis. 247; s. c. 5 N. W. 326.

⁴⁷ *City of Chicago v. Fidelity Bank*, 11 Bradw. (Ill.) 165; *Philips v. City of Stevens Point*, 25 Wis. 594. Taxes levied by a township for road purposes, when illegally collected and disbursed, can not be recovered in an action against the county: *Lauman v. Des Moines Co.*, 29 Iowa 310; *Butler v. Board &c.*, 46 Iowa 326; *Davenport &c. R. Co. v. Lowry*, 51 Iowa 486; s. c. 1 N. W. 486; *Stone v.*

Woodbury Co., 51 Iowa 522; s. c. 1 N. W. 745. A county or town is liable only to the extent of the tax actually received for the use of the taxpayer: *Noyes v. Inhabitants &c.*, 11 Cush. (Mass.) 338; *Look v. Inhabitants &c.*, 51 Maine 375; *Slack v. Town of Norwich*, 32 Vt. 818; *Matheson v. Town of Mazomanie*, 20 Wis. 191. Railroad taxes, when disbursed, can not be recovered from the county. The claim for recovery of taxes voted in aid of a railroad is against the funds in the hands of the treasurer, not against the county: *Dickey v. Polk*, 58 Iowa 287; s. c. 12 N. W. 290; *Barnes v. Marshall Co.*, 56 Iowa 20; s. c. 8 N. W. 677.

⁴⁸ *Inhabitants &c. v. Hurd*, 74 Maine 101; *Wallace v. City of Menasha*, 48 Wis. 79; s. c. 4 N. W. 101; *Perley v. Inhabitants &c.*, 7 Gray (Mass.) 464.

⁴⁹ *City of Chicago v. Fidelity Bank*, 11 Ill. App. 165; *Lorillard v. Town of Monroe*, 12 Barb. (N. Y.) 161. Cf. *Dawson v. Aurelius Tp.*, 49 Mich. 479; s. c. 13 N. W. 824.

⁵⁰ *Howell v. City of Buffalo*, 15 N. Y. 512; *Sheldon v. Village of Kalamazoo*, 24 Mich. 383.

for erroneous assessments or lists.⁵¹ But persons assuming to be assessors may be held responsible as trespassers;⁵² and an action for trespass is the usual remedy for wrongful assessment.⁵³ A lawful assessor who assumes an authority which he does not possess is liable to the same extent as if he possessed no official character whatever.⁵⁴ But an individual taxpayer has no right of action against a supervisor for assessing property on a false valuation, except on the ground of fraud or malice.⁵⁵ The taxpayer must elect between his remedies, whether to sue the assessor as a trespasser or to recover from the county in case of an illegal assessment.⁵⁶ A recovery against a town is conclusive in a subsequent action against the assessors.⁵⁷ The following rule is of general application:—If a collector levies distress and afterwards abuses his authority, the warrant does not protect him, and he becomes a trespasser from the beginning.⁵⁸ A cause of action for illegal taxation accrues at the time of payment, even though the illegality was not then known, and the statute of limitations begins to run from that time.⁵⁹ It is immaterial to the municipal liability that the tax officers were not of its appointment and not under its control.⁶⁰

§ 1645. Misappropriations.—Judge Cooley says that “a misapplication by a corporation, actual or threatened, of moneys collected by taxation, will give no right of action to an individual to recover his proportion of the tax. The money, when collected and paid to

⁵¹ *Alger v. Inhabitants &c.*, 119 Mass. 77; *Stickney v. City of Bangor*, 30 Maine 404; *Hemingway v. Inhabitants &c.*, 33 Maine 445; *Dorn v. Backer*, 61 Barb. (N. Y.) 597; *Brown v. Smith*, 24 Barb. (N. Y.) 419; *Weaver v. Devendorf*, 3 Denio (N. Y.) 117; *Barhyte v. Shepherd*, 35 N. Y. 238; *Easton v. Colander*, 11 Wend. (N. Y.) 90; *Huggins v. Hinson*, 1 Phil. (N. C.) 126; *Dillingham v. Snow*, 5 Mass. 547.

⁵² *Allen v. Archer*, 49 Maine 346.

⁵³ *Town of Warrensburgh v. Miller*, 77 Mo. 56. See also, *Cooley Taxation* (2d ed.), 786 et seq., where the subject is fully treated; *Murphy v. Mayor &c.*, 6 Houst. (Del.) 108.

⁵⁴ *Cooley Taxation* (2d ed.), 789, where many cases are cited.

⁵⁵ *Moss v. Cummings*, 44 Mich. 359; s. c. 6 N. W. 843. But see *Cooley Taxation* 794.

⁵⁶ *Ware v. Percival*, 61 Maine 391.

⁵⁷ *Ware v. Percival*, supra. When a taxpayer gave the collector notice of his rights in regard to money in dispute the collector can not, by paying the money over in accordance with his warrant, escape liability in an action to recover it back: *Kimball v. Corn &c. Bank*, 1 Ill. App. 209.

⁵⁸ *Wood v. Stirman*, 37 Tex. 584; *Blake v. Johnson*, 1 N. H. 91; *Blanchford v. Dow*, 32 Maine 557; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 360.

⁵⁹ *Beecher v. Clay Co.*, 52 Iowa 140; s. c. 2 N. W. 1037; *Scott v. Chickasaw Co.*, 53 Iowa 47; s. c. 3 N. W. 820.

⁶⁰ *Bank of Commonwealth v. Mayor &c.*, 43 N. Y. 184; *Inhabitants &c. v. Heard*, 103 Mass. 543.

the corporation, belongs to it, and not to those from whom it has been collected. For misapplication there may be remedies on behalf of the public and of individual taxpayers; but a suit to recover the moneys must be based upon an individual right to it which could not exist in the case.”⁶¹ And Chief Justice Shaw expressed the following opinion:—“But assuming that it [the expenditure] was wholly unauthorized, it would afford the plaintiff no cause of action. To assert the contrary would be to maintain that whenever the town, by its officers and agents or otherwise, shall allow and pay a bill which they are not authorized to pay, every taxpaying inhabitant, resident or non-resident, may have an action against the town to recover his hundredth, or thousandth, or ten-thousandth part of it. Without relying upon the intolerable inconvenience of such a proceeding, there is no principle upon which it can rest. The money was not his money; it belonged to the corporation. The claim is founded on no contract or promise, express or implied. It is substantially a claim for damages done to the plaintiff by the town or its officers in diminishing a fund in which he as a taxpaying inhabitant was indirectly interested. If he is aggrieved, it is a damage which he suffers in common with all the inhabitants, and he must seek his redress in some other way than by an action of assumpsit against the town.”⁶² In such cases the only effective remedy must be, as a rule, a preventive one. Equity will interfere by injunction, at the suit of property holders or taxpayers, to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties to the injury of the taxpayers, including an unauthorized appropriation of the public funds and a wrongful or illegal disposition of the corporate property.⁶³ Judge Dillon believes this to be almost the universal rule, and he thinks that it is an equitable rule which would allow taxpayers the same rights in the prevention and redress of their wrongs which belong to stockholders in private corporations. We quote his interesting view of the subject:—“In these [private corporations] the ultimate cestuis que trust are the stockholders. In municipal corporations the cestuis que trust are in a substantial sense the inhabitants embraced

⁶¹ *Cooley Taxation*, 818; citing *Withington v. Inhabitants &c.*, 62 Mass. 66; *Moore v. Directors*, 59 Pa. St. 232.

⁶² *Withington v. Inhabitants &c.*, supra. The proper remedies for misappropriation will be treated in the next section.

⁶³ See the case of *The Liberty Bell*, 23 Fed. 843; *Harrington v.*

Town of Plainview, 27 Minn. 224; s. c. 6 N. W. 777; *Willard v. Comstock*, 58 Wis. 565; s. c. 17 N. W. 401; *Lynch v. Eastern &c. R. Co.*, 57 Wis. 430; s. c. 17 N. W. 743, 825; *Robertson v. Breedlove*, 61 Tex. 316; *City of Richmond v. Crenshaw*, 76 Va. 936; *Dillon Munic. Corp.*, § 914. See also, *Crampton v. Zabriskie*, 101 U. S. 601.

within their limits. In each case the corporation, or its governing body, is a trustee. If the governing body of a private corporation is acting ultra vires or fraudulently, the corporation is ordinarily the proper party to prevent or redress the wrong by appropriate action or suit in the name of the corporation. But if the directors will not bring such action, our jurisprudence is not so defective as to leave creditors or shareholders remediless, and either creditors or shareholders may institute the necessary suits to protect their respective rights, making the corporation and the directors defendants. This is a necessary and wholesome doctrine. Why should a different rule apply to a municipal corporation? If the property or funds of such a corporation be illegally or wrongfully interfered with, or its powers be misused, ordinarily the action to prevent or redress the wrong should be brought by and in the name of the corporation. But if the officers of the corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant, and particularly any taxable inhabitant, be allowed to maintain in behalf of all similarly situated a class suit to prevent or avoid the illegal or wrongful act? Such a right is especially necessary in the case of municipal and public corporations, and if it be denied to exist, they are liable to be plundered, and the taxpayers and property owners on whom the loss will eventually fall are without effectual remedy."⁶⁴

§ 1646. **Injunction further illustrated.**^{64a}—A city in Connecticut voted, at a legal meeting of the inhabitants, to appropriate money for a celebration. The amount appropriated was in the city treasury. Certain taxpayers who voted against the measure applied for a bill to restrain the appropriation. The court held that the vote was illegal, and that the injunction was properly granted. Judge Storrs said:—"We are unable to perceive any just ground of discrimination between a disposition of moneys already in the treasury of the corporation and a vote to raise money by a tax, or a contract to pay money for such unauthorized purpose;" and "an injunction in this case was the appropriate remedy; because, first, the city corporation was in the nature of a trustee of the moneys in its treasury for the incorporators, the inhabitants of the city, for the purposes for which they were incorporated, and here was a meditated misappropriation of the trust fund; and secondly, it is extremely doubtful whether the plaintiffs could have found any other remedy. The

⁶⁴ Dillon Munic. Corp., § 915. And see *Crampton v. Zabriskie*, 101 U. S. 601, approving Judge Dillon's text.

^{64a} See ch. 38, ante.

amount appropriated by this vote was in the city treasury, and, if abstracted, must, when wanted for other and legitimate purposes, be supplied by a tax on the inhabitants. It is suggested that the plaintiffs should bring an action against the city for a misappropriation of its funds, or that when such a tax is laid they should, by a proper action, resist its collection. We are by no means prepared to say that an action could be maintained on either of these grounds, and are strongly inclined to think it could not. But, however this may be, we are clearly of the opinion that the plaintiffs are not bound to wait until the money is misspent, nor until such tax shall be levied."⁶⁵

§ 1647. The same subject continued.—The same question as to exceeding the charter authority to use the public funds was decided in a Missouri case, and the doctrine of the Connecticut case has been sanctioned in Maryland and other states.⁶⁶ In Iowa it has been held that it is no ground for restraining the collection of the tax that, when collected, it will be applied in part to the payment of an unconstitutional indebtedness, the plaintiff's proper course being by action to prevent the misapplication of the tax when collected to the discharge of an illegal indebtedness.⁶⁷ In New York, before the act of 1872, a taxpayer had no remedy against the perversion of municipal funds;⁶⁸ but that statute and the subsequent amendments give the taxpayer sufficient relief; and he may maintain an action for the corporation as well as in his own name.⁶⁹

⁶⁵ *City of New London v. Brainard*, 22 Conn. 556.

⁶⁶ *Hitchcock v. City of St. Louis*, 49 Mo. 484; *Mayor &c. v. Gill*, 31 Md. 375, 395. See, to the same purpose, *Merrill v. Plainfield*, 45 N. H. 126; *Mayor &c. v. Groshon*, 30 Md. 436; *Kelly v. Mayor &c.*, 53 Md. 134; *Harvey v. Indianapolis &c. R. Co.*, 32 Ind. 244; *Schofield v. Eighth School Dist.*, 27 Conn. 499, 509; *Webster v. Town of Harwinton*, 32 Conn. 131; *Terrett v. Town of Sharon*, 34 Conn. 105; *Town of Jacksonport v. Watson*, 33 Ark. 704. But, though the facts are as stated in *City of New London v. Brainard*, 22 Conn. 552, cited in the preceding section, yet if they have been guilty of gross laches, and have knowingly permitted third persons to incur liabilities in good faith, relying upon

such appropriations for reimbursement, an injunction will be denied: *Tash v. Adams*, 10 Cush. (Mass.) 252. See also, *Stuart v. School Dist. &c.*, 30 Mich. 69; *People v. Maynard*, 15 Mich. 463.

⁶⁷ *Strom v. City of Iowa City*, 47 Iowa 42. Any citizen taxpayer may prevent the issue and sale of void bonds by a municipality: *Board &c. v. McClintock*, 51 Ind. 325; *Bound v. Wisconsin &c. R.*, 45 Wis. 543; *City of Springfield v. Edwards*, 84 Ill. 626. An interesting case on aid to railroads is *Blake v. Mayor &c.*, 53 Ga. 172.

⁶⁸ *Roosevelt v. Draper*, 23 N. Y. 318. See also, *Dillon Munic. Corp.* 3920.

⁶⁹ See note on Taxpayers' Actions, 22 Abbott N. C. (N. Y.) 86.

§ 1647a. **Suits by taxpayers generally.**—In a suit by a taxpayer to set aside a contract made by a city and have returned to it certain bonds where the complaint shows that a demand on the city to bring such suit or demand a return of the bonds would have been unavailing, the omission to make such demand is not ground of reversal,⁷⁰ nor in such case is it necessary to obtain the city attorney's consent.⁷¹ Under some circumstances a taxpayer has a right of appeal from a decision of a court prejudicial to the rights of the city where the municipal officers refuse to do so. The test is whether the corporation as a whole is injured in a matter in which the individual members of the corporation have a substantial interest. The general rule is that a taxpayer has a right to enforce a cause of action of a public corporation of which he is a member when its officers neglect or refuse to perform their duty.⁷² The making of an unauthorized contract involving an illegal expenditure and taxes may be enjoined at the suit of a taxpayer.⁷³ The issuance of funding bonds for debts contracted in violation of the constitution may be enjoined at the suit of a resident taxpayer.⁷⁴ Where there is a common or general interest one may sue for the benefit of all where the action is for the benefit of all taxpayers, and the amount of the tax is immaterial.⁷⁵ A taxpayer has no right to enjoin the erection of an obstruction merely because the city officers fail to do so,⁷⁶ but a court of equity will restrain an irregular proceeding which threatens irreparable injury.⁷⁷ Where taxpayers have power by statute to enjoin illegal official acts, one who has not sustained a special injury has no right to enjoin the erection of an obstruction in the street by a railroad which has been granted permission so to do.⁷⁸ A resident taxpayer may maintain a bill on behalf of himself and other taxpayers to prevent an illegal disposing of public funds.⁷⁹ A taxpayer's action to set aside an ultra vires act is not

⁷⁰ *Mock v. City of Santa Rosa*, 126 Cal. 330; s. c. 58 Pac. 826.

⁷¹ *Mock v. City of Santa Rosa*, 126 Cal. 330; s. c. 58 Pac. 826.

⁷² *Mulberger v. Beurhaus*, 102 Wis. 1; s. c. 78 N. W. 402; *Quaw v. Paff*, 98 Wis. 586; s. c. 74 N. W. 369; *Frederick v. Douglas Co.*, 96 Wis. 411; s. c. 71 N. W. 798; *Land & c. Co. v. McIntyre*, 100 Wis. 245; s. c. 75 N. W. 964; *Rice v. City of Milwaukee*, 100 Wis. 516; s. c. 76 N. W. 341; *Webster v. Douglas Co.*, 102 Wis. 181; s. c. 77 N. W. 885; 78 N. W. 451.

⁷³ *Mooney v. Clark*, 69 Conn. 241; s. c. 37 Atl. 506.

⁷⁴ *Dunbar v. Board & c.* (Idaho), 49 Pac. 409.

⁷⁵ *Frederick v. Douglas Co.*, 96 Wis. 411; s. c. 71 N. W. 798.

⁷⁶ *Gallagher v. Keating*, 57 N. Y. S. 632; s. c. 40 App. Div. (N. Y.) 81.

⁷⁷ *Coast Co. v. Mayor & c.*, 56 N. J. Eq. 615; s. c. 36 Atl. 21.

⁷⁸ *Gallagher v. Keating*, 57 N. Y. S. 632; s. c. 40 App. Div. (N. Y.) 81.

⁷⁹ *Roberts v. Broadfield*, 12 App. D. C. 453.

subject to compromise.⁸⁰ Abutting owners have no cause of action in the matter of a sewer where there is no charge that their real estate is involved or that they are injured.⁸¹

⁸⁰ *City Item &c. Co. v. City of New Orleans*, 51 La. An. 713; s. c. 25 So. 313. A taxpayer is permitted to intervene in an appeal taken under *Comp. Laws N. Y. 1897: Feeley v. Wurster*, 54 N. Y. S. 1060; s. c. 25 Misc. (N. Y.) 544.

⁸¹ *Shulz v. City of Albany*, 59 N. Y. S. 235; s. c. 42 App. Div. (N. Y.) 437.

CHAPTER XL.

ACTIONS BY AND AGAINST PUBLIC CORPORATIONS.

SECTION	SECTION
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§ 1648. Capacity to sue and be sued—Whether a county is subject to suit.—Although it is common to confer expressly in the charter of a municipal corporation the right to sue and be sued, this is generally an incident to its corporate character, and not necessary to be supported by express provisions. But it is held in many jurisdictions that counties are not liable to suit except by virtue of special statutory authority.¹ A leading case wherein it was declared that a county was

¹The California Code of Civil Procedure, § 1050, reads as follows: —“An action may be brought by one person against another for the purpose of determining an adverse claim which the latter makes against the former for money or property upon an alleged obligation, and also against two or more persons for the purpose of compelling one to satisfy

not subject to suit was decided by the supreme court of Connecticut.² The court there said:—"The state is divided into counties for public purposes, and particularly for the more convenient administration of justice. The object of the division into counties is much the same as the like division in Great Britain, although some of the duties imposed upon counties there are here to be performed by other communities. There the sheriff is the principal officer of the county and holds his courts for the county, and justices of the peace are appointed for the county. Here we have a judge of the county with officers to assist him, and justices of the peace for the county; and the sheriff is here, as in England, the principal executive officer. In this state the only duty imposed upon the county is the erection and support of proper places for holding courts and the safe keeping of prisoners. But neither here nor in England is this duty performed by the inhabitants of the county in public meeting, but in a manner designated by law. * * * The objects and duties of counties in the two countries being so similar, it may be well to inquire whether by the English law those duties may be enforced by suit. No case has been shown, and none is known to the court, where a suit has been sustained against a county upon a contract, or even for a breach of their public duty. An attempt has been made to sustain a suit against the inhabitants of a county for damage occasioned by a defective bridge, the county being by law obliged to maintain roads and bridges; and it was held that there was no foundation on which this action can be supported."³ The court then referred to the statute providing for suits by and against "towns and all lawful societies, communities or corporations," and for service of process upon designated officers, and

a debt due to the other for which plaintiff is bound as a surety." It was held that this section would not authorize an action against a county to determine the legality of a license tax sought to be imposed on the plaintiff by the county. "The state and its political subdivisions," said the court, "can not be sued except as specially authorized by statute, and general language creating new remedies or prescribing procedure have never been held to authorize such actions: *Whittaker v. Tuo-lumne Co.*, 96 Cal. 100; s. c. 30 Pac. 1016. See also, *Mayrhofer v. Board &c.*, 89 Cal. 110; s. c. 26 Pac. 646; *United States v. Booth*, 11 Gill & J.

(Md.) 373; *Commonwealth v. Baldwin*, 1 Watts (Pa.) 54; s. c. 26 Am. D. 33; *Dollar Savings Bank v. United States*, 19 Wall. 239; *United States v. Davis*, 3 McLean 483; *United States v. Williams*, 5 McLean 133; *Commonwealth v. Johnson*, 6 Pa. St. 136; *Josselyn v. Stone*, 28 Miss. 753; *People v. Herkimer*, 4 Cow. (N. Y.) 345; s. c. 15 Am. D. 379; *Hastings v. City of San Francisco*, 18 Cal. 49, 57; *Lowndes Co. v. Hunter*, 49 Ala. 507, 511; *Board &c. v. Mighels*, 7 Ohio St. 109.

² *Ward v. Hartford Co.*, 12 Conn. 404.

³ *Russell v. Men of Devon*, 2 T. R. 667.

continued:—"The words 'lawful societies' and 'communities' are indeed extensive. It can not, however, under these terms be intended to embrace all collections of men; and as it gives these bodies authority at their lawful meetings to appoint agents and attorneys to appear, etc., it must be construed to include only those lawful societies and communities who may by law hold meetings, or who have such officers as are named in the statute; otherwise no mode of service is prescribed. But counties, as such, can hold no lawful meetings. There is no law providing for the warning or organizing of them, and no custom authorizing them. Nor have they any such officers as are named in the statute upon whom service can be made; nor have they any known place of transacting their business. And it has been uniformly held, notwithstanding this statute, that a county could not be sued."⁴

§ 1649. The same subject continued.—In Indiana the board of county commissioners is under the statute a body corporate, and may maintain a suit in its corporate name for the enforcement of any

⁴Ward v. Hartford Co., 12 Conn. 404; citing Sheldon v. Litchfield Co., 1 Root (Conn.) 158; Lyon v. Fairfield Co., 2 Root (Conn.) 30. "It has indeed been held," said the court in the case first cited, "by this court that although the statute does not expressly authorize a suit by quasi-corporation, yet if the law of its creation imposes such duties and confers such privileges as require legal remedies for their enforcement and protection, it is fair to infer that those remedies are also granted: Tilden v. Metcalf, 2 Day (Conn.) 259; McLoud v. Selby, 10 Conn. 390. Is there then anything in the rights and duties of counties which requires such a construction? Counties are not, like school societies or districts, authorized to erect buildings and make assessments for that purpose. They are, indeed, to defray the expense of erecting court-houses and jails; but the manner in which it is to be done is also designated. The county courts are to make the contracts and to see to the performance. In such case the

courts are agents of government by law designated to perform this particular duty, and the mode of raising funds is pointed out; and there is no more difficulty in adopting the same rule as to persons contracting with these agents than with any other agents of the government." In Pruden v. Grant Co., 12 Or. 308; s. c. 7 Pac. 308, it was said that where a county deals with a party in its corporate capacity and violates its obligation or duty it may be sued the same as a natural person; but where the sovereign power of the state is exercised through a county organization—employs the latter as a means and agency for the purpose of regulating and controlling affairs which are for the benefit of the whole community—a claim to compensation created in the discharge of a duty in such a case must be adjusted in the mode pointed out by law." See also, Walker v. Wasco Co. (Or.), 19 Pac. 81; Monroe Co. v. Flynt, 80 Ga. 489; s. c. 6 S. E. 173; Taylor v. County Court, 2 Utah 405.

cause of action it may have against any person.⁵ And the constitution of Nevada has been construed to authorize suits against counties in the state courts the same as natural persons, and they are therefore subject to suit in the federal courts.⁶ It was held in a recent case in Minnesota that a village whose streets and public grounds were by law placed under the control of its authorities, who were given power to prevent the incumbering or obstruction of the same, might maintain an action to enjoin the erection of a building for private use on public ground.⁷

⁵ *Board &c. v. Kimberlin*, 108 Ind. 449; s. c. 9 N. E. 407. Act of March 26, 1851 (St. Cal. 1851, p. 391), incorporating the city of Sacramento, and investing it with authority to sue and be sued; and acts of April 26, 1853 (St. Cal. 1853, p. 117), and April 10, 1854 (St. Cal. 1854, p. 196), authorizing the issuance of bonds of the city,—gave the purchaser of such bonds the right to sue the city if they were not paid when due; and this right could not be impaired by subsequent legislation: *Bates v. Gregory* (Cal.), 22 Pac. 683. Revised Statutes of Missouri, 1879, § 4386, which provide that, upon the reorganization of a city, none of its rights or liabilities, and no suit or prosecution of any kind, “shall be affected by such change,” are not meant to retain previous forms of remedy so as to enable a city, after its reorganization, to bring suit for taxes in its own name, as it was previously empowered to do: *City of Jefferson v. Edwards*, 37 Mo. App. 617. Acts of Arkansas of February 27, 1879, expressly repealing all laws declaring counties to be corporations, and prohibiting suits against them elsewhere than in the county courts, do not apply to a cause of action in equity which had already accrued; and, as the county court has no equity jurisdiction, such a suit may be brought in the circuit court of the county sued:

Griffith v. Sebastian Co., 49 Ark. 24; s. c. 3 S. W. 886.

⁶ *Vincent v. Lincoln Co.*, 30 Fed. 749, where the court said that “whatever may be the legal status of counties in the state of Nevada, whether considered as municipal corporations or otherwise, we think their liability to be sued in any court of competent jurisdiction is too clear to admit of doubt. Ever since the adoption of the constitution of the state in 1864, the supreme court of the state has, in numerous decisions, affirmed this right and enforced this liability;” citing *Waitz v. Ormsby Co.*, 1 Nev. 370; *Clark v. Lyon Co.*, 8 Nev. 181; *Floral Springs W. Co. v. Rives*, 14 Nev. 431. The constitution of the state from which this authority is deduced in art. 8 on “Municipal and other corporations,” § 5, provides:—“Corporations may sue and be sued in all courts, in like manner as individuals.” Section 10 provides:—“No county, city, town or other municipal corporation shall,” etc.; and art. 9, § 4, that “the state shall never assume the debts of any county, town, city or other corporation whatever, unless,” etc.

⁷ *Village of Buffalo v. Harling*, 50 Minn. 551; s. c. 52 N. W. 931. The court said:—“It does not appear whether the village was incorporated by special charter or under the general law, and we are not informed as to what, if any, special

§ 1650. **Service of process.**—When the statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place.⁸ The designation of one particular officer upon whom service may be made excludes all others.⁹ Where the statute provides for service upon the “mayor,” a temporary inconvenience arising from a vacancy in that office affords no good reason for a substitution of some other officer in his place upon whom service could be made by an unwarrantable construction not contemplated by the statute.¹⁰ Judicial notice will not be taken of the signature to an admission of service of process, and, in the absence of the appearance of the party whose signature it purports to be, proof must be made of its genuineness.¹¹

powers were conferred upon the village with respect to the streets and public grounds within its borders. If it had no authority save such as to be implied from the fact of its incorporation as a village, it is probable that it would have no right to maintain an action of this kind. But if the village was organized under the general village law or under a special charter, which, as does the law of 1885, places the streets and public grounds under the control of the village authorities, and authorizes them to prevent the incumbering or obstruction of the same, such an action is maintainable to prevent the public nuisance: *Village of Pine City v. Munch*, 42 Minn. 342; s. c. 44 N. W. 197. If the case is to proceed further it would seem that there should be an amendment of the complaint so as to show what authority has been given to the village in this respect.”

⁸ *City of Watertown v. Robinson*, 69 Wis. 230; s. c. 34 N. W. 139; *Town of Charleston v. Town of Lunenburg*, 21 Vt. 488; *Morrill v. Tehema Mill & Co.*, 10 Nev. 25, 37; *Chambers v. King & Co. Bridge Co.*, 16 Kan. 270; *City of Sacramento v. Fowle*, 21 Wall. 119; *Alexandria v. Fairfax*, 95 U. S. 774; *Board & Co. v. Burtis*, 103

N. Y. 136; s. c. 8 N. E. 482; *Bennet v. United States*, 2 Wash. T. 179; s. c. 3 Pac. 272. There is no chance to speculate whether some other mode will not answer as well: *Helms v. Chadbourne*, 45 Wis. 60.

⁹ *Conroe v. Bull*, 7 Wis. 408; *State v. Hastings*, 10 Wis. 525; *North v. Cleveland & Co. R. Co.*, 10 Ohio St. 548; *Weil v. Greene Co.*, 69 Mo. 281; *Dewey v. Central Car & Co. Co.*, 42 Mich. 399; s. c. 4 N. W. 179.

¹⁰ *City of Watertown v. Robinson*, 69 Wis. 230; s. c. 34 N. W. 139; *Van Rensselaer v. Palmatier*, 2 How. Pr. (N. Y.) 24; *Van Rensselaer v. Petrie*, 2 How. Pr. (N. Y.) 94; *Rees v. City of Watertown*, 19 Wall. 107; *Perkins v. City of Watertown*, 5 Biss. 320; *Lehigh Valley Ins. Co. v. Fuller*, 81 Pa. St. 398; *Heymann v. Cunningham*, 51 Wis. 506; s. c. 8 N. W. 401; *Worts v. City of Watertown*, 16 Fed. 534.

¹¹ *Downs v. Board & Co.*, 4 Wash. 309; s. c. 30 Pac. 147, which was an action to enjoin the issue of certain bonds by a school district, its board of directors and the three members thereof being made defendants. There was no attempt to serve process on the district by delivery to the clerk, as provided by Code of Procedure, § 173. One of the board was served with process by the

§ 1651. **Corporate name in suits.**—A declaration in a suit against a village describing it as “the village of North Muskegon, a municipal corporation of the state of Michigan,” was held to be a sufficient allegation of its corporate existence and character.¹² Where a charter incorporated a city under the name and style of the city of Gainesville, but also declared that the municipal government was vested in a mayor and aldermen, “who shall be styled the mayor and council of the city of Gainesville, and by that name are hereby made a body corporate; * * * as such they may sue or be sued,” a suit against “the mayor and council of the city of Gainesville” was well brought so far as the corporate name was concerned.¹³ In *scire facias* to revive a judgment against a city, and for *mandamus* to enforce its collection, where the petition names the “mayor, aldermen and inhabitants of the city of Houston” as the defendant, and alleges that the business of the city is managed by a mayor and board of aldermen, naming them, the fact that the citation commands the mayor and aldermen to be summoned, as well as the corporation, does not vitiate the citation.¹⁴ Where the constitution requires all prosecutions to be carried on in the name of the state a violation of a city ordinance by a street obstruction is to be in the name of the state.¹⁵ The city may sue in its own name on a bond given by a contractor to protect it against claims for labor and material and for the protection of subcontractors.¹⁶

§ 1652. **Authority to bind town by appearance.**—The selectmen of a town in Massachusetts were authorized by a by-law “* * * as agents of the town to employ counsel to institute and prosecute

sheriff, and there was an indorsement on the complaint of acceptance of service, purporting to be signed by another, but no proof of the genuineness of the signature was offered. It was held that the court obtained no jurisdiction in the premises. - - - In the absence of a statutory provision the common-law practice in the court of king's bench requiring at least fifteen days to intervene between the day of service and the return day of a summons in an action against a municipal corporation prevails in New Jersey: *McNeal v. Mayor &c.*, 51 N. J. L. 444; s. c. 18 Atl. 112. It is well-settled law in Pennsylvania that a municipal corporation can be sued only in the courts of the county

where it is situated: *Heckscher v. City of Philadelphia* (Pa.), 9 Atl. 281; *Oil City v. McAbey*, 74 Pa. St. 249; *Lehigh Co. v. Kleckner*, 5 Watts & S. (Pa.) 181. Whether the action be on a contract or for a tort, the rule is the same: *Potts v. City of Pittsburgh*, 14 W. N. C. (Pa.) 38.

¹² *Clark v. Village of North Muskegon*, 88 Mich. 308; s. c. 50 N. W. 254.

¹³ *Mayor &c. v. Caldwell*, 81 Ga. 76; s. c. 7 S. E. 99.

¹⁴ *City of Houston v. Emery*, 76 Tex. 282, 321; s. c. 13 S. W. 264, 266.

¹⁵ *Town of Dover v. Tawressey*, 2 Marv. (Del.) 285; s. c. 43 Atl. 170.

¹⁶ *Philadelphia v. Stewart*, 195 Pa. St. 309; s. c. 45 Atl. 1056.

suits in the name of the town and to appear for and defend suits brought against it, unless otherwise specially ordered by vote of the town." Upon a petition to the county commissioners to lay out a highway the selectmen appeared before the board in behalf of the town and urged various objections at the hearings upon the merits of the petition. At the final hearing they for the first time contested the authority of the board on the particular ground that the order of notice of the original proceedings was irregularly issued, one of the members of the board having withdrawn from the meeting. It was held that the authority conferred by the by-law was broad enough to cover such a proceeding, and consequently that the appearance of the selectmen cured the defect in the notice. "There is no question," said the court, "that proceedings before the county commissioners in which counsel appear, witnesses are examined and arguments made as in other courts are suits, and as the town is a necessary party to which notice must be given and which has a right to be heard and is necessarily affected by the determination of the matter in issue, the proceeding may be fairly said to have been a suit against the town. There is hardly any class of cases before the courts in which towns are more frequently interested than in those relating to the laying out or alteration of ways. It would be too narrow a construction of the language of the by-law to hold that it did not authorize the selectmen to act for the town in such proceedings. That its practical construction, both by the selectmen and by the town itself, was broader and recognized the authority of the selectmen to act in such a case is apparent from the fact that they, without other authority, did in fact employ counsel and appear in behalf of the town at the hearings and take part in them upon the merits; and from the further fact that after the adverse adjudication the town meeting, instead of repudiating their action and that of the counsel whom they had employed, merely referred the matter back to them with full power to represent and protect the town's interest in any matter which they might deem legal."¹⁷ Where a stipu-

¹⁷ *Inhabitants of Hyde Park v. Salem, Petitioners*, 6 Pick. (Mass.) County Com'rs, 157 Mass. 94; s. c. 470, 473; *Inhabitants &c. v. County Com'rs*, 9 Pick. (Mass.) 46, 50; *Inhabitants &c. v. County Com'rs*, 10 Pick. (Mass.) 519; *Copeland v. Packard*, 16 Pick. (Mass.) 217, 220; *Inhabitants &c. v. County Com'rs*, 20 Pick. (Mass.) 71, 80; *Hancock v. City of Boston*, 1 Met. (Mass.) 122, 406; *Ripley v. Warren*, 2 Pick. 125; *Inhabitants &c. v. County Com'rs*, 1 Met. (Mass.) 336, 344;

lation was entered into between the city of Louisville on the one part and certain banks of the city on the other that the controversies between the banks and the city should abide the result of test suits to be brought, it was held to be within the general authority of the city attorney to stipulate that suits to be brought should be reduced to as few cases as possible and that all suits should abide the result of one suit to be brought.¹⁸

§ 1653. Pleading in suits upon bonds.—Where counties have no inherent or general power to issue bonds, and the power to issue such securities arises from special acts or from general laws for limited and specifically defined purposes, it is necessary to allege in suing upon the bonds that they were issued by special authority or for some purpose for which counties have the right and power to issue them.¹⁹ But where several bonds which were sued on were declared on in apt terms as negotiable instruments duly issued by the county court “for the purpose of erecting a good and sufficient jail,” etc., and for other specified purposes, for all of which purposes the law did in fact authorize the issue, it was held to be unnecessary to negative an issue exceeding the prescribed limit. “Their amount was within the limit of the power of the county court. The petition charged that they were duly issued by that court. If in fact the power of the court in this behalf had been exhausted by previous issues, that fact would seem properly to be matter of defense.”²⁰ An act gave authority to

Simonds v. Parker, 1 Met. (Mass.) 508; *Carpenter v. Aldrich*, 3 Met. (Mass.) 58; *Inhabitants &c. v. County Com'rs*, 9 Met. (Mass.) 423, 433; *Clark v. Mantague*, 1 Gray (Mass.) 446; *Loomis v. Wadhams*, 8 Gray (Mass.) 558, 561; *Inhabitants &c. v. County Com'rs*, 13 Gray 12; *Hastings v. Bolton*, 1 Allen (Mass.) 529, 531; *Lawrence v. Bassett*, 5 Allen (Mass.) 107; *Hazard v. Wason*, 152 Mass. 268; s. c. 25 N. E. 465. “The principle of these cases,” continued the court, “is not altogether that of waiver, but may be thus stated:—that when a court has jurisdiction of the cause it may acquire jurisdiction of the necessary parties by their voluntary appearance and submission.”

¹⁸ *Bank of Commerce v. City of Louisville*, 88 Fed. 398; *North Missouri R. Co. v. Stephens*, 36 Mo. 150.

¹⁹ *Donaldson v. Butler Co.*, 98 Mo.

163; s. c. 11 S. W. 572, holding that the same rule applies to suits upon the coupons. And this rule prevails in the federal courts: *Kennard v. Cass Co.*, 3 Dill. 147; *Thayer v. Montgomery Co.*, 3 Dill. 389.

²⁰ *Catron v. La Fayette Co.*, 106 Mo. 659; s. c. 17 S. W. 577; citing *State v. Clark*, 42 Mo. 519, 523; *Bliss Code Pleading*, § 202; *Railroad Co. v. Otoe Co.*, 1 Dill. 338; *Montgomery Co. v. Auchley*, 92 Mo. 126; s. c. 4 S. W. 425. “If it be held, however,” said the court in *Catron v. La Fayette Co.*, “that in order to recover the plaintiff must allege, and, in the first instance, show that the power had not been exhausted, the allegation that the bonds were ‘duly’ issued would have been sufficient to put the plaintiff on such proof: *Rev. St. Mo. 1879, § 3551.*”

certain commissioners to issue bonds of a city for certain purposes, which were to be denominated on their face, "Rahway City Water Bonds." In an action against the city it was held that an allegation that the bonds were issued by the city was proper.²¹ In the same case it was also objected that the declaration was deficient in not averring that the bonds were denominated on their face "Rahway City Water Bonds." But as the act did not make the provision respecting the name of the bonds authorized to be issued essential to their validity the averment was declared to be unnecessary.²²

§ 1654. Bill of interpleader by public officer.—A complainant filed a bill of interpleader in his official capacity as judge of probate of a county claiming to hold as agent for the county, and by its authority, a certain fund accruing from taxes levied under the provisions of an act for the adjustment and compromise of certain indebtedness of several counties in the state. The bill alleged that the defendants had each claimed to be the owners of certain bonds or obligations against the county, which had been filed for compromise and settlement with the state auditor, as required by the act, and that the money held by the complainant was due as a remaining balance on these claims. The prayer of the bill was that the defendants might be required to interplead among themselves as to who was entitled to the funds in complainant's hands. A demurrer to the

²¹ *Rahway Sav. Inst. v. Mayor &c.*, 53 N. J. L. 48; s. c. 20 Atl. 756. An allegation that a city by its board of public works performed a certain act is sufficient, without specifying the particular members of such board by whom it was done: *Burnham v. City of Milwaukee*, 69 Wis. 379; s. c. 34 N. W. 389. In a suit against a town by a broker to recover for his services in selling town bonds, an averment in the complaint that the town by its trustees employed plaintiff to negotiate the bonds sufficiently alleges that the trustees acted officially in employing plaintiff: *Reed v. Town of Orleans*, 1 Ind. App. 25; s. c. 27 N. E. 109. In an action against a city for injury to real estate, a complaint which alleges that the city wrongfully and unlawfully constructed, and caused to be constructed, the embankment that in-

jured plaintiff's property, is not demurrable for want of an allegation that the alleged wrongful action of the city was authorized by its common council: *City of Jeffersonville v. Myers*, 2 Ind. App. 532; s. c. 28 N. E. 999. See also, *Bronson v. Town of Washington*, 57 Conn. 346; s. c. 18 Atl. 264.

²² *Rahway Sav. Inst. v. Mayor &c.*, 53 N. J. L. 48; s. c. 20 Atl. 756. Where an act requires registration of bonds as a condition of their validity, an averment of registration is necessary in a declaration on a bond: *Morrison v. Inhabitants &c.*, 36 N. J. L. 219. But an omission to aver that the registration had been certified on such a bond was held not to be objectionable, where the act did not declare the bonds to be invalid if not so certified: *Cotton v. Inhabitants &c.*, 47 N. J. L. 401; s. c. 2 Atl. 253.

bill was sustained. The court in pronouncing judgment said:—"The bill is, in our opinion, improperly filed in the name of the complainant—whether in his official capacity, personally or as mere agent. If the county * * * be regarded as the owner of this fund, the bill—if it will lie at all—should be brought in the name of the county itself as complainant, not in the name of its agent. The probate judge is not made the custodian of this fund by law. He is not the debtor of the defendants or either of them. His interest in the fund is that of a mere naked bailee, or agent for a known and disclosed principal. The defendants have a right to have the principal before the court as a party to the record, so that it may be bound by the decree rendered without resort to extrinsic evidence to prove that the agent is acting by its authority in bringing this suit. A principal can not bring a bill of interpleader in an agent's name when the agent is a mere naked custodian of the disputed fund without title or interest in it."²³

§ 1655. Writ of prohibition in behalf of a town—Office of the writ.—Upon an application by a town for a writ of prohibition against a board of county commissioners, it appeared that the latter had proceeded to final adjudication in proceedings to lay out a public highway; that they had originally acquired jurisdiction of the subject-matter by a sufficient petition, but that notice of the time and place of meeting to act on it was irregular, but that, as the court held in the case about to be considered, the defect was cured by a subsequent voluntary appearance by the town. In refusing the application for a writ of prohibition the court said, touching the nature of the process:—"It is plain that a writ of prohibition could not be granted, even if the proceedings of the commissioners after the presentation of the petition were invalid, and if the town was in a position to so claim. The writ is not to be granted to restrain a tribunal which, having jurisdiction of a cause, is merely proceeding in it improperly; and it will not be granted if the court has jurisdiction. It is 'a writ to forbid any court, either spiritual or secular, to proceed in any cause there depending upon suggestion that the cognizance thereof belongeth not to the same court.'"²⁴

²³ Patrick v. Robinson, 83 Ala. 575; s. c. 3 So. 694.

²⁴ Inhabitants &c. v. Wiggins, 137 Mass. 94; s. c. sub. nom. Inhabitants &c. v. County Com'rs, 31 N. E. 693; citing Cunningham, tit. "Prohibition." Continuing, the court said:—"There was considered the rea-

son of prohibitions in general, that they were to preserve the right of the king's crown and courts, and the ease and quiet of the subject; that it was the wisdom and policy of the law to suppose both best preserved when everything runs in its right channel, according to the orig-

§ 1656. **Execution against municipal corporation.**—As a general rule, execution can not be awarded to enforce a judgment against a municipal corporation unless the statute otherwise provides. In a judgment quashing a writ of execution against the city of Chicago, Breese, J., said:—"They can not be said to possess property liable to execution in the sense an individual owns property so subject, for they have the control of the corporate property only for corporate purposes, and to be used and disposed of to promote such purposes, and such only. Levying on and selling such property and removing it would work the most serious injury in any city."²⁵ The awarding

inal jurisdiction of every court.' Oldis v. Donmille, Show. P. C. 58. 'And it is contra coronam et dignitatem regiam for any to usurp to deal in that which they have not lawful warrant from the crown to deal in. . . . ' 2 Inst. 602. And while upon the ancient law it may be noticed that prohibition was refused if not prayed for until after plea. In Clerk v. Andrews, 1 Show. 9, one Moore, at Westminster, out of the jurisdiction of the court of the Poultry-Compter, was garnished in that court; whereupon it was pleaded that Moore was never indebted to the principal defendant *infra jur. cur. praed.* The plea was refused, and Shower moved the king's bench for a prohibition, urging that the court of Poultry-Compter had no jurisdiction of Moore. Holt, C. J., said:—"There was reason in it; but our pleading of it was after imparlance, and so we came too late and because we did not plead in time prohibition was denied." [See also, 2 Show. 156.] The principal cases in which this court has been called upon to discuss the law of prohibition are *Inhabitants &c. v. County Com'rs*, 20 Pick. (Mass.) 71; *Inhabitants &c. v. County Com'rs*, 1 Met. (Mass.) 336; *Washburn v. Phillips*, 2 Met. (Mass.) 296; *Gilbert v. Hebard*, 8 Met. (Mass.) 129; *Vermont &c. R. Co. v. County Com'rs*, 10 Cush. (Mass.) 12; *Day v. Board &c.*, 102 Mass. 310;

Connecticut River R. Co. v. County Com'rs, 127 Mass. 50; *Henshaw v. Cotton*, 127 Mass. 60; *Chandler v. Railroad Commissioners*, 141 Mass. 208; s. c. 5 N. E. 509. An examination of these cases shows that if the court has jurisdiction prohibition will be denied, although upon the record the proceedings may appear to have been defective or informal, and that it will only be interposed in clear cases of excess of jurisdiction."

²⁵ The seizure of fire-engines, for instance, would endanger the lives and property of citizens; and the whole business of the city might be broken up and deranged by levying upon its office furniture, its jails, hospitals and other public buildings: *City of Chicago v. Hasley*, 25 Ill. 485; *City of Flora v. Naney*, 136 Ill. 45; s. c. 26 N. E. 645; *City of McGregor v. Cook* (Tex.), 16 S. W. 936; *City of Morrison v. Hinkson*, 87 Ill. 587; *Emerie v. Gilman*, 10 Cal. 404; *Gilman v. Contra Costa Co.*, 8 Cal. 52; *Sharp v. Contra Costa Co.*, 34 Cal. 284, 290; *King v. McDrew*, 31 Ill. 418; *Board &c. v. Edwards*, 76 Ill. 544; *Knox Co. v. Arms*, 22 Ill. 175; *Wilson v. Commissioners*, 7 Watts & S. (Pa.) 197; 1 Dillon Munic. Corp., § 576; *Freeman Executions*, §§ 22, 126; *Hart v. Burnett*, 15 Cal. 530; *Police Jury v. Michel*, 4 La. An. 84; *Townsend v. Greely*, 5 Wall. 326; *Edgerton v. First Municipality &c.*, 1 La. An. 435; *People v. Doe* G. 1034, 36 Cal.

of an execution against a city is erroneous.²⁶ Writs of attachment and execution can not be issued against a municipality.²⁷ Where the fund from which a claim is payable is exhausted and judgment is rendered, the plaintiff is not entitled to a writ of mandate to allow and order the judgment paid.²⁸

§ 1657. **Garnishment of municipal corporations.**—The question whether a municipal corporation is subject to garnishment has often been before the American courts, and although the decisions are not uniform, in a large majority of the cases it has been held that the writ would not lie. This exemption from garnishee process, when the terms of the statute are not precise and imperative, is based entirely upon the ground of public policy. The considerations in support of this ruling were discussed by the supreme court of Minnesota as follows:—"The varied relations which such bodies [counties] through their officers hold toward individuals as their debtors would render them liable to be constantly attacked with such process, and would very materially embarrass them in the performance of their duties. If they are subject to such suits, they are bound to give them the same attention which is required of private individuals, and this would involve their attendance upon distant courts, and the consequent absence from their respective offices. It would also very much embarrass them in their accounts, as each indebtedness disclosed would necessarily suspend the payment of the sum until the decision of the litigation between the principal parties, which might be protracted for years. Public policy can not tolerate such an obstacle to the exercise of official duties, as this rule would necessarily be if it be allowed to obtain."²⁹ The doctrine of exemption, so far

220; *Brinckerhoff v. Board &c.*, 6 Abb. Pr. (N. S.) (N. Y.) 428; s. c. 37 How. Pr. (N. Y.) 499; 2 Daly (N. Y.) 443. But in some states property of municipalities not appropriated to public use may be taken on execution: *Clarissy v. Metropolitan Fire Dep't*, 7 Abb. Pr. (N. S.) (N. Y.) 352; *City of New Orleans v. Home Mut. Ins. Co.*, 23 La. An. 61; *Holladay v. Frisbie*, 15 Cal. 630; *Wheeler v. Miller*, 16 Cal. 124; *Darlington v. Mayor &c.*, 31 N. Y. 164. See also, *Crafts v. Inhabitants &c.*, 47 Maine 141; *Lyell v. Supervisors &c.*, 3 McLean 580.

²⁶ *City of Danville v. Mitchell*, 63 Ill. App. 647.

²⁷ *Fairbanks Co. v. Kirk*, 12 Pa. Sup. Ct. 210.

²⁸ *Goldsmith v. Board &c.*, 115 Cal. 36; s. c. 46 Pac. 816.

²⁹ *Flandrau, J.*, in *McDougal v. Board &c.*, 4 Minn. 184, 189. The same rule was applied in the following cases:—*Cities: Switzer v. City of Wellington*, 40 Kan. 250; s. c. 19 Pac. 620; 10 Am. St. 196 (holding that the term "corporation" in the statute on the subject did not include municipal corporations); *First Nat'l Bank v. City of Ottawa*, 43 Kan. 294; s. c. 23 Pac. 485; *Roeller v. Ames*, 33 Minn. 132; s. c. 22 N. W. 177; *Mayor &c. v. Rowland*, 26 Ala. 498; *McLellan v. Young*, 54 Ga.

as it rests on public policy, was attacked in a recent case in Montana. "By garnishment," said the court, "the water-works, fire-engines, public buildings and revenues of the corporation are not seized. The corporation is simply required to hold and finally pay over a sum of money or property in which it has no interest to one person rather than another. Its business is not interrupted; its property is not attached; its functions are not deranged. We can not agree that there is any reason why the great public duties of a county need be imperfectly performed, or that its business is in any danger of derangement, if it be compelled by process of a court to pay the salary of a servant to that servant's creditors. The county has no suit to defend, no counsel to employ, no witnesses to collect and pay. It has no burdens cast upon it, and no duty to perform except to act as temporary stakeholder to await the determination of a court in an action in which the county has no interest."³⁶

399; s. c. 21 Am. R. 276; *Mayor &c. v. Root*, 8 Md. 95; s. c. 63 Am. D. 692; *Merwin v. City of Chicago*, 45 Ill. 133; *Hawthorn v. City of St. Louis*, 11 Mo. 59; *Fortune v. City of St. Louis*, 23 Mo. 239; *People v. Mayor &c.*, 2 Neb. 166; *City of Erie v. Knapp*, 29 Pa. St. 173; *Greer v. Rowley*, 1 Pittsb. (Pa.) 1; *Parsons v. McGavock*, 2 Tenn. Ch. 581; *City of Memphis v. Laski*, 9 Heisk. (Tenn.) 511; *Burnham v. City of Fond du Lac*, 15 Wis. 193; *Buffham v. City of Racine*, 26 Wis. 449; *Merrell v. Campbell*, 49 Wis. 535; s. c. 5 N. W. 912. See also, *City of Dallas v. Western Electric Co.*, 83 Tex. 243; s. c. 18 S. W. 552. *Towns*: *Bradley v. Town of Richmond*, 6 Vt. 121; *Boroughs*: *Van Valkenburgh v. Earley*, 1 Luz. Leg. Reg. (Pa.) 216. *Counties*: *Ward v. Hartford Co.*, 12 Conn. 404; *McDougal v. Board &c.*, 4 Minn. 184; *Boone Co. v. Keck*, 31 Ark. 387; *Pettibone v. Beardslee*, 1 Luz. Leg. Reg. (Pa.) 180; *Wallace v. Lawyer*, 54 Ind. 501; s. c. 23 Am. R. 661; *Dotterer v. Bowe*, 84 Ga. 769; s. c. 11 S. E. 896; *Board &c. v. Bond*, 3 Colo. 411; *State v. Eberly*, 12 Neb. 616; s. c. 12 N. W. 96. *In-*

corporated commissioners of public schools: *Clark v. Mobile School Com'rs*, 36 Ala. 621; *Taylor v. Knipe*, 2 Pearson (Pa.) 151. See also, *Hightower v. Slaton*, 54 Ga. 108; *School Dist. v. Gage*, 39 Mich. 484; s. c. 33 Am. R. 421; *Derr v. Lubey*, 1 MacArthur 187; *Pottier &c. Co. v. Taylor*, 3 MacArthur 4; *Brown v. Finley*, 3 MacArthur 77; *Wade Attachment*, §§ 345, 419; *Waples Attachment & Garnishment*, 236 et seq.; *Drake Attachment* (7th ed.), § 516. As to waiver of exemption from garnishment, see *Clapp v. Davis*, 25 Iowa 315. Cf. *First Nat'l Bank v. City of Ottawa*, 43 Kan. 294; s. c. 23 Pac. 485.

³⁶ *Waterbury v. Board &c.*, 10 Mont. 515; s. c. 26 Pac. 1002; 24 Am. St. 67 and 73, n. See also, *City of Denver v. Brown*, 11 Colo. 337; s. c. 18 Pac. 214. Towns were held liable to garnishee process in *Whidden v. Drake*, 5 N. H. 13; *Bray v. Town of Wallingford*, 20 Conn. 416. A school district, in *Seymour v. School Dist.*, 53 Conn. 502; s. c. 3 Atl. 552. A county, in *Adams v. Tyler*, 121 Mass. 380. Cities, in *Wales v. City of Muscatine*, 4 Iowa

The salary of a city officer on grounds of public policy is exempt from garnishment.³⁷

§ 1658. Presentation of claims—Charter provisions construed.—

The charter of Brooklyn declares that "no action or special proceeding" shall be maintained against the city unless it shall appear by the complaint that at least thirty days had elapsed "since the claim or claims upon which said action or special proceeding is founded were presented in detail and duly verified by such claimant or claimants to the comptroller of said city for adjustment;" and another clause in the same section authorizes the comptroller to require "any person presenting for settlement an account or claim" to be sworn and answer orally as to any facts relative to the justness of such "account or claim." It was held that these provisions did not require the presentation of a claim arising *ex delicto*.³⁸ "The words 'claim or account,'" said Andrews, J., "in connection with the purpose of presentation and the designation of the officer to whom the presentation is to be made, naturally indicate claims on contract, which may, in ordinary course, be adjusted by the comptroller or chief financial officer or officers of the city, the justness of which may be ascertained by the summary method of examination provided."³⁹

302. *Contra*, *Jenks v. Osceola Tp.*, 45 Iowa 554, decided after a change in the statute; *City of Laredo v. Nalle*, 65 Tex. 359; *Wilson v. Lewis*, 10 R. I. 285; *City of Newark v. Funk*, 15 Ohio St. 462.

³⁷ *Sanger v. City of Waco*, 15 Tex. Civ. App. 424; s. c. 40 S. W. 549; *Lewis v. City of Denver*, 9 Colo. App. 328; s. c. 48 Pac. 317. Under Va. code, § 5, sub. 13 and § 2967, a city is subject to garnishment: *Portsmouth Gas Co. v. Sanford*, 97 Va. 124; s. c. 33 S. E. 516.

³⁸ *Harrigan v. City of Brooklyn*, 119 N. Y. 156; s. c. 23 N. E. 741. The case was governed by *Howell v. City of Buffalo*, 15 N. Y. 512, which placed the same construction upon a similar provision in the charter of Buffalo. See also, *Cavan v. City of Brooklyn*, 5 N. Y. S. 758, where the question is exhaustively discussed by Judge Van Wyck; *Denair v. City of Brooklyn*, 5 N. Y. S. 835. The same principle of construction has been applied to stat-

utory provisions prohibiting the allowance of costs in actions against municipal corporations, unless the claim upon which the action is founded had been presented to the chief fiscal officer of the corporation before the commencement of the action: *McClure v. Supervisors &c.*, 3 Abb. Ct. App. (N. Y.) 83; *Taylor v. City of Cohoes*, 105 N. Y. 54; s. c. 11 N. E. 282; *Gage v. Village of Hornellsville*, 106 N. Y. 667; s. c. 12 N. E. 817; *Minick v. City of Troy*, 83 N. Y. 514; and *Reining v. City of Buffalo*, 102 N. Y. 308; s. c. 6 N. E. 792, arose under charter provisions expressly including claims *ex delicto*.

³⁹ *Harrigan v. City of Brooklyn*, 119 N. Y. 156; s. c. 23 N. E. 741. "There is nothing in the language of the charter," continued the court, "to take the case out of the operation of the decisions. In *Dickinson v. Mayor &c.*, 92 N. Y. 584, and *Brehm v. Mayor &c.*, 104 N. Y. 186; s. c. 10 N. E. 158, it was assumed by counsel that the provision in the

§ 1659. Action by contractor—Remedy by tax-bills when not exclusive.—A city charter provided that “the city shall not be liable in any manner whatever on account of work done.” An ordinance provided that a certain avenue be graded and prepared for “macadamizing, curbing and guttering.” The city made a contract with plaintiff which provided that it was made subject to the charter and ordinances, which were in terms made a part thereof; and stipulated that plaintiff was not to have any lien or claim against the city in any event, and that the latter should not be liable to any one for damages under the contract for the macadamizing, curbing, etc. Plaintiff sued on the contract, alleging that he had done as much of the work as the grading would permit, and was and had been willing to perform, and assigned as breach of contract that the city refused to complete the grading and to allow plaintiff to fulfill his contract, and alleged that he could not collect anything for the work done until it was completed. It was held that the petition stated a cause of action.⁴⁰ “The provision of the charter,” said the court, “does not apply to a case of this sort. The damage alleged here is not ‘on account of any work done.’ That provision of the charter evidently has reference to claims against the city for the doing of work or making improvements which is to be paid for by special tax on property owners benefited. Neither does the provision of the contract apply to a case like this. The first portion of that stipulation, wherein the plaintiff agrees ‘that he will not have any claim or lien against the city in any event,’ simply means to provide against the city being liable under any circumstances for the work done, and gives emphasis to the other portion of the contract providing in effect for payment being made in special tax-bills against property holders. It sometimes happens that the contractor can not re-enforce his tax-bills on account of some vice in the proceedings which makes them illegal; or from some other cause he is left without recompense for his labor and material, and this provision is merely to protect the city against his claim. The second portion of the pro-

New York Consolidation Act (Laws of 1873, ch. 385, § 105) applied to actions *ex delicto*. Upon this assumption the question was presented in the first case whether the statute of limitations on a cause of action for negligence commenced to run from the time of the injury or from the time of the demand made on the comptroller, and it was held that the charter provision did not postpone the period for the com-

mencement of the limitation prescribed by the general statute; and in the second case that a delay of thirty days after presentation of a claim did not bar the cause of action where the six year expired during that period. The court did not consider the question now presented.”

⁴⁰ *Chambers v. City of St. Joseph*, 33 Mo. App. 536.

vision in the contract, 'that said city shall not in any event be held liable to any one for any damages or sums whatever under the contract, was not intended to release the city from liability for a non-performance of the contract; for non-performance does not arise 'under' a contract, but rather in spite of it. The provision protects the city for things done 'under the contract,' that is in performance of it. * * * The action is not for things done under the contract, but it is for damages resulting from not permitting things to be done under it."⁴¹

§ 1660. Corporate liability to qui tam action for penalties.—It is provided in one section of the general statutes of Connecticut that the selectmen of every town shall erect and maintain necessary guide posts for the direction of travelers, and in another section that "every town which neglects or refuses to erect or maintain guide posts as required by law, or suitable substitutes therefor, shall forfeit annually five dollars" for each case of neglect. In a qui tam action against a town for a penalty under the statute, it was held that the selectmen, in the discharge of the duty imposed upon them by the first section mentioned, were the agents of the town, and that the town was liable for the penalty in case of their default; and that an averment that the town had neglected to maintain a guide post at a certain place was sufficient without an allegation that the selectmen had neglected to do it, and furthermore that it was unnecessary to aver that the town was requested and refused, as a neglect or refusal was sufficient to sustain the action.⁴²

§ 1661. Statutory liability for injuries to sheep by dogs—Filing of statement.—The right to recover damages from a municipal corporation on account of sheep killed by dogs is purely statutory. But statutes giving a remedy under certain circumstances exist in many states, and the owner must do what the statute requires in order to secure the benefit of its provisions, which are always deemed to be mandatory. Thus, the Indiana statute requires the claimant to file

⁴¹ *Chambers v. City of St. Joseph*, 33 Mo. App. 536. "Having shown that the charter provision and the provisions in the contract are not applicable to the case cited, the following authorities are applicable in a greater or less degree to the liability of the city:—*Beard v. City of Brooklyn*, 31 Barb. (N. Y.) 142; *Leeds v. City of Richmond*, 102 Ind. 372; s. c. 1 N. E. 711; *City*

of Leavenworth v. Mills, 6 Kan. 288; *Philadelphia &c. R. Co. v. Howard*, 13 How. 307; *City of Lansing v. Van Gorder*, 24 Mich. 456; *Kearney v. City of Covington*, 1 Met. (Ky.) 339."

⁴² *Bronson v. Town of Washington*, 57 Conn. 346; s. c. 18 Atl. 264; commenting on and explaining *Waterbury v. Town of Darien*, 8 Conn. 163; s. c. 9 Conn. 252, 256.

a sworn statement with the township trustee within ten days from the time the sheep are killed or injured, and it was held that a report not under oath was, in legal effect, no report at all. "We can not agree," said the court, " * * * that the provision of the statute requiring the report to be under oath is merely directory. We can, indeed, conceive no valid reason for such a conclusion. It is important that the trustee should have sworn evidence of the claim; it is important to the due distribution of the fund that the claim should be verified, and it is important because it puts a check upon corrupt as well as reckless claimants. But an oath is in all branches of the law regarded as a solemn and an important thing; a statutory provision requiring it can never be lightly treated, much less disregarded. When the statute says that a report which may form an element in a claim for money shall be under oath, it can not be held that the provision as to the oath is merely directory."⁴³ The same statute came under consideration in a subsequent case where the claimant made a verbal report which was in other respects sufficient, and was told by the trustee that nothing more was required. The mandatory character of the statute was reaffirmed. But it was insisted by the claimant that the township was estopped by the conduct of the trustee to deny that a sufficient report was made. In reply to this the court said:—"It was no part of the trustee's duty to prepare the report or to give advice concerning it. His duties are all prescribed by law, and every one is bound to take notice of the extent and scope of his authority. A public corporation can not be estopped by the conduct

⁴³ *Columbia Tp. v. Pipes*, 122 Ind. 239; s. c. 23 N. E. 750, where the complaint was pronounced bad for a failure to aver that the report was under oath. The court construed the statute as not designed to indemnify owners of sheep which were kept temporarily in a township while in transit to a foreign market, but on the other hand that it was not confined to persons engaged in the sheep industry, but included all citizens who were the owners of sheep kept in the townships, except under circumstances just mentioned. The plaintiff merely alleged that he was the owner of sheep kept and pastured on his farm, and it was contended that the complaint was fatally defective for want of an averment negating the

circumstances which would constitute a defense. There was no express statutory exception, and touching the contention the court said:—"A plaintiff will succeed if he makes a prima facie case under a statute containing no express exceptions, and certainly the complaint before us, in so far as regards the point under immediate mention is concerned, does make a prima facie case under the statute, for it shows that the sheep killed and injured were owned and pastured on the farm of the plaintiffs in the township. We do not believe that it was incumbent upon the plaintiffs to go beyond this and allege that the sheep were not in the township temporarily, and while on their way to market."

of an officer whose duties are defined by law, except to the extent that such officer is authorized to act for the corporation.”⁴⁴

§ 1662. The same subject continued—Massachusetts decisions.—

A statute provided that whoever suffered loss by reason of the worrying, maiming or killing of “sheep, lambs or other domestic animals” by dogs should, upon proof thereof to the selectmen, be entitled to an order from them upon the treasurer of the town for the amount of his loss. In a suit against the town the plaintiff alleged that he made due presentment of his claim for loss to the selectmen, who refused and neglected to draw an order for the payment of his loss. The court denied his right to recover, using the following language:—“No liability is created by the statute on the part of towns for the omission, neglect or refusal of the selectmen to perform the duties imposed on them by the provisions of that act, and none exists at common law.⁴⁵ Besides, the declaration does not allege any breach of duty by the selectmen. There is no averment that the proof of loss or damage sustained by the plaintiff was adequate or sufficient to establish his right to an order on the treasurer. For aught that appears, the plaintiff may have failed in offering sufficient evidence to satisfy the selectmen that he had sustained any loss or damage by reason of the destruction of his sheep in the manner specified in the statute. But if he has offered such proof, it is very questionable whether any action would lie in his favor for a failure of the selectmen to draw an order on the treasurer. The power to determine on the sufficiency of the proof of loss or damage seems by the terms of the statute to be conferred exclusively on the selectmen. This power is in its nature judicial, because it vests in the selectmen a discretion to determine that the facts are proved on which their official action is to be based. It was therefore within the scope of their jurisdiction to decide whether the plaintiff had established his claim by proof, and no action can be maintained against them or the town for the manner in which they exercised the discretion vested in them, although they may have erred in the conclusion to which they arrived.”⁴⁶

⁴⁴ *Abell v. Prairie Civil Tp. &c.*, 4 Ind. App. 599; s. c. 31 N. E. 477. “The statute is for his benefit. He is not a party to it, and in the case at bar he is not in a situation to take any exception to its insufficiency or irregularity.”

⁴⁵ *Chenery v. Inhabitants &c.*, 16

Gray (Mass.) 125; citing *Mower v. Inhabitants &c.*, 9 Mass. 247.

⁴⁶ *Chenery v. Inhabitants &c.*, 16 *Gray (Mass.)* 125; citing *Ela v. Smith*, 5 *Gray (Mass.)* 121. The opinion was written by Bigelow, C. J., and concurred in by the whole court. In the following year, the

§ 1663. **Liability for acts of officers in killing dogs running at large.**—A dog was killed when running at large contrary to an ordinance ordering all dogs confined, although it had just escaped and was being pursued by the owner to return it to confinement. In an action against the city the validity of the ordinance was sustained.⁴⁷ “Of all property,” said the court, “dogs are more peculiarly the subject of police regulations than any other class. They are very generally kept and considered of value because of their tendency to revert to their savage state, and to attack as an enemy any stranger who may approach them; and it is because of the danger to the public arising from these instincts that they are so often and so generally subjected to police regulations, especially in cities and towns. It is held with great unanimity by the courts that regulations of the most stringent character and the most summary proceedings for the destruction of these animals kept contrary to such regulations are entirely within legislative power, and free from constitutional objection, though the property of the owner is destroyed without notice or hearing in the execution of the law. In Massachusetts it has been held that a dog, not licensed or collared according to the provisions of law, may be shot within the owner’s close by the officers.”⁴⁸ So in

court being composed of the same members, the case of *Osborn v. Selectmen &c.*, 2 Allen (Mass.) 207, came before them. There the owner of an animal injured brought a petition for mandamus against the selectmen to compel them to draw an order in his favor, alleging that he had presented proof of the facts, but that they refused, etc. The answer admitted the truth of the facts set forth, but disputed the authority of defendants because the animal was a horse, and it was contended that the statute was not intended to extend to them. The court held that horses were certainly “domestic animals,” and granted the writ. The opinion was delivered by Dewey, J., and no question was made that the plaintiff was entitled to the relief. The statement of the case, however, says the plaintiff “prayed for a writ of mandamus ordering them to draw an order in his favor;” while in the opinion of the court it is said that “it was the duty

of the selectmen to proceed to inquire whether the petitioner had suffered loss,” etc., thus leaving it doubtful whether there is any conflict between the case and the remarks of Bigelow, C. J., in *Chenery v. Inhabitants &c.*, quoted in the text.

⁴⁷ *Julienne v. Mayor &c.*, 69 Miss. 34; s. c. 10 So. 43.

⁴⁸ Citing *Blair v. Forehand*, 100 Mass. 136. See also, *Tower v. Tower*, 18 Pick. (Mass.) 262; *Carter v. Dow*, 16 Wis. 298. Cf. *Bishop v. Fahay*, 15 Gray (Mass.) 61; *Kerr v. Seaver*, 11 Allen (Mass.) 151; *Morey v. Brown*, 42 N. H. 373, in which the court, replying to the argument that the act conflicted with the constitution in that it was a taking of private property for public use, or deprived the owners of their property in dogs, said the act had no such effect, “but merely to regulate the use and keeping of such property in a manner that seemed to the legislature reasonable and

New Hampshire, under a statute providing that 'no person shall be liable by law for killing any dog which shall be found not having around his neck a collar,' etc., it was held that a private person might lawfully kill a dog not collared in compliance with law."

§ 1664. **Suits by the municipality.**—Where the city has entered into a contract with a water company to furnish its citizens with water the city is the proper party to sue for a breach.⁴⁹ The city, having paid a judgment against it growing out of a defective sidewalk, may recover of the property owner though he was not liable to the person injured,⁵⁰ and it seems the city is not precluded from recovery by reason of its being a joint tort-feasor.⁵¹ Where judgment is obtained against a city for personal injury its failure to keep its street in safe condition will not bar an action by it for failure of defendant to properly guard its trenches in excavating.⁵² Where a contractor's bondsmen agreed to pay all material men but did not do so, the city must sue for the use of the material men.⁵³ A city has no authority to maintain a suit in behalf of any of its inhabitants.⁵⁴ In the absence of a statute a city has no right to appeal in a criminal case.⁵⁵

§ 1665. **Suits against municipality—Defenses.**—It is not a defense that an election called to ratify a contract with a water company was held at a single voting place, which had been the custom for a number of years, instead of in each ward, where the result of the election in favor of the ordinance has been declared, the company notified of such result and contract fulfilled.⁵⁶ A city can not defend its liability for breach of an agreement by setting up a judgment holding an assessment uncollectable.⁵⁷ In a suit against

expedient. It is a mere police regulation, such as we think the legislature might constitutionally establish." See also, *Cooley Const. Lim.* 741.

⁴⁹ *Cleburne Water &c. Co. v. City of Cleburne*, 13 Tex. Civ. App. 141; s. c. 35 S. W. 733.

⁵⁰ *City of Holyoke v. Hadley &c. Co.*, 174 Mass. 424; s. c. 54 N. E. 889.

⁵¹ *City of Holyoke v. Hadley &c. Co.*, *supra*.

⁵² *City of Boston v. Coon*, 175 Mass. 283; s. c. 56 N. E. 287.

⁵³ *City of Bethany v. Howard*, 149 Mo. 504; s. c. 51 S. W. 94.

⁵⁴ *Park v. Modern Woodmen of America*, 181 Ill. 214; s. c. 54 N. E. 932.

⁵⁵ *City of Water Valley v. Davis*, 73 Miss. 521; s. c. 19 So. 235. But see *City of St. Charles v. Hackman*, 133 Mo. 634; s. c. 34 S. W. 878.

⁵⁶ *Crebs v. City of Lebanon*, 98 Fed. 549. Cf. *Gorrell v. Greensboro Water Supply Co.*, 124 N. C. 328; s. c. 32 S. E. 720; *Portland v. Improvement Co.*, 33 Or. 307; s. c. 52 Pac. 28.

⁵⁷ *New Orleans v. Warner*, 175 U. S. 120; s. c. 20 S. Ct. 44.

the city for dumping garbage near plaintiff's premises it is not a defense that plaintiff permitted garbage and refuse to be deposited on his premises which contributed to the injury.⁵⁸ It is improper to direct a verdict for the city because notice was not served in the required time where before the time and after until death the evidence shows plaintiff's condition was such as to excuse her, since the question whether or not plaintiff was excused was for the jury if the evidence was disputed.⁵⁹ If the charter does not require it, it is no defense that the claim was not presented to nor acted on by the council.⁶⁰ The defense of "no funds" for services rendered is not availing unless there were no funds available when the employment was made;⁶¹ and it is no defense in an action for the expenses of the board of health, under N. Y. Village Law of 1870, chapter 291.⁶² In an action against a city for negligently causing the death of a fireman it is not a defense that the city procured an accident policy for such fireman, the amount of which was paid to his widow after his death.⁶³ An action at law will lie against a city to recover the amount due on warrants where the city agreed to provide a fund for the payment of the warrants and failed to do so.⁶⁴ A city is not liable for the acts of its police officers in making an unwarrantable arrest, and where the city is not a party it is not the duty of the corporation counsel to defend in behalf of officers sued.⁶⁵ Where the statute authorizes suit against a public officer to prevent waste of funds or property the courts will not, in the absence of fraud, undertake to determine whether certain material furnished them is of the quality provided for by contract.⁶⁶

§ 1666. **Damages, measure of.**—In a suit for damages from a choked-up sewer, where the jury are instructed that nothing could be allowed for sickness of family, loss of time, etc., the jury are to fix the damages by considering discomfort, annoyance, loss of enjoyment of home, as merely a depreciation of rental value.⁶⁷ Where the

⁵⁸ *Correll v. City of Cedar Rapids*, 110 Iowa 333; s. c. 81 N. W. 724.

⁵⁹ *Barclay v. City of Boston*, 173 Mass. 310; s. c. 53 N. E. 822.

⁶⁰ *Gill v. City of Oakland*, 124 Cal. 335; s. c. 57 Pac. 150.

⁶¹ *Kent v. Village of North Tarrytown*, 56 N. Y. S. 885; s. c. 26 Misc. (N. Y.) 86.

⁶² *Kent v. Village of North Tarrytown*, *supra*.

⁶³ *City of Kansas City v. McDonald*, 60 Kan. 481; s. c. 57 Pac. 123.

⁶⁴ *Bank of British Columbia v. City of Port Townsend*, 16 Wash. 450; s. c. 47 Pac. 896.

⁶⁵ *City of Chicago v. Williams*, 182 Ill. 135; s. c. 55 N. E. 123.

⁶⁶ *Paul v. City of New York*, 61 N. Y. S. 570; s. c. 46 App. Div. (N. Y.) 69.

⁶⁷ *City of Louisville v. O'Malley*, 21 Ky. L. 873; s. c. 53 S. W. 287.

surface water is diverted on plaintiff's land the measure of damages is not the difference in value before and after the injury.⁶⁸ In a suit for injury to property caused by a negligently constructed sewer, plaintiff may recover his expenses in preserving his property after discovering the injury.⁶⁹ In the absence of express statutory authority, exemplary damages can not be recovered against a city.⁷⁰

§ 1667. Recovery of money wrongfully paid.—Money paid on a license which became void may be recovered of the city;⁷¹ and so may money paid to the city by mistake.⁷² A suit against a city to recover taxes paid will not be sustained unless a statement shall have been presented to the council as required by statute.⁷³

§ 1668. Limitations against suits.—A special limitation of actions to six months in cities of the first class for injuries to property is unconstitutional.⁷⁴ Where the statutes provides that no suit shall be brought for personal injuries after six months from the time of the injury unless notice shall be served on the city within ninety days from the injury, if notice is served suit may be brought at any time within the general statutory limitation.⁷⁵ The statute runs against a municipal corporation the same as individuals.⁷⁶ A charter provision limiting actions for personal injuries to six months is unconstitutional.⁷⁷ A statute limiting the time for bringing actions against a city can be pleaded only by the city.⁷⁸ Limitations run against a municipality as against an individual.⁷⁹ The defense that suit was not brought on a claim within the time fixed by the statute is defensive and plaintiff need not plead it affirmatively.⁸⁰ A statute requiring actions for personal injuries to be brought in six months is special legislation and unconstitutional.⁸¹

⁶⁸ *Correll v. City of Cedar Rapids*, 110 Iowa 333; s. c. 81 N. W. 724.

⁶⁹ *Mayor &c. v. Small*, 108 Ga. 309; s. c. 34 S. E. 152.

⁷⁰ *Bennett v. City of Marion*, 102 Iowa 425; s. c. 71 N. W. 360.

⁷¹ *Nurnberger v. Town of Barnwell*, 42 S. C. 158; s. c. 20 S. E. 14.

⁷² *City of Duluth v. McDonnell*, 61 Minn. 288; s. c. 63 N. W. 727.

⁷³ *Flieth v. City of Wausau*, 93 Wis. 446; s. c. 67 N. W. 731.

⁷⁴ *City of Louisville v. O'Malley*, 21 Ky. L. 873; s. c. 53 S. W. 287.

⁷⁵ *Robinson v. City of Cedar Rap-*

ids, 100 Iowa 662; s. c. 69 N. W. 1064.

⁷⁶ *In re Opening of Beck St.*, 44 N. Y. S. 1087; s. c. 19 Misc. (N. Y.) 571.

⁷⁷ *City of Louisville v. Seibert*, 21 Ky. L. 328; s. c. 51 S. W. 310.

⁷⁸ *Rosetta Gravel &c. Co. v. Kennedy*, 51 La. An. 1535; s. c. 26 So. 468.

⁷⁹ *Ralston v. Town of Weston*, 46 W. Va. 544; s. c. 33 S. E. 326.

⁸⁰ *Hawley v. City of Johnstown*, 58 N. Y. S. 49; s. c. 40 App. Div. (N. Y.) 568.

⁸¹ *City of Louisville v. McGill*, 21

§ 1669. **Miscellaneous.**—Where the plaintiff brings suit in behalf of a city and personally has a direct and substantial interest in the controversy, his ulterior motives in bringing the suit are immaterial.^{81a} An individual has no power to institute an action to compel the mayor to execute a contract.⁸² In a suit to recover excess of taxes paid, where the excess payment is conceded, it is not a defense that at the time the original complaint was filed the taxes were not due or payable.⁸³ Money collected to pay interest on void bonds which can not be recovered by the taxpayer may be carried to the general fund of the city.⁸⁴ An action may be maintained in the federal court to recover on bonds payable out of a special fund required to be created by the corporation and which it has failed to provide; and plaintiff is not required to bring mandamus in the state court.⁸⁵ Laches in not objecting to a resolution of the council is not to be attributed to a taxpayer who had no actual notice or knowledge of the resolution.⁸⁶ Where claims are payable out of funds appropriated for such payment an absolute judgment against the city is not proper;⁸⁷ and this is so where the funds for the particular years and out of which the claim is payable have been misapplied to the payment of claims for later years.⁸⁸ Where a municipal contract for the payment for an improvement provides for the payment through a special assessment the remedy against the municipality is by mandamus if the municipality has merely failed to proceed with diligence to collect the assessment; but where the municipality disables itself from performing the contract by such action on its part as makes void,⁸⁹ and therefore uncollectible an assessment, or refuses to perform the contract on its part, then the remedy is for a breach of the contract.⁹⁰ It has been held that judgment creditors of a school board of a city whose judgments are payable from taxes levied and collected for certain years may maintain a creditor's bill against the city charged by law with

Ky. L. 718; s. c. 52 S. W. 1053. Suits against for personal injury under limitation statute of Iowa,—see *Sachs v. City of Sioux City*, 109 Iowa 224; s. c. 80 N. W. 336.

^{81a} *Mock v. City of Santa Rosa*, 126 Cal. 330; s. c. 58 Pac. 826.

⁸² *Balch v. City of Utica*, 59 N. Y. S. 516; s. c. 42 App. Div. (N. Y.) 567.

⁸³ *City of Indianapolis v. Ritzinger*, 24 Ind. App. 65; s. c. 56 N. E. 141.

⁸⁴ *Irwin v. Exton*, 125 Cal. 622; s. c. 58 Pac. 257.

⁸⁵ *Shepard v. Tulare Irr. Dist.*, 94 Fed. 1.

⁸⁶ *Black v. Common Council &c.*, 119 Mich. 571; s. c. 78 N. W. 660.

⁸⁷ *Johnson v. City of New Orleans*, 50 La. An. 920; s. c. 24 So. 635.

⁸⁸ *Johnson v. City of New Orleans*, supra.

⁸⁹ *Weston v. City of Syracuse*, 158 N. Y. 274; s. c. 53 N. E. 12; *People v. Mayor &c.*, 144 N. Y. 63; s. c. 38 N. E. 1006; *Reilly v. City of Albany*, 112 N. Y. 30; s. c. 19 N. E. 508.

⁹⁰ *City of New Orleans v. Fisher*, 91 Fed. 574.

the collection of taxes, where the purpose is to require an accounting as to taxes and interest alleged to have been collected and not paid over to the school board.⁹¹ Neglect of the officers of a municipal corporation to exercise its franchises will not justify the appointment of a receiver, where it does not appear that the officers are abusing its franchises, or that they are or the corporation is insolvent.⁹² Sureties on a bond given to save the city harmless are necessary parties to a suit for damages when made so by statute.⁹³ Where a statute authorizes a taxpayer to bring an action to prevent waste to city property, it is not authority to him to enjoin park commissioners from using city moneys for a different purpose than that for which they were appropriated, where not needed for the latter purpose.⁹⁴

§ 1670. Application of estoppel in municipal affairs.—The doctrine of estoppel is applied to municipal corporations as well as to private corporations and individuals. We have already considered its application with reference to municipal bonds and other subjects incidentally. All that is necessary to create an estoppel in pais is to show that, upon the faith of a certain action on the part of the city which it had power to take a company incurred a new liability: such as the negotiation of a new loan, and the issue of a new bond and mortgage to secure the same.⁹⁵

§ 1671. When estoppel applied to municipality.—(a) *In the employment of attorneys:* The city will be estopped from denying liability for the services of attorneys though they were employed without authority, and have performed their services.⁹⁶ (b) *By the acts of its officers:* A municipal corporation may be estopped by the acts of its officers.⁹⁷ (c) *By agreement to abide a decision:* Where it

⁹¹ It is possible that the necessity for an accounting in this case will justify the jurisdiction.

⁹² *Hurlbut v. Town of Lookout Mountain* (Tenn.), 49 S. W. 301.

⁹³ *Donovan v. City of Oswego*, 59 N. Y. S. 759; s. c. 42 App. Div. (N. Y.) 539.

⁹⁴ *Holtz v. Diehl*, 56 N. Y. S. 841; s. c. 26 Misc. (N. Y.) 224. Under Ky. act May 23, 1890, the state may recover from a city taxes upon wharf property: *Commonwealth v. City of Louisville*, 20 Ky. L. 893; s. c. 47 S. W. 865. *Massachusetts Stat. 1892, ch. 270*, giving right of action against the city for labor, is

not unconstitutional: *Callahan v. City of Boston*, 175 Mass. 201; s. c. 55 N. E. 892.

⁹⁵ *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557; s. c. 17 S. Ct. 653.

⁹⁶ *City of Denison v. Foster* (Tex. Civ. App.), 28 S. W. 1052.

⁹⁷ *Board &c. v. City of Lincoln*, 81 Ill. 156, 159; *People v. Supervisors &c.*, 67 Ill. 57, 59; *Hitchcock v. Galveston*, 96 U. S. 341, 351; *George F. Blake Mfg. Co. v. Sanitary Dist. &c.*, 77 Ill. App. 287; s. c. affirmed sub nom. *Sanitary Dist. &c. v. Geo. F. Blake Mfg. Co.*, 179 Ill. 167; s. c. 53 N. E. 627. Cf. *Cook Co. v. Harms*, 108 Ill. 151; *Chicago v. C.*

has been stipulated that a suit to be brought against the city shall abide the result of a judgment to be entered in a test case involving the same questions, a judgment in the test case will work an estoppel against the city and in favor of the party to the stipulation.⁹⁸ (d) *By recitals in bonds:* The rule in regard to estoppel by reason of recitals in municipal bonds may be stated as follows: A municipal corporation is estopped from defending an action by an innocent purchaser to collect its negotiable bonds which recite that they were issued for the purpose of funding the bonds, warrants, or floating debt of the corporation, either on the ground that the warrants or bonds which they were issued to satisfy were void, or that the apparent debt which they were issued to pay was fictitious.⁹⁹ A purchaser of bonds is chargeable with notice of the terms, conditions and requirements of permissive statutes under which such bonds are issued.¹⁰⁰ A corporation which by the regularity of the execution of evidences of debts, apparent on their face, induces lenders or borrowers to loan money upon or to buy them, is thereby estopped from denying their validity or effect on the ground that, in the execution or in the preliminary proceedings which warranted their execution, its officers failed to comply with some law or rule of action relative to the mere time or manner of their procedure with which they might have complied but which they carelessly or negligently disregarded.¹⁰¹ Bonds

& W. Ind. R. Co., 105 Ill. 73; *City of Chicago v. Sexton*, 115 Ill. 230; s. c. 2 N. E. 263; *City of Chicago v. Roth*, 26 Ill. 456; *Martel v. City of East St. Louis*, 94 Ill. 67.

⁹⁸ *Bank of Commerce v. City of Louisville*, 88 Fed. 398; *Patton v. Caldwell*, 1 Dall. 419; *Brown v. Sprague*, 5 Denio (N. Y.) 545; *Cole v. Favorite*, 69 Ill. 457; *Wood v. Ensel*, 63 Mo. 193; *Gates v. Hunter*, 3 Strob. Eq. (S. C.) 136-140; *Palmer v. Hayes*, 112 Ind. 289; s. c. 13 N. E. 882; *Gill's Case*, 7 Ct. Cl. 522; *Rapelye v. Prince*, 4 Hill (N. Y.) 119. And see *Bush v. Coler*, 53 N. Y. S. 679; s. c. 24 Misc. (N. Y.) 368.

⁹⁹ *Board &c. v. Ætna L. Ins. Co.*, 90 Fed. 222; s. c. 32 C. C. A. 585. Cf. *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38; s. c. 86 Fed. 272; *National L. Ins. Co. &c. v. Board &c.*, 10 C. C. A. 637; s. c. 62 Fed. 778; *West Plains Tp. v. Sage*,

16 C. C. A. 553; s. c. 69 Fed. 943; *Board &c. v. Howard*, 27 C. C. A. 531; s. c. 83 Fed. 296; *Jasper Co. v. Ballou*, 103 U. S. 745; *Anderson Co. Com'rs v. Beal*, 113 U. S. 227; s. c. 5 S. Ct. 433; *Cairo v. Zane*, 149 U. S. 122; s. c. 13 S. Ct. 803; *Ashley v. Board &c.*, 8 C. C. A. 455; s. c. 60 Fed. 55; *City of Cadillac v. Woonsocket Sav. Inst.*, 7 C. C. A. 574; s. c. 58 Fed. 935.

¹⁰⁰ *Mercer Co. v. Provident &c. Co.* 72 Fed. 623; s. c. 19 C. C. A. 44; *Marsh v. Fulton Co.*, 10 Wall. 676; *McClure v. Oxford Tp.*, 94 U. S. 429; *Northern Bank v. Porter Tp. Trustees*, 110 U. S. 608; s. c. 4 S. Ct. 254; *Barnett v. Denison*, 145 U. S. 135, 139; s. c. 12 S. Ct. 819; *Barnum v. Okolona*, 148 U. S. 393; s. c. 13 S. Ct. 638; *Citizens' Sav. &c. Ass'n v. Perry Co.*, 156 U. S. 692, 701; s. c. 15 S. Ct. 547.

¹⁰¹ *Speer v. Board &c.*, 88 Fed. 749; s. c. 33 C. C. A. 101; *Union Pac. R.*

issued upon the representation that they are authorized by statute estop the municipality from showing as against a bona fide purchaser that they are not so issued and that certain preliminary steps were not in fact taken.¹⁰² A compromise judgment will work an estoppel in the matter of defense to bonds issued thereunder.¹⁰³ (e) *By part performance of contract*: Where a contract is made with a water company reciting the adoption of a resolution, and the council approves the contract, and both parties act under it for a considerable length of time, the city is estopped to urge the failure to adopt such resolution.¹⁰⁴ (f) *By abandonment of alley*: A city is estopped to claim an alley has not been abandoned where it has been fenced for over twenty years and improvements made on it.¹⁰⁵

§ 1672. When estoppel not applied to municipality.—(a) *By use of sidewalks*: A city, by permitting its sidewalks to be used for four years without objection, is not estopped from preventing such use;¹⁰⁶ nor is the use justified because others are permitted to do so.¹⁰⁷ (b) *By entry of judgment*: The entry of judgments on similar grounds in favor of other parties does not estop the city.¹⁰⁸ (c) *By termination of license*: A city is not estopped to assert its right to terminate the operation of an inclined railroad at the termination of a specified period.¹⁰⁹ (d) *Where contract is unconstitutional*: A municipality is not estopped from denying its liability on a contract which has been made in violation of the constitution.¹¹⁰ A city having no power to grant an individual the permanent use of a street, there can be no estoppel against it from requiring the street to be opened in its entirety. The reason is that no estoppel can arise from an act of the municipal authorities done without authority of law.¹¹¹

Co. v. Chicago &c. R. Co., 10 U. S. App. 98; s. c. 51 Fed. 309; Sioux City &c. Co. v. Trust Co. &c., 27 C. C. A. 73; s. c. 82 Fed. 124; Board &c. v. Sherwood, 27 U. S. App. 458; s. c. 11 C. C. A. 507; 64 Fed. 103; City of Huron v. Second Ward Sav. Bank, 30 C. C. A. 38; s. c. 86 Fed. 272.

¹⁰² City of South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449; s. c. 31 C. C. A. 585.

¹⁰³ Union Bank &c. v. Board &c., 90 Fed. 7.

¹⁰⁴ Ludington Water Supply Co., v. City of Ludington, 119 Mich. 480; s. c. 78 N. W. 558.

¹⁰⁵ Jordan v. City of Chenoa, 166 Ill. 530; s. c. 47 N. E. 191. See City

of Chicago v. Sawyer, 166 Ill. 290; s. c. 46 N. E. 759; Reuter v. Lame, 94 Wis. 300; s. c. 68 N. W. 955; 34 L. R. A. 733.

¹⁰⁶ City of Denver v. Girard, 21 Colo. 447; s. c. 42 Pac. 662.

¹⁰⁷ People v. Van Houten, 35 N. Y. S. 186; s. c. 13 Misc. (N. Y.) 603.

¹⁰⁸ Seavey v. City of Seattle, 17 Wash. 361; s. c. 49 Pac. 517.

¹⁰⁹ Louisville Tr. Co. v. City of Cincinnati, 73 Fed. 716.

¹¹⁰ Noel v. City of San Antonio, 11 Tex. Civ. App. 580; s. c. 33 S. W. 263.

¹¹¹ Snyder v. City of Mt. Pulaski, 176 Ill. 397; s. c. 52 N. E. 62. Cf. Seeger v. Mueller, 133 Ill. 86; s. c.

The city may recover property sold by it without authority of law without repayment of the money received on the sale.¹¹² (e) *Where use of street is granted by resolution*: The fact that a corporation, acting under resolutions of a board of public works, expends large sums in changing the motive power of its road does not estop the city from denying the right of the company to occupy streets, where franchises are only granted by ordinance.¹¹³ (f) *By unauthorized sale*: Where the city has not appropriated money received by it on an unauthorized sale it may recover the property attempted to be sold without repayment of the money received.¹¹⁴

§ 1673. Estoppel of persons and corporations.—Owners of property which has been assessed for taxation may by acts estop themselves from insisting that their property is not subject to taxation.¹¹⁵ Where a municipality condemns property for street purposes and it appears that the owner claimed the award made, and upon a dispute arising as to the ownership of the award the money was deposited in court, and thereafter the city, with the assent of the landowner, entered upon the land and worked the street, the owner can not maintain ejectment for the premises.¹¹⁶ An owner living on a street with full knowledge of the progress of the work from commencement to completion is estopped to question the regularity of the proceedings.¹¹⁷ One acquiescing in the making of an improvement or petitioning therefor, is not estopped from enjoining an excessive assessment, but his property is bound for the payment of a proper share of a legal assessment for the improvement.¹¹⁸ The joining in a petition for an improvement is not a waiver of the statutory requirements as to the making of an assessment for the improvements.¹¹⁹ Plaintiffs who did not participate nor acquiesce in election proceedings are not estopped from calling in question the ordering of an election to aid in the construction of a

24 N. E. 513; *Pettis v. Johnson*, 56 Ind. 139; *Stevens v. St. Mary's Tr. School*, 144 Ill. 336; s. c. 32 N. E. 962; *Day v. Green*, 4 Cush. (Mass.) 433.

¹¹² *Huron Water Works Co. v. City of Huron*, 8 S. D. 169; s. c. 65 N. W. 816.

¹¹³ *Louisville Tr. Co. v. City of Cincinnati*, 76 Fed. 296.

¹¹⁴ *Huron Water Works Co. v. City of Huron*, 7 S. D. 9; s. c. 62 N. W. 975.

¹¹⁵ *Kuhn v. City of Port Townsend*, 12 Wash. 605; s. c. 41 Pac. 923; *Seward v. Rheiner*, 2 Kan. App. 95; s. c. 43 Pac. 423.

¹¹⁶ *Binghamton Opera House Co. v. City of Binghamton*, 156 N. Y. 651; s. c. 51 N. E. 315.

¹¹⁷ *Lewis v. Albertson*, 23 Ind. App. 147; s. c. 53 N. E. 1071.

¹¹⁸ *Birdseye v. Village of Clyde*, 61 Ohio St. 27; s. c. 55 N. E. 169.

¹¹⁹ *Grant v. Bartholomew*, 58 Neb. 839; s. c. 80 N. W. 45.

railroad.¹²⁰ A person who has contracted to convey to the city water works is estopped to deny the power of the city to purchase.¹²¹

¹²⁰ Taxpayers of Webster Parish v. ¹²¹ Bristol v. Bristol &c. W. W. Co., Police Jury, 52 La. An. 465; s. c. 27 19 R. I. 413; s. c. 34 Atl. 359. So. 102.

CHAPTER XLI.

MUNICIPAL DEPARTMENTS.

SECTION

1674. Creation of departments.

1675. Board of health.

1676. Board of education.

SECTION

1677. Board of police—Department
of police.

1678. Fire department.

1678a. Department of parks.

§ 1674 **Creation of departments.**—In the administration of municipal government, and particularly in larger cities, it has been found expedient to establish bureaus or departments charged with the duties of regulation and control over the business properly pertaining to the respective departments of service. These several departments usually have a chief, or executive head, who is in most essential particulars a municipal officer with the powers, duties and liabilities usually attaching to such office. In other cases the legislature has seen proper to create, or provide for the creation, of departments of police, health, park, etc., within the limits of the municipality charged with the duty of administering the affairs of such departments. In such cases the functions of these quasi-municipal corporations relate to the exercise of powers that are termed political or governmental, which the state in the exercise of its sovereign powers may exercise or delegate as it may determine. It may delegate them to the city, or to an independent body as it may see proper. The limitation in the creation of a municipality within a municipality lies in the curtailment of the rights of self government inherently existing in the city proper. But, as a rule, the constitutionality of such legislation has been sustained, as in the case of police or health departments, on the ground that the public peace and health are the legitimate subjects of state jurisdiction and control, and although it may delegate the power of regulation to a city it may resume that power and redelegate it elsewhere at will.

§ 1675. **Board of health.**—Provision is usually made in the charter of cities, towns and villages, or in a general statute relating to the subject, for the creation or organization and jurisdiction of a board of health, the primary object and purpose being the preservation of the public health. The scope of powers exercised by such boards is usu-

ally fixed by legislative enactment, or to be found in the rules prescribed by them and which they are authorized, expressly or by implication, to establish. Owing to the nature of the subjects with which these departments are required to deal, and the frequent and unforeseen emergencies that arise or are liable to arise, a large degree of discretion is given to them in many matters under their jurisdiction. In a word when the public health is involved the power of a board of health will be liberally construed and the exercise of that power will not be viewed as critically as would be proper in other matters. It sometimes happens that a state board of health and a local board, city or county, are found exercising power and jurisdiction within the same territory and yet there is but little ground for conflict, for the reason that both are essentially state institutions in the exercise of power originating in the same source. The power exercised by a board of health is generally by and in its name as an agency of the state, although it may lack the usual essentials of an organized municipality. A county board of health may sue as such where it is an agency of the state, although it is not a corporation.¹ A board of health is authorized to file a bill to suppress a nuisance shown to be such independent of any code or ordinances of its own.² The action of a local board of health in ordering an abatement of a nuisance within a specified time requires no notice to the person interested. He has an adequate remedy by injunction or on the personal liability of the members.³ The quarantining of a house infected with small-pox by a health officer is not taking private property for public use without compensation.⁴ The board of health has power to make an order that no unvaccinated child be permitted to attend public school during the continuance of an epidemic of small-pox; and an unvaccinated child was properly excluded from school though unexposed and well.⁵ Whatever is a nuisance per

¹ Henderson Co. Board of Health v. Ward, 21 Ky. L. 1193; s. c. 54 S. W. 725.

² Board of Health &c. v. Henzler (N. J.), 41 Atl. 228. On general power of board of health to abate nuisances, see note to Grossman v. Oakland, 30 Or. 478; s. c. 41 Pac. 5, in 36 L. R. A. 593-603.

³ Hartman v. Mayor &c., 1 Marv. (Del.) 215; s. c. 41 Atl. 74.

⁴ Whidden v. Cheever, 69 N. H. 142; s. c. 44 Atl. 908.

⁵ Blue v. Beach, 155 Ind. 121; s. c. 56 N. E. 89. Cf. City of Salem v. Eastern R. Co., 98 Mass. 431, 443; Bissell v. Davison, 65 Conn. 183; s. c. 32 Atl. 348; Duffield v. Williamsport School Dist., 162 Pa. St. 476; s. c. 29 Atl. 742; In re Rebenack, 62 Mo. App. 8; Morris v. City of Columbus, 102 Ga. 792; s. c. 30 S. E. 850; In re Walters, 32 N. Y. S. 322;

se at common law may be abated by boards of health.⁶ Where it is provided by statute that boards of health, in order to prevent the spread of epidemic diseases, may bring the infected population under prompt treatment during premonitory and other stages of diseases, such board is entitled to the custody of the county pest-house where small-pox patients are confined.⁷ A health officer is not liable in damages to the owner of premises for refusing to remove a tenant afflicted with small-pox, under N. H. Pub. St., ch. 110, § 2.⁸ An ordinance creating an office is not invalid for a failure to prescribe the particular manner the duties of such offices shall be performed.⁹ A city is not liable for the destruction of bedding of scarlet fever patients by order of the board of health.¹⁰

§ 1676. Board of education.—The board of education, as in the case of a board of health, may be provided for by the charter or other statutory authority and be a part of the municipality proper, or it may be a creation of the legislature although acting within the territorial limits of an organized municipality. We have already seen that the officers and agents of a department may be selected by the municipality and paid by it and yet be in fact state officials and agents exercising functions that are purely governmental. Usually in this country education, within the scope of common schools, is a matter of state jurisdiction and regulation and is therefore legislative, with the machinery of which the municipality has no concern, and where it is selected as the instrumentality, through a board of education, or otherwise, the action of the board is only to a limited extent a matter of

s. c. 84 Hun (N. Y.) 457; *Potts v. Breen*, 167 Ill. 67; s. c. 47 N. E. 81; *Lawbaugh v. Board &c.*, 177 Ill. 572; s. c. 52 N. E. 850; *State v. Burdge*, 95 Wis. 390; s. c. 70 N. W. 347; *Corey v. Carter*, 48 Ind. 327.

⁶ *Commonwealth v. Yost*, 11 Pa. Super. Ct. 323.

⁷ *Henderson Co. Board &c. v. Ward*, 21 Ky. L. 1193; s. c. 54 S. W. 725.

⁸ *Whidden v. Cheever*, 69 N. H. 142; s. c. 44 Atl. 908.

⁹ *City of Ouray v. Carson*, 14 Colo. App. 345; s. c. 59 Pac. 876.

¹⁰ *Mayor &c. v. Mulligan*, 95 Ga. 323; s. c. 22 S. E. 621. A person who is city physician is not ex officio a member of the board of health where the ordinance appointing him is invalid: *Attorney-General v. Mc-*

Cabe, 172 Mass. 417; s. c. 52 N. E. 717. The health department of the city of N. Y., under laws of 1882, ch. 410, § 48, has the right to diminish the salary of one of its appointive clerks as to prospective services: *Wilson v. City of New York*, 65 N. Y. S. 328; s. c. 31 Misc. (N. Y.) 693. Power of, under New Jersey act of 1888, ch. 56, in reference to turning on and shutting off of water: *Johnston v. Borough of Belmar*, 58 N. J. Eq. 354; s. c. 44 Atl. 166. Power of, under N. Y. laws of 1893, ch. 661: *In re Kent*, 60 N. Y. S. 627. Power of the board of health of Detroit to quarantine whole house,—see *Highland v. Schulte*, 123 Mich. 360; s. c. 82 N. W. 62.

municipal control, even where the board is appointed by the mayor or council. The subject of school officers, their duties and powers has already received treatment and will not be extended in this connection.¹¹ Power, given to a board of education, to make by-laws and rules necessary for the discharge of their duties does not empower them to require a two-thirds vote of the members to elect a clerk whose election is provided for by statute and where the statute makes a majority competent to act.¹² The power of a board is measured by and is no greater than that the legislature can confer.¹³ A board of education is, as a rule, the creation of the state and as such is a public corporation and an agent of the state for the purpose of maintaining public schools and school buildings. It contracts as a corporation subject to the ordinary rules governing contracts. It receives and holds the school funds from the taxpayers in the capacity of a trustee and is bound by the ordinary rules of trusteeship.¹⁴

§ 1677. Board of police—Department of police.—The individual powers, duties, rights and liabilities of members of the police force have already received consideration in various chapters. In the distribution of power in the administration of municipal affairs there is sometimes a department known as board of police, police department and various other designations, which is charged with the administration of police powers of the municipality, usually presided over by a chief. The details in the management of these departments as organized in the several cities have no uniformity and there is an utter lack of harmony in the decisions relating thereto, and, for that reason they are wholly excluded from consideration. In some cities the department of police is created by statutes wholly independent of the municipality and the purpose has been mainly to divorce this department from the pernicious influence and effects of politics and political influence. The powers of these public corporations are fixed by statutes of their creation, either in express terms or necessary implication, and being local are of no general concern. They usually have

¹¹ See Public Education, ch. 34, 731; s. c. 52 S. W. 969. Public schools organized under N. M. act of 1891 are not city schools: *Water Supply Co. &c. v. City of Albuquerque*, 9 N. M. 441; s. c. 54 Pac. 969. Power of city board of education under Wis. Rev. St., § 925, sub-sec. 116, over high schools: *State v. Towle*, 103 Wis. 388; s. c. 79 N. W. 419. Construction of Wis. Rev. St., § 925, sub-sec. 116: *State v. Sweeney*, 103 Wis. 404; s. c. 79 N. W. 420.

¹² *Heyker v. Herbst*, 20 Ky. L. 1883; s. c. 50 S. W. 859.

¹³ *Adams v. Brennan*, 177 Ill. 194; s. c. 52 N. E. 314.

¹⁴ *Adams v. Brennan*, *supra*. The election of members of board of education by secret ballot instead of *vive voce* vote is an irregularity, but the election is not void: *City of Cynthia v. Board &c.*, 21 Ky. L.

full power and control of the appointment and discharge of policemen, with certain limitations under civil service acts, and the power of review in some designated tribunal. And so where the statute provides for the reduction of the number of police, the police commissioner, for the purpose of reducing the force, may discharge a policeman without complaint, notice or hearing, although the charter may provide that policemen shall only be removed for cause after hearing.¹⁵ A pension providing a death benefit for the widow of a policeman in case he shall die from natural causes does not apply to a death caused by a railroad accident.¹⁶ Where a police board have full control of the department of police, including the right to expel or discharge for cause shown, and refuse to hear a complaint they may be compelled by mandamus to do so.¹⁷ Under organizations of this nature there is usually provision made for a tribunal charged with the duty of hearing complaints preferred against the members of the department for dereliction of duty and power conferred to mete out such punishment as may seem proper and which may amount to dismissal from the service, but which in all cases must be reasonable and not oppressive. There is no uniformity in the procedure of the trial boards, but generally there must be charges preferred in writing, notice given of the hearing, and opportunity afforded to defend. Of course it could not be expected that the evidence offered would be governed by the strict rules of admissibility applicable to courts, but there should at least be order in the presentation and a reasonable regard for pertinence and relevancy, and the order based upon the findings must be reasonable and not arbitrary or oppressive. The findings of a police board on evidence which is conflicting will not be disturbed, where it would have supported a verdict of a jury.¹⁸ And so where a rule of the board declared that the unexplained absence of a policeman for five days should at the option of the board be deemed a resignation, and after such absence the board by resolution declared such absence to be a resignation the court will not disturb the action.¹⁹ Where a policeman on trial before police commissioners charged his superior in open court with lying it is sufficient ground for dismissal.²⁰ Where the police commissioners in determining a policeman's guilt considered his record as a policeman without the record being offered in evidence, the trial on certiorari

¹⁵ *State v. Police Com'rs &c.*, 80 Mo. App. 206.

¹⁶ *Slevin v. Board &c.*, 123 Cal. 130; s. c. 55 Pac. 785.

¹⁷ *Skellman v. Board &c.*, 64 N. J. L. 489; s. c. 45 Atl. 803; *Stryker v. Skellman*, 14 N. J. L. 189.

¹⁸ *People v. Roosevelt*, 57 N. Y. S. 11; s. c. 38 App. Div. (N. Y.) 635.

¹⁹ *People v. Diehl*, 63 N. Y. S. 362; s. c. 50 App. Div. (N. Y.) 58.

²⁰ *People v. Moss*, 63 N. Y. S. 912; s. c. 50 App. Div. (N. Y.) 308.

was ordered set aside and a new trial ordered.²¹ It is not a disqualification of a police commissioner while sitting on the trial of a policeman charged with absence without leave that during the trial the policeman engaged in a quarrel with him, and the judgment of dismissal will not be set aside.²² Where on the trial of a policeman, charged with absence without leave, after personal service of the complaint, charges and notice of examination, a plea of guilty is entered, the judgment of dismissal is not void for failure to specify the particular charge on which the dismissal was based. A finding on one charge is sufficient.²³ Where the charges before the board of police against a clerk were neglect of duty, absence without permission and incompetency, and it appeared that the neglect was that of others, that the incompetency related to matters not forming part of his duty, and the absence was on a legal holiday allowed by the superintendent of police, and it further appeared that the charges preferred were to make room for one of the same political faith as the majority of the board, and the removal was predetermined by the board, and the removal was not for the betterment of the service, the action will be reversed.²⁴ Mere employees in the police department may be discharged without public trial, although the statute provides that no person employed on the police force shall be discharged without public trial.²⁵ The record of an officer is admissible on the extent of punishment in case of conviction on a specific charge.²⁶ The chief of police being responsible as he necessarily is for the efficiency, orderly deportment of the force and even the individual discipline of its members,

²¹ *People v. York*, 64 N. Y. S. 2; s. c. 50 App. Div. (N. Y.) 359.

²² *People v. York*, 65 N. Y. S. 696; s. c. 53 App. Div. (N. Y.) 336.

²³ *People v. York*, 65 N. Y. S. 696; s. c. 53 App. Div. (N. Y.) 336.

²⁴ *People v. Diehl*, 65 N. Y. S. 801; s. c. 53 App. Div. (N. Y.) 645. The supreme court will not weigh the evidence before trial board, nor will their action in dismissing a policeman be disturbed on certiorari unless the finding is clearly against the weight of evidence: *Cavanagh v. Board &c.*, 59 N. J. L. 412; s. c. 35 Atl. 793; *People v. Roosevelt*, 44 N. Y. S. 655; s. c. 16 App. Div. (N. Y.) 331. Too late to object to sufficiency of specifications on review by certiorari: *People v. Welles*, 45 N. Y. S. 713; s. c. 18 App. Div. (N. Y.) 132.

²⁵ *People v. York*, 60 N. Y. S. 208; s. c. 43 App. Div. (N. Y.) 444.

²⁶ *People v. Roosevelt*, 43 N. Y. S. 73; s. c. 13 App. Div. (N. Y.) 404. Board of police of Boston have power to establish fines and forfeitures for absence or neglect of duty: *Malcom v. City of Boston*, 173 Mass. 312; s. c. 53 N. E. 812. Power of police department of city of Rochester to employ police surgeon: *Cain v. Warner*, 60 N. Y. S. 769; s. c. 45 App. Div. (N. Y.) 450. The board of police and fire commissioners of the city of Galveston were held to be separate and independent of the city council and not subject to its control, in *Jones v. Dougherty* (Tex. Civ. App.), 56 S. W. 596.

is vested with a large degree of discretion and is usually untrammelled in his action where it is within the scope of power of a peace officer. And while his appointment and compensation are purely matters of municipal control and regulation he is nevertheless a state officer whose action or non-action, nonfeasance or misfeasance, as a rule are not subject to judicial surveillance, mandatory direction, nor is he subject to an action for damages. Where the sole power to make transfers of the force is in the chief of police, the action of the police commissioners in remanding a policeman to patrol duty is to be regarded as a mere recommendation and the act of removal is the act of the chief.²⁷ The chief of police is not liable personally in damages for the issuance and service of a warrant on a person charged with the violation of an ordinance when in fact he was not guilty. The rule is that if officers charged with the enforcement of an ordinance are not without jurisdiction of the subject matter, they are exempt from civil liability for an error while acting within the jurisdiction given.²⁸

§ 1678. Fire department.—In most cities the fire department is a branch of the municipal government, though the matter of regulation and control is frequently vested in a board of fire commissioners whose powers and duties are designated by statute or ordinance, but who are nevertheless municipal officers. But notwithstanding this, owing to the nature of the duties devolving upon a fire department, as elsewhere seen, its officers, or agents, are engaged in a governmental function for whose acts the city is not liable, whether they be acts of omission or commission.²⁹ It has been contended that where a city organizes a fire department voluntarily, which is under the control of the city, whose officers and members are appointed, discharged and paid by it, and where the entire department is controlled and regulated and duties prescribed by ordinance, the relation of master and servant is created and the doctrine of respondeat superior applies as to acts of negligence. This contention, however, can not be sustained, While it is true that the services of a fire department are performed by it as a voluntary organization of the municipality, yet they are not in fact municipal acts from which the corporation as such receives a special benefit, but are, to all intents and purposes, acts performed in the public service for the performance or non-performance of which no

²⁷ *People v. Moss*, 58 N. Y. S. 1051; s. c. 42 App. Div. (N. Y.) 196.

²⁸ *Cottam v. Oregon City*, 98 Fed. 570. Utah laws of 1896 in relation to power of chief of police: *Eslinger v. Pratt*, 14 Utah 107; s. c. 46 Pac. 763. Where the council has control

of the police department it may abolish such offices as it sees fit in the department, and their salaries thenceforth cease: *Meissner v. Boyle*, 20 Utah 316; s. c. 58 Pac. 1110.

²⁹ *Wilcox v. Chicago*, 107 Ill. 334, 337; s. c. 47 Am. R. 434.

action lies. This doctrine is sustained by the great weight of authority as well as reason.³⁰ Besides if it were the law that a municipality could be held for action or non-action, the negligence and want of care in preservation of property from fire, it would be disastrous to the city from a financial standpoint, possibly equal to the value of the property destroyed, so that public policy would dictate exemption from liability.³¹ The owner or occupant of a building was not required at common law to keep it in a reasonably safe condition for members of a fire department, who in the exercise of their duties might have occasion to enter the building.^{31a} The abolition of the position of hydrant inspector for economic reasons and to secure uniformity of method is not of itself evidence of bad faith in the matter of removal. The appointment, removal, salary and other incidental matters in connection with firemen have been heretofore considered.³²

³⁰ *Wilcox v. Chicago*, 107 Ill. 334; s. c. 47 Am. R. 434; *Maxmilian v. Mayor &c.*, 62 N. Y. 160; s. c. 20 Am. R. 468; *Smith v. City of Rochester*, 76 N. Y. 506, 513; *Jewett v. City of New Haven*, 38 Conn. 368; s. c. 9 Am. R. 382; *Ogg v. City of Lansing*, 35 Iowa 495; s. c. 14 Am. R. 499; *Field v. City of Des Moines*, 39 Iowa 575; s. c. 18 Am. R. 46; *Heller v. Mayor &c.*, 53 Mo. 159; s. c. 14 Am. R. 444; *Howard v. City of San Francisco*, 51 Cal. 52; *Hafford v. City of New Bedford*, 16 Gray (Mass.) 297; *Fisher v. City of Boston*, 104 Mass. 87; s. c. 6 Am. R. 196.

³¹ *Wilcox v. City of Chicago*, 107 Ill. 334, 337; s. c. 47 Am. R. 434; *Hamilton v. Minneapolis Desk Mfg. Co.*, 78 Minn. 3; s. c. 80 N. W. 593; *People v. Scannell*, 62 N. Y. S. 930; s. c. 48 App. Div. (N. Y.) 445. The rights of a widow of a deceased fireman to participate in a fireman's pension fund discussed and determined in *In re Tobin*, 66 N. Y. S. 97; s. c. 53 App. Div. (N. Y.) 453. As to pay of engineers of steamers under charter of Greater New York, § 640, see *Donnelly v. City of New York*, 65 N. Y. S. 1030; s. c. 53 App. Div. (N. Y.) 447; 66 N. Y. S. 411; 54 App. Div. (N. Y.) 155. The retirement provided for by § 790, laws of 1897, New York charter, is not a removal within the meaning of laws

of 1899, ch. 370, § 21, in relation to the removal of honorably discharged soldiers: *People v. Scannell*, 65 N. Y. S. 832; s. c. 53 App. Div. (N. Y.) 161. When so provided by statute a commissioner may try a fireman for an alleged offense committed before the act went into effect under which jurisdiction was given him: *People v. Coyle*, 64 N. Y. S. 894; s. c. 31 Misc. (N. Y.) 593; 66 N. Y. S. 827; 55 App. Div. (N. Y.) 223. Where the rule providing for the appointment of persons in the fire department limits applicants to ages between nineteen and twenty-eight a person over twenty-eight, but not twenty-nine, is ineligible: *State v. Hyman*, 19 Ohio C. C. 622.

^{31a} *Hamilton v. Minneapolis Desk Mfg. Co.*, 78 Minn. 3; s. c. 80 N. W. 693; *Woods v. Miller*, 30 App. Div. (N. Y.) 232; s. c. 52 N. Y. S. 217; 86 N. Y. St. 217.

³² Chapter 32. Where the statute provides that honorably discharged firemen holding positions in cities and counties shall not be discharged without notice and an opportunity to defend afforded, such statute does not apply where the office is abolished in good faith: *People v. York*, 65 N. Y. S. 1074; s. c. 53 App. Div. (N. Y.) 429. Where the salary of firemen is illegally reduced by the fire commissioners the acceptance of the reduced salary does not

§ 1678a. **Department of parks.**—Park boards, park commissioners, or by whatsoever name they are called, are of two kinds or rather of two modes of creation. In some instances they are organized under provisions of the charter and are under the municipal regulation and control. In other cases they are creations of the legislature under general or special acts and when organized form municipal corporations with general powers granted, including the powers of condemnation, taxation and other like powers, covering the scope and purpose of their creation. As to the creation of this latter class within the territorial limits of municipalities resulting in the existence of two municipal corporations at the same time in the same locality it has been contended that no such power exists; that no two corporations can exist at the same time within the same territory, exercising the same powers, jurisdiction and privileges.³⁴ The contention as a general doctrine is true, and the creation of a park within the city limits and placing the same within the control of a park board as a separate entity does not ipso facto oust the city of its general jurisdiction, but it does place in the park board the power of laying out, improving and the management and control of the park property. To that extent the jurisdiction of the board is exclusive. With this limitation then it is true that the municipality and park board may occupy the legal position of two independent and co-equal municipalities at the same time in the same district. If in such case the park board should be dissolved for any reason the park property would revert to the city and it would resume its jurisdiction and control.³⁵ Where the depart-

prevent the recovery of the residue: *Brauer v. City of Portland*, 35 Or. 471; s. c. 58 Pac. 861; 59 Pac. 117; 60 Pac. 378. Where the salary of an officer in the fire department is illegally reduced, but he agrees to work for the reduced amount and accepts such reduced salary at the end of each month, the contract being executed, he is bound by it: *De Boest v. Gambell*, 35 Or. 368; s. c. 58 Pac. 72. The charter of Atlantic City gives the city council power to appoint a chief engineer of the fire department under that clause providing for the appointment of all subordinate officers who may, in the opinion of the city council, be necessary for the promotion of the health or convenience and safety of the city: *Gouldley v. City Council*

&c., 63 N. J. L. 537; s. c. 42 Atl. 852. The board of fire commissioners of New York city have no power to abolish an office, merely to remove an officer and appoint another in his stead: *People v. La Grange*, 40 N. Y. S. 1026; s. c. 7 App. Div. (N. Y.) 311. Construction of charter of New York in reference to transfer of fire marshal of Brooklyn: *People v. Gray*, 53 N. Y. S. 274; s. c. 32 App. Div. (N. Y.) 458.

³⁴ *Taylor v. City of Ft. Wayne*, 47 Ind. 274; *Strosser v. City of Ft. Wayne*, 100 Ind. 443; *State v. Town of Winter Park*, 25 Fla. 371; s. c. 5 So. 818; *President &c. v. Society &c.*, 24 N. J. L. 385.

³⁵ *West Chicago Park Com'rs v. City of Chicago*, 152 Ill. 392; s. c. 38 N. E. 697.

ment of parks is vested with the exclusive government, management and control of all parks, squares and public places without qualification, it has been held that the department was still in the performance of corporate city functions, the department of parks being recognized by the charter as part of the administrative power of the city.³⁶ There are other so-called boards common in the administration of municipal government in other departments of service, but they have received consideration as to their powers, duties and liabilities in connection with some other branches of the subject, mainly because they were municipal officers and are so treated and recognized.

³⁶ *Napier v. City of Brooklyn*, 58 N. Y. S. 506; s. c. 41 App. Div. (N. Y.) 274. Although a clerk was illegally removed from an office, but took no steps to review the order of removal or to be reinstated he can not recover salary for the period subsequent to his removal, another being employed and paid for such service: *Van Valkenburgh v. Mayor &c.*, 63 N. Y. S. 6; s. c. 49 App. Div. (N. Y.) 208. The removal of a clerk without compliance with laws of 1882, ch. 410, § 48, was held illegal in *Van Valkenburgh v. Mayor &c.*, 63 N. Y. S. 6; s. c. 49 App. Div. (N. Y.) 208. Riverside drive is part of Riverside park and under the jurisdiction of the department of parks: *Ackerman v. True*, 66 N. Y. S. 140; s. c. 31 Misc. (N. Y.) 597.

CHAPTER XLII.

DAMAGES IN MUNICIPAL MATTERS.

SECTION

1679. Elements of damages.

1680. The measure of damages.

1681. Damages to adjoining owners.

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grade.

SECTION

1683. Damages in case of independent contractor.

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1685. Damages in miscellaneous matters.

§ 1679. **Elements of damages.**—Damages are said to be the indemnity recoverable by a person who has sustained an injury, either in his person, property or relative rights through the act or default of another. Not all injuries, and particularly from a municipality, result in damages recoverable in a court. There are many acts of a city which is the representative or agent of the public which injure a resident in common with all others similarly situated for which no recovery can be had. A municipality may do many things which it has authority to do, and do them in a lawful manner, which result in injury to a person but which are denominated *damnum absque injuria*. There may be a legal injury, an invasion of the rights of another, without any substantial damage, which is called in law *injuria sine damno*. This includes all those causes of action wherein the court or jury is authorized to award nominal damages, and the judgment establishes a right rather than compensation. The elements which enter into the subject matter of damages must of necessity vary with each particular class of actions and may even vary with each action in a given class. “The elements of damage vary with the various kinds of action which may be brought and elements admissible in one kind of action are inadmissible in another.”¹ In municipal matters most cases involve the subject of negligence, in which to entitle a plaintiff to recover against a municipality, damage must be alleged and proved. Damages resulting from neglect of duty must result in a loss or there can be no recovery. It is an elementary rule of damages that they must be certain, both as to their nature and the causes from which they proceed.² An obstruction to the owner’s pas-

¹ Sedgwick *Elements of Damages*,

² *Griffin v. Colver*, 16 N. Y. 489.

sage to the street from his property is an element, and so of all other facts and circumstances calculated to depreciate the market value in the mind of one intending in good faith to purchase.³ The destruction of shade trees along the sidewalk in front of an owner's premises is a proper element of damages to be considered.⁴ Where it is sought to recover damages growing out of the erection of a viaduct, the profits of plaintiff's business before the erection and the losses thereafter are not admissible in evidence.⁵ The general rule is that anticipated profits are not recoverable in any case. The field opened by such an investigation is entirely too broad, and besides the element of certainty would be ignored.⁶ The cost of making alterations in buildings, unless made necessary by a change in the grade, so as to be as convenient of access as before, is not recoverable.⁷ In a proceeding to assess benefits and damages to property on which a spring of water is located, the special value of the spring should be considered with all lawful uses to which the spring may be put for profit.⁸ In a proceeding to establish damages and benefits from a public improvement growing out of the taking of property on streets that have not been graded it is proper to consider the property in its present condition and relations to other property and streets surrounding it.⁹ In an action to recover damages growing out of a change of grade, evidence having reference to conditions not growing out of the change of grade is not properly admissible.¹⁰ Where the action is for injury to the use and occupation, the plaintiff is entitled to recover such sum as fairly represents the damage to the use and occupation during the time specified growing out of the improvement.¹¹ Evidence as to the difficulty of connecting with a sewer rendered necessary by a change of grade is properly admissible.¹² Evidence as to the number of tenants in a building opposite plaintiff's property is not admissible in an action for damages growing out of a change of grade.¹³ Evidence that a less number of trains stopped at a station after the change of grade is not properly an element of damages.¹⁴

³ *City of Omaha v. Flood*, 57 Neb. 124; s. c. 77 N. W. 379.

⁴ *Walker v. City of Sedalia*, 74 Mo. App. 70.

⁵ *Sauer v. Mayor &c.*, 60 N. Y. S. 648; s. c. 44 App. Div. (N. Y.) 305.

⁶ *Philadelphia Ball Club v. City of Philadelphia*, 192 Pa. St. 632; s. c. 44 Atl. 265.

⁷ *Lotze v. City of Cincinnati*, 61 Ohio St. 272; s. c. 55 N. E. 828.

⁸ *Kansas City v. Bacon*, 157 Mo. 450; s. c. 57 S. W. 1045.

⁹ *Kansas City v. Bacon*, *supra*.

¹⁰ *Dana v. City of Boston*, 176 Mass. 97; s. c. 57 N. E. 325.

¹¹ *City of Louisville v. Coleburne*, 22 Ky. L. 64; s. c. 56 S. W. 681.

¹² *City of Chicago v. Jackson*, 88 Ill. App. 130.

¹³ *City of Chicago v. Jackson*, *supra*.

¹⁴ *City of Chicago v. Jackson*, *supra*.

§ 1680. **The measure of damages.**—The measure of damages must of necessity as in the elements of damages, vary with each particular class of cases. Thus in actions for breach of contract the proper measure must be different from the measure in actions of tort, for the simple reason that in the former the elements that enter into the adequate compensation for a breach are few and simple while in the latter, in most cases, the scope of investigation is very much more extended. If the injury is to the person or property and is the result of negligence there are elements that are not confined to pecuniary measurement by any recognized rules of value, and particularly so in personal injury cases. The measure of damages growing out of the torts of municipalities, and particularly from negligence in regard to its streets and sidewalks, has been considered in connection with those subjects. The measure of damages for injury to plaintiff's premises by backing sewage into his cellar is governed by the injury to his real estate, which includes loss of rents and necessary expense, except in so far as he could have guarded against it by reasonable care.¹⁵ Where by a proposed improvement a lessee is excluded from his premises or they are rendered useless he may abandon them and recover of the city the market value of the use of the premises for the remainder of the term.¹⁶ In determining the damages to real estate the proper measure of damages occasioned by the improvements is the difference in the market value of the property before and after the improvements are made. Profits present and prospective are not proper.¹⁷ But the difference in value before and after the improvement is not the true measure in a case where there is a continuing trespass, as in such case, the conditions existing when the suit is brought only can be recovered for.¹⁸ The measure is the difference in value of the property before and after the grade is changed.¹⁹ The whole cost of raising a lot to the changed grade is not the true measure, but the additional elevation occasioned by the change as affecting the value of the property after the change is admissible.²⁰ Where by reason of a change in the grade damages

¹⁵ *O'Brien v. City of Worcester*, 172 Mass. 348; s. c. 52 N. E. 385.

¹⁶ *Pause v. City of Atlanta*, 98 Ga. 92; s. c. 26 S. E. 489.

¹⁷ *Sanitary District of Chicago v. McGuirl*, 86 Ill. App. 392; *Rives v. City of Columbia*, 80 Mo. App. 173.

¹⁸ *Mott v. Lewis*, 65 N. Y. S. 31; s. c. 52 App. Div. (N. Y.) 558. Cf. *Uline v. New York & C. R. Co.*, 101 N. Y. 98; s. c. 4 N. E. 536; *Comesky v. Postal Tel. Cable Co.*, 41 App. Div. (N. Y.)

245; s. c. 58 N. Y. S. 467; *Pappenheim v. Metropolitan R. Co.*, 128 N. Y. 436; s. c. 28 N. E. 518; *Slingerland v. International Cont. Co.*, 43 App. Div. (N. Y.) 215; s. c. 60 N. Y. S. 12; *Stowers v. Gilbert*, 156 N. Y. 600; s. c. 51 N. E. 282.

¹⁹ *New Haven & C. Co. v. City of New Haven*, 72 Conn. 288; s. c. 44 Atl. 229, 609.

²⁰ *Mead v. City of Pittsburg*, 194 Pa. St. 392; s. c. 45 Atl. 59.

are sustained by an adjoining owner it is not proper to show that traffic has been diverted from one side of the street to the other, or to show the extent of traffic on one side as compared with the other, since the physical condition of the street, lot and buildings is capable of direct and certain proof independent of the action of the public.²² The measure of damage for a change of grade is the difference in the market value immediately after and immediately before.²³ The permanent maintenance of the grade as established is an element.²⁴ The statutes in some states provide for the appointment of appraisers of damages growing out of a change in grade.²⁵ Where a statutory method of determining the damages is provided a right of action does not accrue until the municipality has failed to proceed as required by statute.²⁶ The measure of damages caused by excavating the street is the difference in the market value before and after.²⁷ Probable expense in constructing a gate, planking, and maintaining a watchman at a street crossing of a railroad are not elements of damages for opening a street across a railroad.²⁸ In such case the decrease in value of the use for railroad purposes is proper.²⁹

§ 1681. **Damages to adjoining owners.**—As seen above it is not in all cases that a person who suffers an injury is enabled to recover damages therefor. All persons who become residents and property owners in a municipality do so with the knowledge and tacit consent that their private interests are at all times subject to the paramount interests of the public, and that public improvements are not to be retarded or circumscribed by incidental private injuries. Therefore where an owner of property is obstructed in the access to and egress from a building owned by him during the progress of a public improvement, the damages are incidental and no recovery in such case can be had.³⁰ But where the injury is permanent damages are re-

²² *City of Chicago v. Jackson*, 88 Ill. App. 130.

²³ *McCray v. Town of Fairmount*, 46 W. Va. 442; s. c. 33 S. E. 245; *City of Jacksonville v. Loan*, 65 Ill. App. 218; *Blair v. City of Charleston*, 43 W. Va. 62; s. c. 26 S. E. 341.

²⁴ *City of Omaha v. Flood*, 57 Neb. 124; s. c. 77 N. W. 379.

²⁵ *In re Brook Ave.*, 40 N. Y. S. 949; s. c. 8 App. Div. (N. Y.) 294; *Smith v. City of Omaha*, 49 Neb. 883; s. c. 69 N. W. 402; *Abel v. City of Minneapolis*, 68 Minn. 89; s. c. 70 N. W. 857.

²⁶ *Gilpin v. City of Ansonia*, 68 Conn. 72; s. c. 35 Atl. 777; *Pittellkow v. City of Milwaukee*, 94 Wis. 651; s. c. 69 N. W. 803.

²⁷ *City of Louisville v. Hegan*, 20 Ky. L. 1532; s. c. 49 S. W. 532. But see *Hampton v. Kansas City*, 74 Mo. App. 129.

²⁸ *Chicago &c. R. Co. v. City of Chicago*, 166 U. S. 226; s. c. 17 S. Ct. 581.

²⁹ *Chicago &c. R. Co. v. City of Chicago*, *supra*.

³⁰ *Sanitary Dist. of Chicago v. McGuirl*, 86 Ill. App. 392.

coverable. The abutting owner may recover damages growing out of the erection of a viaduct in front of his property by means of which access, light and air are interfered with.³¹ Nor is it necessary that the act which results in the injury shall be the act of the city if it is done under its control and supervision. Where a city gives a railroad corporation the grade of a street and directs where and how it shall be cut down and how the road shall be laid and the work is done under the direction and supervision of the city, the city is liable to the abutting property owner for damages.³² It has been held, however, that mere authority given by the city to another to do a thing does not make the city liable. Thus where work on a street is done by a railroad company under authority of the city and an abutting owner is injured the railroad company and not the city is liable.³³ If a sewer is legally laid out and constructed, but is maintained in such a manner as to create a private nuisance, the city is liable in damages; and so where a system of drains artificially diverts the surface water from its natural course and causes it to accumulate upon a person's land in such quantities as to create a private nuisance, it is liable. The city is liable in damages for constructing a sewer in such manner that it will terminate in a tail-race owned by an individual.³⁴ At common law the right of a land owner to lateral support seems to be admitted. So, where in the construction of a sewer no part of the adjoining land is taken, but by reason of the removal of the subsoil the land cracks and settles and the buildings are injured, recovery may be had.³⁵ A city has a right to empty its sewers into a natural stream, but will be liable to riparian owners for injury.³⁶ The owner of a lot may recover from the city the damages occasioned by taking part of his lot and damages to his trees and shrubbery.³⁷

³¹ *Sauer v. Mayor &c.*, 60 N. Y. S. 648; s. c. 44 App. Div. (N. Y.) 305. The permanent injury to a person's property adjoining an improvement renders the city liable: *Pause v. City of Atlanta*, 98 Ga. 92; s. c. 26 S. E. 489.

³² *Laager v. City of San Antonio* (Tex. Civ. App.), 57 S. W. 61.

³³ *Jordan v. City of Benwood*, 42 W. Va. 312; s. c. 26 S. E. 266.

³⁴ *Haskell v. City of New Bedford*, 108 Mass. 208; *Brayton v. City of Fall River*, 113 Mass. 218; *Manning v. City of Lowell*, 130 Mass. 21; *Bates v. Inhabitants &c.*, 151 Mass.

174; s. c. 23 N. E. 1070; *Nevins v. City of Fitchburg*, 174 Mass. 545; s. c. 55 N. E. 321.

³⁵ *Cabot v. Kingman*, 166 Mass. 403; s. c. 44 N. E. 344; *Gilmore v. Driscoll*, 122 Mass. 199.

³⁶ *City of Bloomington v. Costello*, 65 Ill. App. 407.

³⁷ *City of Ludlow v. Mackintosh*, 21 Ky. L. 924; s. c. 53 S. W. 524. Work by the street commissioner extending over a period of six weeks, and where the city disposed of some of the dirt, will constitute a prima facie case against the city for injury to an adjoining property own-

Benefits to an adjoining owner growing out of an improvement are a proper offset to damages suffered, such as improved light and ventilation and increased business facilities.³⁸ Where the statute authorizes the recovery of damages by an abutting property owner by reason of the change of grade it does not mean those alone who abut on the street where the grade is changed.³⁹

§ 1682. Damages from change of grade.—In the absence of a statute or constitutional provision providing therefor, the weight of authority in this country is that a city is not liable for consequential damages growing out of a change in the grade of a street or sidewalk.⁴⁰ The reason for the general rule is in the fact that an owner takes and holds property abutting on a street subject to the right of the city to change the grade as public necessity may require. The right to damages has been recognized in some jurisdictions where it is shown that the city is negligent in performing the work made necessary by a change in the grade;⁴¹ and also where the city has once established a grade and subsequently changes the grade thus established.⁴² In the absence of constitutional, statutory or charter pro-

er: *Richardson v. City of Webster*, 111 Iowa 427; s. c. 82 N. W. 920.

³⁸ *Lotze v. City of Cincinnati*, 61 Ohio St. 272; s. c. 55 N. E. 828.

³⁹ *Lewis v. Borough of Homestead*, 194 Pa. St. 199; s. c. 45 Atl. 123. An abutting property owner has a constitutional remedy for damages in Mo. independent of acts of 1893: *Walker v. City of Sedalia*, 74 Mo. App. 70. Owners of non-abutting property are not entitled to damages under N. Y. laws of 1888, ch. 345, § 12: *In re Grade Crossing Com'rs &c.*, 61 N. Y. S. 748; s. c. 46 App. Div. (N. Y.) 473. In a joint action by lot owners for injury to real estate growing out of walling up a sewer, recovery can not be had for injury to health: *O'Brien v. City of Worcester*, 172 Mass. 348; s. c. 52 N. E. 385.

⁴⁰ *Cummins v. City of Seymour*, 79 Ind. 491; s. c. 41 Am. R. 618; *Snyder v. President &c.*, 6 Ind. 237; *Simmons v. City of Camden*, 26 Ark. 276; s. c. 7 Am. R. 620; *Walish v.*

City of Milwaukee, 95 Wis. 16; s. c. 69 N. W. 818; *City of Quincy v. Jones*, 76 Ill. 231; s. c. 20 Am. R. 243. And see cases cited in note to *Radcliff v. Mayor*, 4 N. Y. 195; s. c. 53 Am. D. 357, and *Sheehy v. Kansas City &c. R. Co.*, 94 Mo. 574; s. c. 7 S. W. 579; 4 Am. St. 396; *Abel v. City of Minneapolis*, 68 Minn. 89; s. c. 70 N. W. 851. See contra: *Akron v. Chamberlain Co.*, 34 Ohio St. 328; s. c. 32 Am. R. 367; *City of Louisville v. City of Louisville Rolling Mill Co.*, 3 Bush (Ky.) 416; *City of Louisville v. Hegan*, 20 Ky. L. 1532; s. c. 49 S. W. 532; *Eaton v. Railroad Co.*, 51 N. H. 504; *Garraux v. City Council &c.*, 53 S. C. 575; s. c. 31 S. E. 597.

⁴¹ *Dorman v. City of Jacksonville*, 13 Fla. 538; s. c. 7 Am. R. 253; *Hendershott v. City of Ottumwa*, 46 Iowa 658; s. c. 26 Am. R. 182.

⁴² *City of Anderson v. Bain*, 120 Ind. 254; s. c. 22 N. E. 323; *City of Lafayette v. Nagle*, 113 Ind. 425; s. c. 15 N. E. 1; *Walish v. City of Milwaukee*, 95 Wis. 16; s. c. 69 N. W.

visions, a city is not liable for casting surface water on an adjoining lot unless the water is collected in a body and thrown upon the lot.⁴³ A mere increase in the amount will not create a liability unless the water is thrown on the premises in a body.⁴⁴ Where the city is liable by reason of the change in the grade of a street it is liable for a change in the grade of the sidewalk although the grade of the street remains as before.⁴⁵ Where a city opens and uses a street upon the natural surface it adopts the surface as a grade line and is liable for a change.⁴⁶ As in case of the negligent performance of the work, so the noncompliance with the street grade will render the city liable for damages to an abutting owner.⁴⁷ The city is not liable for damages caused by a railroad company in raising the grade of a street for the purpose of laying its tracks, although it grants the right to the company to lay its tracks and operate its road on such street;⁴⁸ nor is it liable for damages resulting from change of grade, which must be presumed to have been paid when the highway was laid out and originally constructed;⁴⁹ nor where a street committee has changed the grade without authority.⁵⁰ Where damages are allowed at all it is only the abutting owner that is entitled to them,⁵¹ but lessees may be entitled to them.⁵² A person purchasing property on a street where

818. Abutting owners whose land is not taken, but is injured by a change in the grade, are entitled to damages under N. Y. St. 1888, ch. 345, as amended in St. 1890, ch. 255: In re Grade Crossing Com'rs &c., 44 N. Y. S. 844; s. c. 17 App. Div. (N. Y.) 54. Under the constitution of Kentucky the city is liable for throwing surface water upon a person's property by the change in the grade of a street: City of Mt. Sterling v. Jephson, 21 Ky. L. 1028; s. c. 53 S. W. 1046. In the absence of a statute a city is not liable in damages for a change of grade: Ehram v. City of Utica, 55 N. Y. S. 942; s. c. 37 App. Div. (N. Y.) 272.

⁴³ Yeager v. Town of Fairmount, 43 W. Va. 259; s. c. 27 S. E. 234.

⁴⁴ Jordan v. City of Benwood, 42 W. Va. 312; s. c. 26 S. E. 266. Where by reason of a change in the grade surface water is collected and carried by a gutter and discharged upon private property the city is

liable: Carll v. Village of Northport, 42 N. Y. S. 576; s. c. 11 App. Div. (N. Y.) 120.

⁴⁵ Hinckley v. Franklin, 69 N. H. 614; s. c. 45 Atl. 643; McGar v. Borough of Bristol, 71 Conn. 652; s. c. 42 Atl. 1000.

⁴⁶ Blair v. City of Charleston, 43 W. Va. 62; s. c. 26 S. E. 341; 35 L. R. A. 852.

⁴⁷ Blanden v. City of Ft. Dodge, 102 Iowa 441; s. c. 71 N. W. 411.

⁴⁸ Vigeant v. City of Marlborough, 175 Mass. 459; s. c. 56 N. E. 708. But see Denison & Co. v. James, 20 Tex. Civ. App. 358; s. c. 49 S. W. 660.

⁴⁹ Almy v. Coggeshall, 19 R. I. 549; s. c. 36 Atl. 1124.

⁵⁰ Maudlin v. City of Trenton, 67 Mo. App. 452.

⁵¹ Cherry v. City of Rock Hill, 48 S. C. 553; s. c. sub nom. Cherry v. Fewell, 26 S. E. 798.

⁵² In re Grade Crossing Com'rs, 44 N. Y. S. 844; s. c. 17 App. Div. (N. Y.) 54.

the grade is established must improve with reference to such grade and not the natural grade.⁵³ The payment of damages to an abutting owner is not a condition precedent to making the changes unless made so by statute.⁵⁴ Special benefits, but not general benefits, arising from a change of grade may be deducted from the damages.⁵⁵ The widening of a street and a subsequent change of grade are separate causes of action, and one is not a bar to the other.⁵⁶ By an act of congress half of the damages awarded to owners may be assessed against the District of Columbia and the other half against the lands benefited, without a jury.⁵⁷ Plaintiff is not estopped from claiming damages to his property by soliciting a city council to adopt a wrongful method of grading a street.⁵⁸ In an action to recover damages for a change of grade it is not proper to put in evidence a former change of grade and expenses thereof.⁵⁹ The damages suffered by an abutting owner by reason of depressing the grade are not confined to the cost of a retaining wall.⁶⁰ The term "alter" as used in a charter means any change in the structural formation of a street such as raising or lowering its surface or change of location.⁶¹ Authority to close streets and sell the freehold of such streets, and to lay out such new streets as shall be of public benefit, provided the consent of the abutting owners be obtained, does not make the city liable for damages for raising a sidewalk in front of an owner's property.⁶² The city is not liable to a gas company for damages for removing its mains from a street discontinued by the city where it is not shown that the removal of its mains has diminished the value of its land.⁶³ Where a street is in part vacated the city is liable for damages based on the special inconvenience to a property owner in being deprived of the previous access to his property.⁶⁴

§ 1683. **Damages in case of an independent contractor.**—It is the settled law of England that one employing another is not liable for

⁵³ *City of Omaha v. Williams*, 52 Neb. 40; s. c. 71 N. W. 970.

⁵⁴ *Gilpin v. City of Ansonia*, 68 Conn. 72; s. c. 35 Atl. 777.

⁵⁵ *Blair v. City of Charleston*, 43 W. Va. 62; s. c. 26 S. E. 341.

⁵⁶ *Rodgers v. City of Philadelphia*, 181 Pa. St. 243; s. c. 37 Atl. 339.

⁵⁷ *Bauman v. Ross*, 167 U. S. 548; s. c. 17 S. Ct. 966.

⁵⁸ *Blanden v. City of Ft. Dodge*, 102 Iowa 441; s. c. 71 N. W. 411. Where a time is fixed for objections and presenting a claim for damages it is a waiver not to appear: *Kansas*

City v. Duncan, 135 Mo. 571; s. c. 37 S. W. 513.

⁵⁹ *Watson v. City of Columbia*, 77 Mo. App. 267.

⁶⁰ *Hamilton & Co. v. Rape*, 101 Tenn. 222; s. c. 47 S. W. 416.

⁶¹ *Paris Mountain Water Co. v. City Council &c.*, 53 S. C. 82; s. c. 30 S. E. 699.

⁶² *Bramlett v. City of Laurens*, 58 S. C. 89; s. c. 36 S. E. 444.

⁶³ *Natick Gaslight Co. v. Inhabitants &c.*, 175 Mass. 246; s. c. 56 N. E. 292.

⁶⁴ *City of Chicago v. Baker*, 98 Fed.

his collateral negligence unless the relation of master and servant existed between them: so that a person employing a contractor to do work is not liable for the negligence of that person or his servants. On the other hand, a person causing something to be done, the doing of which casts upon him a duty, can not escape responsibility attaching to him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he can not thereby relieve himself from liability to those injured by the failure to perform it.⁶⁵ Where the contractor is to do the work under the direction and subject to the approval of the city it is liable. If the city reserves the right to control and direct the action of the contractor it fixes the liability; and in such case it is not the exercise of the actual power to control, but the right to exercise that right under the contract that determines the question.⁶⁶

§ 1684. **Damages where city fails to assess.**—Where a city makes a contract and neglects or refuses to levy an assessment to pay the indebtedness created thereby it is liable in damages;⁶⁷ but a mere

830. Where the city's witnesses place plaintiff's damages at from \$15,000 to \$25,000, and the plaintiff's witnesses place the damages at from \$76,000 to \$81,000, an award of \$56,000 is not so palpably against the weight of evidence as to justify the setting aside of the verdict: *In re Grade Crossing Com'rs &c.*, 64 N. Y. S. 1074; s. c. 52 App. Div. (N. Y.) 122. Construction of Mich. St. 1893, in relation to damages to abutting owner by reason of grades: *Harper v. City of Detroit*, 110 Mich. 427; s. c. 68 N. W. 265. The changes made after an alteration of the grade to be recoverable must be necessary changes resulting from the change in the grade: *Philadelphia Ball Club v. City of Philadelphia*, 192 Pa. St. 632; s. c. 44 Atl. 265.

⁶⁵ *Cabot v. Kingman*, 166 Mass. 403; s. c. 44 N. E. 344; *Dalton v. Angus*, 6 App. Cas. 740, 829; *Hale v. Sittingbourne &c. R. Co.*, 6 H. & N. 488; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Tarry v. Ashton*, 1 Q. B. D. 314; *Hughes v. Percival*, 8 App. Cas. 443; *Bower v. Peate*, 1 Q. B. D. 321; *Hardaker v. Idle Dist.*

Council, (1896) 1 Q. B. 335; *Woodman v. Metropolitan R. Co.*, 149 Mass. 335; s. c. 21 N. E. 482; *Blessington v. City of Boston*, 153 Mass. 409; s. c. 26 N. E. 1113; *Harding v. City of Boston*, 163 Mass. 14; s. c. 39 N. E. 411.

⁶⁶ *Lennehan v. Rollins*, 137 Mass. 123; *City of Erie v. Caulkins*, 85 Pa. St. 247; *Railroad Co. v. Hansing*, 15 Wall. 649; *Eaton v. European &c. R. Co.*, 59 Maine 520; *City of Cincinnati v. Stone*, 5 Ohio St. 38; *Clapp v. Kemp*, 122 Mass. 481; *Brooks v. Inhabitants &c.*, 106 Mass. 271; *Kimball v. Cushman*, 103 Mass. 194. Contractors not proper parties although they have agreed to indemnify the city for damages growing out of carelessness: *Sauer v. Mayor &c.*, 41 N. Y. S. 957; s. c. 10 App. Div. (N. Y.) 267.

⁶⁷ *Heller v. City of Garden City*, 58 Kan. 263; s. c. 48 Pac. 841; *McEwan v. City of Spokane*, 16 Wash. 212; s. c. 47 Pac. 433; *McCann v. City of Albany*, 42 N. Y. S. 94; s. c. 11 App. Div. (N. Y.) 378; *Bowman v. City of Colfax*, 17 Wash. 344; s. c. 49 Pac. 551.

stay of an assessment proceeding does not render a city liable for interest.⁶⁸ Where money has been wrongfully collected and illegally retained by a municipality, interest may be recovered as damages.⁶⁹ Where a resolution provided that damages resulting from a ditch should be paid by private parties, which plaintiff knew or had reason to know, he is not estopped from recovering damages from the city, though he did not notify the city that he would not look to the private parties.⁷⁰ While it has been held that mandamus will lie to compel an assessment, it has also been held that equity has jurisdiction to enforce and protect the rights of a contractor;⁷¹ but where a city has no power to contract for improvements payable out of the general fund it can not be made liable to a contractor for its failure to provide a special fund for such payment.⁷²

§ 1685. **Damages in miscellaneous matters.**—Where, as a result of cutting down a street on which no grade has been established, access to abutting property is rendered more difficult, a retaining wall rendered necessary, and shade trees injured or destroyed, the city is liable in damages.⁷³ Where merchandise is injured by the inundation of a cellar caused by the negligence of the city in permitting the obstruction of a gutter it is liable.⁷⁴ A town is liable in damages for injury to a well though none of the owner's land is taken.⁷⁵ Where a city collects water and carries it out of its natural course it is its duty to furnish an outlet, and while it may not be liable primarily for an obstruction to this outlet by another, but having notice that it had been stopped, it is liable for not removing or causing to be removed the obstruction.⁷⁶ A city has no right to collect surface water in a channel and pour it on the land of another.⁷⁷ Where the city constructed certain catch-basins by reason

⁶⁸ *Vider v. City of Chicago*, 164 Ill. 354; s. c. 45 N. E. 720; *City of Chicago v. People*, 56 Ill. 327.

⁶⁹ *La Salle Co. v. Simmons*, 5 Gilm. (Ill.) 513; *Bourland v. Peoria Co.*, 16 Ill. 538; *Pike Co. v. Hosford*, 11 Ill. 170.

⁷⁰ *City of Dallas v. Beeman*, 23 Tex. Civ. App. 315; s. c. 55 S. W. 762.

⁷¹ *German Am. Sav. Bank v. City of Spokane*, 17 Wash. 315; s. c. 47 Pac. 1103; 49 Pac. 542.

⁷² *German Am. Sav. Bank v. City of Spokane*, *supra*.

⁷³ *Richardson v. City of Webster City*, 111 Iowa 427; s. c. 82 N. W. 920.

⁷⁴ *Schumacher v. City of New York*, 57 N. Y. S. 968; s. c. 40 App. Div. (N. Y.) 320.

⁷⁵ *Bickford v. Inhabitants &c.*, 173 Mass. 552; s. c. 54 N. E. 343.

⁷⁶ *City of Effingham v. Surrells*, 77 Ill. App. 460.

⁷⁷ *Town of Thornton v. Fugate*, 21 Ind. App. 537; s. c. 52 N. E. 763. It has been held that stoppage of surface water by grading a street and thus overflowing contiguous property is not actionable: *Harp v. City of Baraboo*, 101 Wis. 368; s. c. 77 N. W. 744.

of which a greater amount of water was discharged in front of plaintiff's property, tort will not lie for such damages in the absence of proof that the improvements were not properly constructed. The remedy is statutory.⁷⁸ An injury from a viaduct is a continuing injury, and recovery may be had for the time not barred by statute, though the right of action for the erection is barred.⁷⁹ Interest from the time of liquidating the damages to the date of final judgment is recoverable, if the plaintiff is not at fault in the matter of delay.⁸⁰ Interest is not included in assessing benefits and damages.⁸¹ The assessment by commissioners of damages and benefits will not be disturbed by the courts unless some error in law is manifest or unless the commissioners adopted some erroneous principles in arriving at a conclusion.⁸² Where a resolution appropriated a certain sum to shorten a creek provided the adjoining property owners would raise any additional money needed, \$250 of which was raised and paid, after which work was begun and plaintiff injured, the evidence sustained a finding that the work was authorized by the city and it was liable.⁸³ Where plaintiff has erected buildings with reference to the grade as then established, and has protested against a change in the grade, he is not liable for an assessment for improvements according to the new grade where the city has not ascertained or tendered his damages.⁸⁴ Where the award of commissioners is made by the law "final and conclusive" as to land taken for park purposes, the confirmation of the award vests the title in the city free and clear of all liens, and liens on the lands if any are transferred to the fund.⁸⁵ A release of damages based upon being permitted to connect with a sewer is not a release of damages for an overflow caused by a subsequent change in the established grade of the streets and thus throwing additional water into the sewer and overcharging it.⁸⁶ Unassessed taxes are not liquidated and not the subject of set-off against damages of a property owner.⁸⁷ An adjoining owner's damages growing out of a

⁷⁸ *Holleran v. City of Boston*, 176 Mass. 75; s. c. 57 N. E. 220. Cf. *Kennison v. Inhabitants &c.*, 146 Mass. 467; s. c. 16 N. E. 278.

⁷⁹ *Phelps v. City of Detroit*, 120 Mich. 447; s. c. 79 N. W. 640.

⁸⁰ *New Haven &c. Co. v. City of New Haven*, 72 Conn. 276; s. c. 44 Atl. 229, 609.

⁸¹ *In re Opening of East 169th St.*, 56 N. Y. S. 819; s. c. 26 Misc. (N. Y.) 257.

⁸² *City of Kingston v. Terry*, 53 N. Y. S. 652; s. c. 24 Misc. (N. Y.) 616.

⁸³ *City of Dallas v. Beeman*, 23 Tex. Civ. App. 315; s. c. 55 S. W. 762.

⁸⁴ *Whitaker v. City of Deadwood*, 12 S. Dak. 608; s. c. 82 N. W. 202.

⁸⁵ *Carpenter v. City of New York*, 60 N. Y. S. 633; s. c. 44 App. Div. (N. Y.) 230.

⁸⁶ *King v. Granger*, 21 R. I. 93; s. c. 41 Atl. 1012.

⁸⁷ *Jarboe v. City of Carrollton*, 73 Mo. App. 347.

change of grade are unaffected by his subsequent conveyance without reservation.⁸⁸ A city is not liable for incidental injuries which grow out of the exercise of legislative powers in the erection of public improvements, if the premises are not invaded.⁸⁹ Where one of the owners of property abutting on a street where the grade has been changed brought suit to determine his damages against the city under the statute of 1889, and the remaining property owners took no steps to determine their rights until the first suit was determined, they are not guilty of laches.⁹⁰ The approving of the action of commissioners by a city council does not have the effect of a judgment unless it strictly conforms to the statute.⁹¹ The finding of viewers is conclusive as to damages to private property from public improvements.⁹²

⁸⁸ *Hodgman v. Concord*, 69 N. H. 349; s. c. 41 Atl. 287.

⁸⁹ *Town of Norman v. Ince*, 8 Okl. 412; s. c. 58 Pac. 632.

⁹⁰ *Rogge v. City of Elizabeth*, 64 N. J. L. 491; s. c. 46 Atl. 164.

⁹¹ *Busenbark v. Clements*, 22 Ind. App. 557; s. c. 53 N. E. 665.

⁹² *Gumbes v. City of Philadelphia* (Pa. St.), 43 Atl. 88. Construction of *Burns' R. S. Ind.* 1901, § 3623 (*Ind. Acts* 1891, p. 122), concerning damages in condemnation proceedings: *City of Terre Haute v. Evansville & c. R. Co.*, 149 Ind. 174; s. c. 46 N. E. 77; 37 L. R. A. 174. When petition was filed in time for damages under laws of Massachusetts,—see *Albro v. City of Fall River*, 175 Mass. 590; s. c. 56 N. E. 894. Authority of commissioners under N. Y. laws,—see *In re Caffrey*, 65 N. Y. S. 470; s. c. 52 App. Div. (N. Y.) 264. Under N. Y. laws of 1881, ch. 101, a survey and filing of a map of the rights affected is a prerequisite to the commissioners' right to take property: *Ledey v. City of Amsterdam*, 64 N. Y. S. 1036; s. c. 31 Misc.

(N. Y.) 123. Where a railroad company, under an ordinance, changes the grade of its tracks across a street and thus necessitates a change in the grade of a street the railroad and borough authorities are liable under Pa. Stat. of May 24, 1878: *Lewis v. Borough of Homestead*, 194 Pa. St. 199; s. c. 45 Atl. 123. The damages growing out of prohibiting the erection of buildings above a certain height may be assessed against the city under Mass. Stat. 1898, ch. 452: *Attorney-General v. Williams*, 174 Mass. 476; s. c. 55 N. E. 77. Remedy in R. I. is an appeal from appraisal of board of aldermen: *Almy v. Coggeshall*, 19 R. I. 549; s. c. 36 Atl. 1124. Damages for a building erected after the passage of an act for condemnation, but before commissioners had acted, if erected in good faith, may be recovered: *In re Mayor &c.*, 54 N. Y. S. 1066. An injured person, through negligence of contractor, has no lien on balance due from city: *Mansfield v. Mayor &c.*, 44 N. Y. S. 229; s. c. 15 App. Div. (N. Y.) 316.

CHAPTER XLIII.

PLEADING.

SECTION

- 1686. Necessary allegations.
- 1687. Unnecessary allegations.
- 1688. Sufficiency of allegations.
- 1689. Insufficiency of allegations.
- 1690. The declaration, complaint, or petition.

SECTION

- 1691. Bill in chancery—Allegations of.
- 1692. Variance between allegations and proof.
- 1693. Instructions to jury.

§ 1686. **Necessary allegations.**—It is not intended in this chapter to discuss the subject of pleading generally, the requirements in any special action or proceeding, or the sufficiency generally, but rather to illustrate the several topics by reference to the latest decisions applicable. In all proceedings by or against a municipality there are certain allegations which are termed in law “necessary allegations” or “averments” without which no action can be sustained. The court has a right to know what the cause of action is, and on what grounds the plaintiff bases his claim for recovery. The defendant has a right to know specifically the cause of action, and if the cause is based upon facts, or a series of facts, these facts must be alleged clearly and distinctly in order that he may admit or deny them as he shall deem best in establishing a defense. Hence there are certain allegations in every suit at law or in chancery that are regarded as necessary allegations, necessary to make out a cause of action, necessary to the introduction of evidence, and necessary to sustain a judgment when rendered. A few illustrations of what have been held to be necessary allegations are as follows: To entitle plaintiff to recover for services as jail guard he must allege that he was appointed by the city, or that it agreed to pay him, or that the services were rendered pursuant to a contract.¹ In an action against abutting property owners for an injury growing out of a defective sidewalk, it is incumbent on the plaintiff to allege and show a compliance with the statute in regard to notice to such owners to repair.² Where notice of an injury is required as a condition precedent to recovery the service of notice must

¹ City of Covington v. Elliott, 21 Ky. L. 895; s. c. 53 S. W. 526.

² Martinovich v. Wooley, 128 Cal. 141; s. c. 60 Pac. 760.

be averred.³ Where the statute provides that no person holding an appointive office in a city who has served the time required by law in the volunteer fire department, or shall have been a member at its disbandment, shall be removed except for cause, after hearing, a person claiming such protection must allege that he served the requisite time or was a member at its disbandment.⁴ Where, in an action to recover on municipal bonds, there is an allegation that plaintiff is the bona fide holder of such bonds, and the bonds recite the fact of their issuance pursuant to law, it is unnecessary to allege the facts showing regularity and legality.⁵ In an action to recover from a city money paid on a special assessment on the ground that the assessment was illegal, the facts which render the assessment void, and the payment under protest, must be alleged.⁶ Where the statute makes the giving of notice of the intention to commence suit for a personal injury a condition precedent, the complaint must allege the giving of such notice.⁷ In a suit to recover taxes wrongfully paid the petition must allege that the ordinance levying the tax and the assessment were duly made, the return of the assessment, that from it the tax-bills were duly made out, and signed by the clerk and were turned over to the city collector, setting out the tax-bill in its words or substance, and filing a copy of same and of the ordinance and assessment.⁸ In such a suit it is only necessary to allege the facts which the statute makes prima facie evidence of the right to recover.⁹ In a suit to recover a license fee for cars run upon a street railway, the number of cars run must be alleged.¹⁰ Where the statute provides that claims against municipal corporations shall be presented and payment refused before action brought, and that the complaint, unless verified and alleging such presentation and refusal, shall be dismissed, it applies only to actions ex contractu, and an allegation of such presentation and refusal is not required in an action for personal injuries received through a defective sidewalk.¹¹

³ *Pareley v. Incorporated Town of Mechanicsville*, 101 Iowa 266; s. c. 259. Y. S. 661; s. c. 44 App. Div. (N. Y.)

70 N. W. 189. But see *Frisby v. Town of Marshall*, 119 N. C. 570; L. 969; s. c. 53 S. W. 655. s. c. 26 S. E. 251.

⁴ *People v. Coler*, 57 N. Y. S. 636; s. c. 40 App. Div. (N. Y.) 65.

⁵ *Shepard v. Tulane Irr. Dist.*, 94 Fed. 1.

⁶ *Hawkeye Loan &c. Co. v. City of Marion*, 110 Iowa 468; s. c. 81 N. W. 718.

⁷ *Krall v. City of New York*, 60 N.

⁸ *Shuck v. City of Lebanon*, 21 Ky. L. 969; s. c. 53 S. W. 655.

⁹ *Shuck v. City of Lebanon*, supra.

¹⁰ *City of Cape May v. Cape May Transp. Co.*, 64 N. J. L. 80; s. c. 44 Atl. 948.

¹¹ *Neal v. Town of Marion*, 126 N. C. 412; s. c. 36 S. E. 117. Cf. *Shields v. Town of Durham*, 118 N. C. 450; s. c. 24 S. E. 794; *Frisby v. Town of Marshall*, 119 N. C. 570; s. c. 26 S. E.

§ 1687. **Unnecessary allegations.**—A policeman seeking to recover his salary during a period in which he was illegally removed and prevented from discharging his duties need not allege that he was ready and willing to perform his duties.¹² In a complaint by a contractor to foreclose an assessment lien it is not necessary to set out the contract, or the plans and specifications, where it is alleged that the contract was awarded to him on a certain date; that he made the improvement in accordance with the ordinance; that the improvement was accepted; that the engineer was ordered to report the final estimate of costs, which he did, which was filed and approved; and that the plans and estimates were on file in the engineer's office;¹³ nor in such case is it necessary to allege the date when the council ordered bids to be received nor the date of the contract.¹⁴ A complaint to enforce an assessment need not allege an assessment was due when it shows the assessment was made and that the statutory time for payment has passed.¹⁵ Where the injury grows out of a shock from an electric-light wire it is not necessary to allege that the city was authorized to operate an electric-light plant, if it is alleged that the city was organized under the general law which confers such authority.¹⁶ It is not necessary to aver that which the constitution requires, as the court will take judicial notice thereof.¹⁷ In a suit based on a municipal corporate obligation it is unnecessary to allege the authority of its agents.¹⁸

§ 1688. **Sufficiency of allegations.**—No matter under what form of procedure, there are certain well-known requirements as to the sufficiency of allegations either in making out a cause of action or a defense. In an action to enforce the lien of a special assessment an allegation that the board had duly made and passed the resolution was a sufficient averment of the facts to show jurisdiction on the part of the board.¹⁹ In a street assessment proceeding it is not necessary to allege the terms of the agency of the person making the demand, or that plaintiff had authorized him to make the demand.²⁰ An averment that plaintiff was without fault and in the

251; *Sheldon v. City of Asheville*, 119 N. C. 606; s. c. 25 S. E. 781; *Nicholson v. Commissioners &c.*, 121 N. C. 27; s. c. 27 S. E. 996.

¹² *Everill v. Swan*, 20 Utah 56; s. c. 57 Pac. 716.

¹³ *Lewis v. Albertson*, 23 Ind. App. 147; s. c. 53 N. E. 1071.

¹⁴ *Lewis v. Albertson*, *supra*.

¹⁵ *Lewis v. Albertson*, *supra*.

¹⁶ *City of Honey Grove v. Lamas-ter* (Tex.), 50 S. W. 1053.

¹⁷ *Berlin Iron Bridge Co. v. City of San Antonio*, 92 Tex. 388; s. c. 49 S. W. 211; 50 S. W. 408.

¹⁸ *Board &c. v. Board &c.*, 63 N. J. L. 371; s. c. 43 Atl. 722.

¹⁹ *Williams v. Bergin*, 127 Cal. 578; s. c. 60 Pac. 164.

²⁰ *Williams v. Bergin*, *supra*.

exercise of care and skill is sufficient; that the team was an ordinarily gentle one, such as could be intrusted to one of plaintiff's age.²¹ Where a city ordinance is pleaded merely to show defendant's negligence, its title, date, substance, etc., need not be pleaded.²² Any direct damages are "special damages" and need not be particularly pleaded.²³ An averment that plaintiff was injured in a public highway in the city is sufficient without an averment that the highway was one the defendant was bound to repair.²⁴ An averment that the city suffered and permitted a sidewalk to be and remain in bad repair, without alleging a failure to repair in a reasonable time after notice, is sufficient when questioned for the first time on trial.²⁵ A bill to enforce an assessment need only allege a substantial compliance with the statute.²⁶ An information describing an offense in the language of the ordinance is sufficient.²⁷ An averment as to the publication of notice of a street improvement is, after verdict, and in the absence of a special demurrer, sufficient if it alleges that the notice was posted and published in the manner prescribed by law.²⁸ An allegation by the assignee of a special tax-bill issued by a city of the making of the bill, the contents thereof with dates, assignment, filing and the ownership of the lot, is sufficient.²⁹ In an action by a municipality to recover special taxes the pleading of the ordinances making the levy is sufficient without alleging the indebtedness or the facts constituting the indebtedness.³⁰ An allegation that the defendant wrongfully and negligently permitted a sidewalk to be and remain unsafe and out of repair implies notice.³¹ An averment of the defective condition of the entire block where the injury occurred is sufficient to show notice.³² The fact that a street lamp was not lighted may be testified to in the absence of an averment to that effect, it being a circumstance bearing upon the degree of plaintiff's care.³³ An allegation that a board was organized and acting under

²¹ *City of Mt. Vernon v. Hoehn*, 22 Ind. App. 282; s. c. 53 N. E. 654.

²² *Nohrden v. Northeastern R. Co.*, 54 S. C. 492; s. c. 32 S. E. 524.

²³ *McGar v. Borough of Bristol*, 71 Conn. 652; s. c. 42 Atl. 1000.

²⁴ *Thompson v. City of Corpus Christi* (Tex.), 38 S. W. 373.

²⁵ *Storrs v. City of Grand Rapids*, 110 Mich. 483; s. c. 68 N. W. 258.

²⁶ *City of Parkersburg v. Tavenner*, 42 W. Va. 486; s. c. 26 S. E. 179.

²⁷ *City of Kansas City v. Zahner*, 73 Mo. App. 396.

²⁸ *California Imp. Co. v. Reynolds*, 123 Cal. 88; s. c. 55 Pac. 802.

²⁹ *City of Carthage v. Badgley*, 73 Mo. App. 123.

³⁰ *City of San Antonio v. Berry*, 92 Tex. 319; s. c. 48 S. W. 496.

³¹ *City of Nokomis v. Salter*, 61 Ill. App. 150. But see *City of Junction City v. Blades*, 1 Kan. App. 85; s. c. 41 Pac. 677.

³² *Strudgeon v. Village of Sand Beach*, 107 Mich. 496; s. c. 65 N. W. 616.

³³ *Village of Cullom v. Justice*, 161 Ill. 372; s. c. 43 N. E. 1098.

the laws providing for such board is sufficient without alleging that it was legally constituted.³⁴ Where fraud is charged in the making of a contract by the common council with a telephone company, the facts which would constitute a case of fraud must be alleged. The mere statement is not sufficient that other unincorporated persons had agreed to pay \$15,000 for the franchise granted to the company or bid therefor, non constat the contract with the incorporated company in the judgment of the council may have been more beneficial to the city.³⁵ A complaint alleging that defendant, the city of Ottawa, was a municipal corporation and that the sidewalk on a designated street in said city was, and had been, in a dangerous and defective condition, etc., is sufficient though it does not allege that the sidewalk was in the city of Ottawa.³⁶ Where an injury was sustained by falling through a coal hole erected and maintained by an abutting owner for the use of his tenants, the petition is sufficient if it alleges the ownership of the building, its location to the street, the nature of the covering, its unsafe and dangerous condition; that defendant had actual notice of the dangerous condition; that plaintiff, thinking the covering was safe and secure, stepped upon it and was precipitated through the hole, etc.³⁷ If there are allegations which if proven would warrant the jury in inferring that the city had notice or knowledge of an obstruction in the street, it is not necessary that the declaration contain direct allegations of knowledge or notice.³⁸

§ 1689. **Insufficiency of allegations.**—An averment that a municipality at the time of incurring an indebtedness was indebted in ex-

³⁴ *City of Huntington v. Boyd*, 25 Ind. App. 250; s. c. 57 N. E. 939.

³⁵ *Barhite v. Home Tel. Co. &c.*, 63 N. Y. S. 659; s. c. 50 App. Div. (N. Y.) 25.

³⁶ *City of Ottawa v. McCreery*, 10 Kan. App. 443; s. c. 61 Pac. 986.

³⁷ *Collier v. Hyatt*, 110 Ga. 317; s. c. 35 S. E. 271.

³⁸ *Downs v. Commissioners &c.*, 2 Penn. (Del.) 132; s. c. 45 Atl. 717. An allegation that a resolution was legally passed by the board of aldermen, after a full hearing of all parties in interest at a legal meeting by a majority vote of all qualified aldermen, was held sufficient: *Cate v. Martin*, 69 N. H. 610; s. c. 45 Atl. 644. (This case would seem to violate a well-known principle in

pleading. That the resolution was "legally passed," "at a full hearing" "at a legal meeting," "by a majority vote" of "qualified aldermen" can be conclusions only.) Averments held sufficient in *Mayor &c. v. Starr*, 112 Ala. 98; s. c. 20 So. 424; *Elliott v. Field*, 21 Colo. 378; s. c. 41 Pac. 504; *City of Huntingburgh v. First*, 15 Ind. App. 552; s. c. 43 N. E. 17. Sufficiency of allegation as to fixing of street grade,—see *Bitzer v. O'Bryan*, 21 Ky. L. 1307; s. c. 54 S. W. 951. Reference to an ordinance in a pleading as a certain ordinance of the city of T., known as ordinance No. 66, is not sufficient under Cal. Code Civ. Proc., § 459: *City of Tulare v. Hevren*, 126 Cal. 226; s. c. 58 Pac. 530.

cess of the constitutional limit is not sufficient. It must allege the amount of indebtedness and amount of taxable property in order that the court may determine whether the constitutional limit has been exceeded.³⁹ In an allegation of fraud in a special assessment the facts which constitute the fraud must be set out.⁴⁰ An allegation that a tax has been levied to pay an alleged void judgment, without stating the facts which render the judgment void, is not sufficient.⁴¹ An averment in a proceeding to foreclose an assessment lien that an engineer's certificate was never duly or properly or legally recorded is a mere conclusion and void.⁴² In pleading an ordinance reference to its title is not sufficient. It must be pleaded at least in substance.⁴³ An allegation that defendant knew a sidewalk was out of repair is not a sufficient allegation that defendant knew of the defect causing the injury.⁴⁴ An allegation in a complaint to cancel a contract entered into between the common council and a telephone company that the contract was made to favor the telephone company, without setting out the facts that justify the conclusion, is wholly insufficient to justify a judicial investigation as to the reasons which actuated the council in making the contract.⁴⁵ An allegation upon information and belief that the promoters and persons interested in a water company and others conspired to cheat and defraud the city by means of the proposed contract is insufficient.⁴⁶ An allegation in a complaint upon information and belief that a contract about to be entered into is the result of a fraudulent political combination is not sufficient.⁴⁷ An averment of things not necessary to a recovery is demurrable.⁴⁸ A complaint seeking to recover a penalty for not keeping a number conspicuous on a vehicle by "owners or drivers" is not sufficient in alleging that defendant was carrying passengers for hire.⁴⁹

§ 1690. **The declaration, complaint, or petition.**—Whether the plaintiff's statement of his cause of action contains the necessary averments depends upon the kind of action and the nature of the par-

³⁹ *Perry v. Brown*, 21 Ky. L. 344; s. c. 51 S. W. 457.

⁴⁰ *Willard v. Albertson*, 23 Ind. App. 162; s. c. 53 N. E. 1076; 54 N. E. 446.

⁴¹ *Weber v. Dillon*, 7 Okl. 568; s. c. 54 Pac. 894.

⁴² *Ede v. Cuneo* (Cal.), 55 Pac. 388.

⁴³ *Watt v. Jones*, 60 Kan. 201; s. c. 56 Pac. 16.

⁴⁴ *City of Huntington v. Burke*, 12 Ind. App. 133; s. c. 39 N. E. 170.

⁴⁵ *Barhite v. Home Tel. Co.*, 63 N. Y. S. 659; s. c. 49 App. Div. (N. Y.) 25.

⁴⁶ *Keator v. Dalton*, 62 N. Y. S. 878; s. c. 29 Misc. (N. Y.) 692.

⁴⁷ *Press Pub. Co. v. Holahan*, 62 N. Y. S. 872; s. c. 29 Misc. (N. Y.) 684.

⁴⁸ *City of Carthage &c. v. Badgley*, 73 Mo. App. 123.

⁴⁹ *Osborne v. Borough of Springlake*, 64 N. J. L. 362; s. c. 46 Atl. 164.

ticular cause of complaint which is the basis of the right of recovery. A few illustrations are given: A complaint for violating an ordinance prohibiting the riding of a bicycle on sidewalks other than brick, stone, plank or gravel must show that the sidewalk was not one of the material specified.⁵⁰ An averment in the complaint that the hole existed in the sidewalk, and the length of time it had been allowed to exist negligently, and that plaintiff, without knowledge of it and without negligence, stepped into it, is sufficient.⁵¹ A complaint for violation of an ordinance must set out the ordinance, and it is not sufficient to refer to the section and chapter.⁵² A complaint which sets up the execution and delivery of a contract, annexing a copy and alleging it was void under the charter, is sufficient to raise the question of good faith, public policy and the power to make, since such questions are questions of law based on the contract and charter.⁵³ A complaint that does not allege that notice of the award of a contract was "conspicuously" posted, as required by statute, is sufficient on general demurrer.⁵⁴ In a petition to enforce the payment of warrants for street improvements, allegations that recite in detail the provisions of the charter, the ordinance directing the improvement, the advertisements for bids, the award to plaintiff of the contract, the execution of the contract, the performance of the work without objection, the acceptance of the work by the proper officer, the approval of such acceptance by the council, and the issuance of warrants, are sufficient.⁵⁵ An allegation in a complaint that the defendant, by its agents, made an excavation in the street and left it unguarded, and that plaintiff, being ignorant of its existence, was injured thereby while exercising due care, and without fault on his part, states a cause of action.⁵⁶ A complaint alleging that plaintiff, without knowledge of the dangerous condition of a sidewalk, was walking thereon using all precautions and doing everything possible to learn its condition, and, while looking at the same, it gave way, and plaintiff was injured, is not demurrable as showing contributory negligence.⁵⁷ Where the cause of action is based upon the drowning of children in a pond which is unguarded and uninclosed, part being on one of the streets and part on adjoining land, the complaint should

⁵⁰ *Town of Whiting v. Doob*, 152 Ind. 157; s. c. 52 N. E. 759.

⁵¹ *City of Huntington v. Burke*, 21 Ind. App. 655; s. c. 52 N. E. 415.

⁵² *State v. Cruickshank*, 71 Vt. 94; s. c. 42 Atl. 983.

⁵³ *Hendrickson v. City of New York*, 160 N. Y. 144; s. c. 54 N. E. 680.

⁵⁴ *Williams v. Bergin*, 127 Cal. 578; s. c. 60 Pac. 164.

⁵⁵ *Middlesborough Town &c. Co. v. Knoll*, 21 Ky. L. 1399; s. c. 55 S. W. 205.

⁵⁶ *City of Goshen v. Alford*, 154 Ind. 58; s. c. 55 N. E. 27.

⁵⁷ *City of Bedford v. Woody*, 23 Ind. App. 401; s. c. 55 N. E. 499.

allege the injury happened on that part of the pond located in the street.⁵⁸ An allegation that the city, knowingly, for a period of three years permitted the frequent and customary use of a hatchway entirely unguarded is sufficient.⁵⁹ Where under the pleading there is no question of fact to be submitted to the jury, the complaint may be properly dismissed.⁶⁰ The New York charter provision that no action for any cause whatever shall be maintained unless the complaint states that thirty days have elapsed since the claim was presented to the city comptroller applies to actions *ex delicto*.⁶¹ A petition may be sufficient to recover under an implied contract though not sufficient to recover under an express contract.⁶² Where there was an averment in a petition to enforce a street assessment for certain street improvements where they had not already been made, that the lot described in the petition had been assessed for a portion of the cost of the work, it was unnecessary to allege that the work had not already been done in front of the lot in question.⁶³ Petition to recover for personal injuries from a defective sidewalk held sufficient.⁶⁴ A petition based on an improvement warrant on a special fund averring the city's duty to collect the assessment on abutting owners for the improvement and its failure and neglect of this duty, and that it had neglected to collect and was making no effort to do so, is sufficient.⁶⁵ Where the charter specifically defines the manner in which a contract shall be made by a municipality, a petition based on

⁵⁸ *Arnold v. City of St. Louis*, 152 Mo. 173; s. c. 53 S. W. 900. Cf. *Smith v. City of St. Joseph*, 45 Mo. 449; *Bassett v. City of St. Joseph*, 53 Mo. 290; *Russell v. Inhabitants &c.*, 74 Mo. 480; *Brennan v. City of St. Louis*, 92 Mo. 482; s. c. 2 S. W. 481; *Overholt v. Vieths*, 93 Mo. 422, 424; s. c. 6 S. W. 74; *Witte v. Stifel*, 126 Mo. 295; s. c. 28 S. W. 891; *Butz v. Cavanaugh*, 137 Mo. 503; s. c. 38 S. W. 1104; *Moran v. Pullman &c. Car Co.*, 134 Mo. 641; s. c. 36 S. W. 659; *Harman v. City of St. Louis*, 137 Mo. 494; s. c. 38 S. W. 1102.

⁵⁹ *Whitty v. City of Oshkosh*, 106 Wis. 87; s. c. 81 N. W. 992.

⁶⁰ *Hargreaves v. City of Yonkers*, 61 N. Y. S. 1003; s. c. 47 App. Div. (N. Y.) 642.

⁶¹ *Pulitzer v. City of New York*, 62 N. Y. S. 587; s. c. 48 App. Div. (N. Y.) 6. Cf. *Calvin v. City of Brook-*

lyn, 119 N. Y. 630; s. c. 23 N. E. 741; *Nagel v. City of Buffalo*, 34 Hun (N. Y.) 1; *Minick v. City of Troy*, 83 N. Y. 514; *Reining v. City of Buffalo*, 102 N. Y. 108. 312; s. c. 6 N. E. 792; *Knox v. Mayor &c.*, 55 Barb. (N. Y.) 404; *Duryea v. Mayor &c.*, 26 Hun (N. Y.) 120; *Hakes v. Peck*, 30 How. Pr. (N. Y.) 104; *People v. Green*, 56 N. Y. 466; *United States v. Gilmore*, 8 Wall. 330; *Van Frachen v. City of Ft. Howard*, 88 Wis. 570; s. c. 60 N. W. 1062.

⁶² *Berlin Iron Bridge Co. v. City of San Antonio*, 92 Tex. 388; s. c. 50 S. W. 408.

⁶³ *Perine v. Lewis*, 128 Cal. 236; s. c. 60 Pac. 772.

⁶⁴ *City of Lawrence v. Littel*, 9 Kan. App. 130; s. c. 58 Pac. 495.

⁶⁵ *Jones v. City of Portland*, 35 Or. 512; s. c. 58 Pac. 657.

such contract must allege that the contract in fact was made in the manner prescribed. It must set forth the terms and the charter requirements.⁶⁶ A petition alleging that by an ordinance of the city it was the duty of the defendant city, etc., without setting out a copy of the ordinance or alleging, in substance, its terms, is not sufficient.⁶⁷ The petition need not allege the purposes of the assessment if it alleges that ordinances of the city provided for the levy of a certain per cent. on property valuation.⁷⁸ In a suit to recover fees of an office a petition which does not state either that the plaintiff was in possession of the office and had been wrongfully ousted, or that his claim to the office had been legally determined, is not sufficient.⁷⁹ In an action to compel the granting of a franchise the complaint need not allege the nonperformance of specific acts, where the refusal to grant the franchise includes the specific acts.⁸⁰ Complaint in an action by property owners to recover money received on a sale of property under a special assessment, where the improvement is not completed, held insufficient.⁸¹ A complaint under a contract made with a committee of the council need not set out the ordinance authorizing the committee to make the contract where it alleges the committee had power and the council recognized its validity.⁸²

§ 1691. Bill in chancery—Allegations of.—A bill in chancery should in all cases be drawn with the same degree of care as the statement of the cause of action in a common-law proceeding. The reasons for preciseness and accuracy of statement of the essential facts that constitute the cause of action, or defense, are as imperative in chancery as at law, and while the rules in regard to the relief to be, or that may be, granted are more elastic, and there are fewer technicalities in the procedure, yet the necessity for good pleading in the former is as exacting as in the latter. In a suit to enjoin the letting of a contract to improve a street on the ground that the city is already indebted beyond the constitutional limit, the bill or complaint is insufficient when it fails to show that the city will be unable

⁶⁶ *Wiley v. City of Columbus*, 109 Ga. 295; s. c. 34 S. E. 575.

⁶⁷ *Brush Electric & Co. v. Le-fevre*, 93 Tex. 604; s. c. 57 S. W. 640.

⁷⁸ *Harris v. City of Houston*, 21 Tex. Civ. App. 432; s. c. 52 S. W. 653.

⁷⁹ *Hughlett v. City of Wellsville*, 75 Mo. App. 341.

⁸⁰ *Pereria v. Wallace*, 129 Cal. 397;

s. c. 62 Pac. 61. Cf. *Purinton v. Inhabitants &c.*, 174 Mass. 556; s. c. 55 N. E. 461; *Meyers v. Hudson & Co.*, 63 N. J. L. 573; s. c. 44 Atl. 713; *Consolidated Traction Co. v. East Orange Tp.*, 63 N. J. L. 669; s. c. 44 Atl. 1099.

⁸¹ *Rogers v. City of St. Paul*, 79 Minn. 5; s. c. 81 N. W. 539.

⁸² *Harrison v. City of Sulphur Springs (Tex.)*, 50 S. W. 1064.

to pay from current revenues its current expenses and the expense of the improvement as it shall come into existence, and that the city will pay or attempt to pay the same.⁸³ A bill to enjoin an assessment which fails to allege that the proper officer threatens to collect or is proceeding to collect is not good.⁸⁴ In an action to enjoin the collection of a portion of an assessment as invalid it must be alleged that the valid portion has been tendered and such amount must be paid into court.⁸⁵ A bill for injunction is not subject to demurrer if it alleges that an assessment was in fact unjust, unequal and made without regard to benefits, where it is also alleged that the abutting properties were not benefited equally; that they were of unequal value, size and depth.⁸⁶ In chancery, as at law, it is not proper to allege a conclusion, but the facts from which the conclusion is drawn must be alleged.⁸⁷ A lot owner, in an action on a special tax-bill, who desires to show imperfect execution, or improper authorization of the work, must specifically plead the facts in his answer. A general denial is not sufficient.⁸⁸

§ 1692. Variance between allegations and proof.—It is a rule of universal application that there must be no substantial variance between the allegations and the proof. One case can not be made by allegations and another by the proof. The defendant may be able to meet the plaintiff's allegations made by the pleadings and be wholly unable to meet a different case made by the evidence on the hearing. Under a complaint for trespass on improved or inclosed land suit will not be maintained for trespass within a building.⁸⁹ A general allegation that an injury was sustained by plaintiff without fault or negligence on his part is not overcome by facts pleaded showing that defects in a sidewalk could have been observed. Although a defect in a sidewalk may be observable non constat, plaintiff may have exercised care commensurate with the requirements of law.⁹⁰ Where the proof showed that an injury was caused by the turning of a loose board in the walk, causing plaintiff's foot to slip into a hole, and the allegation was that the injury was caused by plaintiff stepping into a

⁸³ *Cason v. City of Lebanon*, 153 Ind. 567; s. c. 55 N. E. 768.

⁸⁴ *Clark v. City of Worcester*, 167 Mass. 81; s. c. 44 N. E. 1082.

⁸⁵ *Studabaker v. Studabaker*, 152 Ind. 89; s. c. 51 N. E. 933.

⁸⁶ *Lyon v. Town of Tonawanda*, 98 Fed. 361.

⁸⁷ *Willard v. Albertson*, 23 Ind.

App. 164; s. c. 53 N. E. 1077; 54 N. E. 403.

⁸⁸ *City of Carthage &c. v. Badgley*, 73 Mo. App. 123.

⁸⁹ *St. Louis v. Babcock*, 156 Mo. 154; s. c. 56 S. W. 731.

⁹⁰ *City of Bedford v. Woody*, 23 Ind. App. 231; s. c. 53 N. E. 838.

hole in the sidewalk, there is a variance, and plaintiff is not entitled to recover.⁹¹

§ 1693. Instructions to jury.—An instruction that a city is bound to keep its sidewalks in good and sufficient repair to render them reasonably safe for all persons passing over them is not erroneous.⁹² Under two counts, one alleging defective construction of a sidewalk and another alleging failure to repair the same, where plaintiff is entitled to recover under either, it is error to instruct that the city is not liable unless the accident was caused by a loose plank, and the city had notice of the defect.⁹³ It is error to instruct that if force was used to open a gate leading to a bridge undergoing repairs, plaintiff could not recover, where the evidence showed plaintiff on previous

⁹¹*Gagan v. Janesville*, 106 Wis. 662; s. c. 82 N. W. 558. Cf. *City of Lawrence v. Littell*, 9 Kan. App. 130; s. c. 58 Pac. 495; *Krall v. City of New York*, 44 App. Div. (N. Y.) 259; s. c. 60 N. Y. S. 661; *Whitty v. City of Oshkosh*, 106 Wis. 87; s. c. 81 N. W. 992; *City of Mt. Vernon v. Hoehn*, 22 Ind. App. 282; s. c. 53 N. E. 654; *City of Huntington v. McClurg*, 22 Ind. App. 261; s. c. 53 N. E. 658; *City of Bedford v. Woody*, 23 Ind. App. 231; s. c. 53 N. E. 838. As to what will not be a variance between the averments and proof of injury, see *City of Joliet v. Johnson*, 177 Ill. 178; s. c. 52 N. E. 498. A declaration in an action for personal injury need not detail all the characteristics and consequences of the injury: *City of Joliet v. Johnson*, supra. In the enforcement of a lien for special taxes the burden is on the party asserting the lien to show its validity: *Equitable Trust Co. v. O'Brien*, 55 Neb. 735; s. c. 76 N. W. 417; and to show a compliance by the taxing authorities with all essential statutory requirements: *Merrill v. Shields*, 57 Neb. 78; s. c. 77 N. W. 368. Damages accruing after suit brought are recoverable under amended petition: *City of Louisville*

v. McGill, 21 Ky. L. 718; s. c. 52 S. W. 1053. Where suit is brought to recover wages as a patrolman, the defense that there was no such office must be raised by answer: *City of Huntington v. Boyd*, 25 Ind. App. 250; s. c. 57 N. E. 939. Where plaintiff alleged that proposals were only advertised for by the city, the defendant city will not be permitted to show under a general denial a defect in the publication of the advertisement. Such defect must be specially pleaded: *Hunt v. City of New York*, 62 N. Y. S. 184; s. c. 47 App. Div. (N. Y.) 295. Indictment under charter of Greater New York, §§ 413, 419, held insufficient: *People v. Kane*, 161 N. Y. 380; s. c. 55 N. E. 946. Act of March 15, 1899, reorganizing the police department of St. Louis, does not violate Mo. const., art. 10, § 10: *State v. Mason*, 153 Mo. 23; s. c. 54 S. W. 524. A petition by solicitor general, filed after twenty days from time of notice, etc., is too late under Georgia act of Dec. 6, 1897: *Raff v. Town of Calhoun*, 110 Ga. 806; s. c. 36 S. E. 214.

⁹²*City of Roanoke v. Shull*, 97 Va. 419; s. c. 34 S. E. 34.

⁹³*City of Dallas v. Jones*, 93 Tex. 38; s. c. 49 S. W. 577; 53 S. W. 377.

occasions opened the gate and crossed the bridge in safety.⁹⁴ An instruction that if the dangerous condition of a street was known to plaintiff, and that if he could have avoided it by passing around, or on the other side of the road, and he did not do so, he could not recover, is erroneous, as it omits reasonable care on the part of plaintiff.⁹⁵ In an action to recover for injuries by falling into a ditch, an instruction is properly refused which states that if at or near the ditch there were sufficient lights and barriers to give warning of danger, and plaintiff saw them, and did not heed them, he thereby assumed the risk whether he knew of its existence or not.⁹⁶ An instruction that a defective sidewalk must have been known to the city through some of its officers or agents, whose knowledge would constitute notice, is cured by another instruction confining the notice to such officers or agents as had authority to act on behalf of the city with reference to notice.⁹⁷ An instruction that persons traveling over a street in constant use may presume it is reasonably safe for ordinary travel in its entire width is proper where plaintiff knew of no obstruction.⁹⁸

⁹⁴ *Kane v. City of Yonkers*, 60 N. Y. S. 216; s. c. 43 App. Div. (N. Y.) 599.

⁹⁵ *Kossman v. City of St. Louis*, 153 Mo. 293; s. c. 54 S. W. 513.

⁹⁶ *O'Neil v. Hanscom*, 175 Mass. 313; s. c. 56 N. E. 587; *Maloney v. Hanscom*, 175 Mass. 313; s. c. 56 N.

E. 587; *Maloney v. City of Cambridge*, 175 Mass. 313; s. c. 56 N. E. 587.

⁹⁷ *City of Topeka v. Noble*, 9 Kan. App. 171; s. c. 58 Pac. 1015.

⁹⁸ *City of Spring Valley v. Gavin*, 182 Ill. 232; s. c. 54 N. E. 1035.

CHAPTER XLIV.

EVIDENCE.

SECTION	SECTION
1694. Admissibility of evidence.	1698. Contributory negligence—Evidence of.
1695. Sufficiency of evidence.	1699. Record of council—Proof of.
1696. Burden of proof.	1700. Presumptions.
1697. Questions of fact are for the jury.	1701. Miscellaneous.

§ 1694. **Admissibility of evidence.**—The application of the principles and rules of evidence is not different in any material respect in municipal litigation from their application in general litigation. This chapter will therefore be devoted to illustrations of the general subject in the use of strictly municipal cases, or the application of the general principles to municipal affairs. The admissibility of evidence is restricted to the material issues involved, and its nature and character are largely dependent upon the general subject-matter involved. The scope and latitude of the judicial inquiry vary with each class of cases necessarily, but there are certain fundamental principles involved in the admissibility of evidence that extend through the entire subject to all cases and classes. The control of a street by a municipality may be shown by evidence of its making repairs thereon, or any other acts that manifest a right or duty in regard thereto. Evidence that a sidewalk had been repaired by the city is sufficient to warrant a finding that it was in the possession of the city. Besides, where it is shown that the street is a public street it will be presumed, in the absence of evidence to the contrary, that the city was in possession of and built and maintained the sidewalk. A city has absolute control of the streets within corporate limits.¹ Where an injury grows out of an unevenly filled ditch, the contract for the work containing a provision as to the manner of filling the ditches, and which has not been complied with, the evidence is properly admissible to show that the city knew how the ditches ought to

¹ City of Anna v. Boren, 77 Ill. seilles, 136 Ill. 401; s. c. 26 N. E. App. 408; Carney v. Village of Mar- 491.

be filled to protect the public and also to show negligence.² Where an injury is alleged to be the result of the defective condition of a sidewalk the condition at the place where the injury occurred is the only material inquiry, and it is not material what its condition may have been elsewhere; but evidence may be admissible for one purpose and not for another. Thus, in the case of the injury just supposed the condition of the walk at other places than where the injury occurred—general bad repair—is admissible evidence on the question of notice to the municipality.³ Evidence of the condition of a sidewalk generally at or near the place of accident is admissible as tending to show notice.⁴ Evidence as to the condition of the walk a short time after the alleged injury is proper where it tends to show the condition or state of repair before the injury.⁵ It is error to admit evidence as to the condition of a sidewalk six weeks after an injury, but such error is harmless where it appears that the sidewalk was practically the same at both periods.⁶ It is clearly improper to admit evidence as to the condition of a sidewalk at a time remote from the date of the alleged injury.⁷ Evidence that a sidewalk was repaired some time after an injury is not admissible to show knowledge of the city of a defect;⁸ but where an injury is alleged to have been caused by an obstruction in the street, evidence that the obstruction was removed after the injury is proper as tending to show the nature and character of the obstruction.⁹ In an action for injuries caused

² *City of Aurora v. Scott*, 82 Ill. App. 616.

³ *Bailey v. City of Centerville*, 108 Iowa 20; s. c. 78 N. W. 831. Evidence as to the condition of a street generally for more than a mile is not admissible where no question of notice is involved: *Olson v. Town of Luck*, 103 Wis. 33; s. c. 79 N. W. 29.

⁴ *Lyons v. City of Red Wing*, 76 Minn. 20; s. c. 78 N. W. 868. Where the injury was the result of the condition of the sidewalk it is not improper to admit evidence as to its condition in close proximity to the place where the injury occurred, for the purpose of charging notice: *Boyle v. City of Saginaw*, 124 Mich. 348; s. c. 82 N. W. 1057.

⁵ *Plummer v. City of Milan*, 79 Mo. App. 439. Evidence of condition of walk ten weeks after accident is admissible as tending to

show condition when accident occurred: *Richardson v. City of Marceline*, 73 Mo. App. 360.

⁶ *City of Dallas v. Jones (Tex.)*, 54 S. W. 606. Evidence that for a month after an accident there was no change in the condition of a sidewalk is admissible where there is other evidence as to its condition immediately after: *Bailey v. City of Centerville*, 108 Iowa 20; s. c. 78 N. W. 831.

⁷ Evidence that nearly a year after an accident the defendant had the sidewalk examined and found it in good condition is not admissible: *City of Ottawa v. Black*, 10 Kan. App. 439; s. c. 61 Pac. 985.

⁸ *City of Dallas v. Meyers (Tex. Civ. App.)*, 55 S. W. 742.

⁹ *Dillon v. City of Raleigh*, 124 N. C. 184; s. c. 32 S. E. 548. Evidence that a walk, on which an injury oc-

by falling on a crosswalk, evidence that other persons had fallen at the same place about the same time, or priorly, is admissible to show notice to the city of the condition of crosswalk where the injury occurred.¹⁰ Evidence that other persons had tripped over the same board is admissible to show its previous condition and the manner of its discovery by the witnesses.¹¹ Where a report of a council committee in relation to a sidewalk corresponds with the complaint as to the place where an injury occurred the report is properly admissible in evidence to show the condition of the sidewalk.¹² In an action to recover for an injury growing out of allowing a pile of rocks to remain unguarded on a public street it is competent to show that other obstructions not alleged in the petition narrowed the street and the conditions of the street generally at the time and place of the accident.¹³ Where a child was drowned in a hole in a street in which a sewer had been constructed, evidence was properly excluded which did not establish the connection of the city with the excavation in which the injury occurred.¹⁴ Evidence that a foreman of sidewalks repaired the sidewalk where an injury occurred is admissible as tending to show his authority over that piece of walk, where it was contended that the foreman in question did not have authority over the sidewalk where the injury took place.¹⁵ Evidence is admissible to show that permits had been previously issued to others, but that the clerk had been ordered to issue no more permits to any one.¹⁶ It was error to admit evidence that sewage flowing along the border of plaintiff's land would enhance its value for agricultural purposes, where it did not flow upon plaintiff's land and it was

curred, was afterwards taken up and a new one laid is admissible to show how witnesses knew of its condition, but it must be limited to this purpose: *Trohs v. City of Dubuque*, 109 Iowa 219; s. c. 80 N. W. 341. Cf. *Cramer v. City of Burlington*, 45 Iowa 627; *Hudson v. C. & N. W. R. Co.*, 59 Iowa 581; s. c. 13 N. W. 735; *Kuhns v. Wisconsin & C. R. Co.*, 76 Iowa 67, 71; s. c. 40 N. W. 92. As a rule evidence of subsequent repairs is inadmissible to show negligence: *Sylvester v. Incorporated Town of Casey*, 110 Iowa 256; s. c. 81 N. W. 455.

¹⁰ *Piper v. City of Spokane*, 22 Wash. 147; s. c. 60 Pac. 138.

¹¹ *Frohs v. City of Dubuque*, 109

Iowa 219; s. c. 80 N. W. 341; *Fordham v. Gouverneur Village*, 160 N. Y. 541; s. c. 55 N. E. 290. That another person was injured at the same place is not admissible: *Goble v. Kansas City*, 148 Mo. 470; s. c. 50 S. W. 84.

¹² *City of Pittsburg v. Broderson*, 10 Kan. App. 430; s. c. 62 Pac. 5.

¹³ *City of Kansas City v. McDonald*, 60 Kan. 481; s. c. 57 Pac. 123.

¹⁴ *Carle v. City of De Soto*, 156 Mo. 443; s. c. 57 S. W. 113.

¹⁵ *Sprague v. City of Rochester*, 64 N. Y. S. 846; s. c. 52 App. Div. (N. Y.) 53.

¹⁶ *State v. Orr*, 68 Conn. 101; s. c. 35 Atl. 770; 34 L. R. A. 279.

not possible for him to use it.¹⁷ An ordinance regulating the construction of sidewalks is admissible to show negligence of the city in an action to recover for an injury from a sidewalk where the sidewalk is not constructed in accordance with the ordinance.¹⁸ In an action against a city to recover damages because of the vacation of a street, evidence that the property would be damaged additionally from smoke and cinders occasioned by the elevation of tracks nearby is not admissible, the city not being liable for such damage.¹⁹ Evidence of the cost of bringing property to a grade with the street is not admissible on the question of damages.²⁰ It is error to admit in evidence an ordinance for improvements which do not correspond with the improvements embraced in the estimates required as preliminary by the statute;²¹ and it is error to admit testimony that plaintiff at the time of the injury was carrying accident insurance.²² Evidence as to the number of miles of streets in the city is inadmissible as tending to show what is a reasonable time to impute notice of a defect in the sidewalks.²³ In a suit for personal injury on a street it is immaterial that the street as laid out does not correspond with its actual location if the street as laid out embraces the place of the accident.²⁴ The certificate of a city comptroller of the city's indebtedness is not evidence.²⁵ Declarations of third persons as to the condition of a street where the injury occurred are admissible to show the condition of the street was a matter of public notoriety, as tending to prove notice to the city of the condition of the street.²⁶ In an action for personal injury growing out of a defective sidewalk it is not error to admit testimony of others also falling over loose boards in the sidewalk if such evidence is confined to the question of notice to the city of the dangerous condition of the walk.²⁷ Where notice of the condition of a sidewalk is admitted, evidence remote in its nature as to the time of the accident should not be admitted.²⁸

¹⁷ *City of San Antonio v. Smith*, 94 Tex. 266; s. c. 59 S. W. 1109.

¹⁸ *Shumway v. City of Burlington*, 108 Iowa 424; s. c. 79 N. W. 123.

¹⁹ *City of Chicago v. Baker*, 98 Fed. 830; s. c. 39 C. C. A. 318.

²⁰ *McCombs v. City of Pittsburgh*, 194 Pa. St. 348; s. c. 45 Atl. 60.

²¹ *Chicago & C. R. Co. v. City of Chicago*, 184 Ill. 154; s. c. 56 N. E. 410.

²² *Cox v. City of Chicago*, 83 Ill. App. 540. Where the injury occurred by falling through a hole in the sidewalk the question, "Could a person exercising ordinary care

have seen the hole and avoided stepping into it?" is inadmissible: *City of Roanoke v. Shull*, 97 Va. 419; s. c. 34 S. E. 34.

²³ *City of Roanoke v. Shull*, *supra*.

²⁴ *City of Holyoke v. Hadley & Co.*, 174 Mass. 424; s. c. 54 N. E. 889.

²⁵ *City of Chicago v. English*, 180 Ill. 476; s. c. 54 N. E. 609.

²⁶ *Piper v. City of Spokane*, 22 Wash. 147; s. c. 60 Pac. 138.

²⁷ *Wilberding v. City of Dubuque*, 111 Iowa 484; s. c. 82 N. W. 957.

²⁸ *Selleck v. City of Janesville*, 104 Wis. 570; s. c. 80 N. W. 944.

§ 1695. **Sufficiency of evidence.**—Where an action against a municipality relates to an injury to a person through alleged negligence of the former, the evidence as a whole must connect the injury with the defects, obstructions or other causes which are alleged to have produced the injury; and the defect in a street or sidewalk, or whatever it may be, must be within the knowledge of the municipality actual or implied.²⁹ A city council can not be held liable for the death of a child which is drowned in an excavation, where the evidence does not show that the street was ever opened by the city or that the city had actual or implied knowledge of the excavation.³⁰ The city is liable for an injury caused by plaintiff stepping against a stone near the edge of the sidewalk, which stone was about two feet long, one foot high and two and one-half feet wide, which had been on the sidewalk from three to five years and was passed by policemen frequently, the existence of which was not known to plaintiff, where there was no evidence showing want of ordinary caution.³¹ Where plaintiff was injured on an ice-coated slope of an alley approach, evidence that in the specifications for grading and paving the alleys and streets it was provided that the approaches should be graded as directed by the city engineer does not establish the adoption of a plan by a competent engineer so as to relieve the city of the responsibility for a dangerous method of construction.³² As to the question of constructive notice of the condition of an iron lid covering a catch-basin, the condition of the lid at the time of the accident, the broken surface of the iron being rusted, the well-known fact by the municipal authorities that similar lids of other catch-basins were tampered with frequently by boys, and that the particular basin was near the police patrol box, are sufficient to warrant a submission of the case to the jury.³³ Inequalities in the sidewalk do not warrant a verdict that the walk was not reasonably safe.³⁴ Where a wrong basis of apportionment is alleged facts must be proved which will show that under a proper basis of apportionment the cost would be less.³⁵ Proof that at the time of the issuance of bonds no provision was made for a sinking fund as required by the constitution does

²⁹ *Small v. Town of Prentice*, 102 Wis. 256; s. c. 78 N. W. 415.

³⁰ *Carle v. City of De Soto*, 156 Mo. 443; s. c. 57 S. W. 113.

³¹ *Davis v. City of Austin*, 22 Tex. Civ. App. 460; s. c. 54 S. W. 927.

³² *Hodges v. City of Waterloo*, 109 Iowa 444; s. c. 80 N. W. 523.

³³ *District of Columbia v. Payne*, 13 App. D. C. 500.

³⁴ *Newton v. Worcester*, 174 Mass. 181; s. c. 54 N. E. 521.

³⁵ *Barrett v. Falls City Artificial Stone Co.*, 21 Ky. L. 669; s. c. 52 S. W. 947. Cf. *McHenry v. Selvage*, 18 Ky. L. 473; s. c. 35 S. W. 645.

not establish that no such provision was made when they were sold.³⁶ Evidence that work on an improvement was under the supervision of the town marshal and was accepted and paid for by the municipality is sufficient to show that it was municipal work.³⁷

§ 1696. **Burden of proof.**—Where the city as a defense maintained that the obligation sued on was in excess of the limit of indebtedness permitted, it must prove such defense.³⁸ The burden of proof is upon the person who undertakes to enforce the lien of a special assessment of taxes to establish the validity of the assessment.³⁹ Resisting the payment of taxes on the ground of invalidity places the burden on the person so resisting.⁴⁰ A charter provision making properly authenticated tax-bills *prima facie* proof that all steps have been taken to make them binding throws the burden on the taxpayer.⁴¹ In a suit on an order payable from a special assessment the burden of proving that there was money belonging to the fund in the treasury is on the plaintiff.⁴² The burden is on plaintiff to show how and why an accident occurred.⁴³

³⁶ *Wright v. City of San Antonio* (Tex. Civ. App.), 50 S. W. 406. What is sufficient evidence under Ky. St., § 2899,—see *City of Louisville v. Cassady*, 20 Ky. L. 1348; s. c. 49 S. W. 194. What is sufficient evidence under street improvement act of Cal., § 7, St. 1891,—see *California Imp. Co. v. Reynolds*, 123 Cal. 88; s. c. 55 Pac. 802.

³⁷ *Town of Thornton v. Fugate*, 21 Ind. App. 537; s. c. 52 N. E. 763. Evidence held sufficient to justify a nonsuit in *Warren v. City of Independence*, 153 Mo. 593; s. c. 55 S. W. 227. Evidence justifying a verdict for the defendant city: *Maanum v. City of Madison*, 104 Wis. 272; s. c. 80 N. W. 591. Evidence held not to justify recovery: *Rushton v. City of Allegheny*, 192 Pa. St. 574; s. c. 44 Atl. 249. Evidence held not to show negligence on the part of the city: *Jordan v. City of New York*, 60 N. Y. S. 696; s. c. 44 App. Div. (N. Y.) 149. Facts held not to be such as to show notice on part of the city or circumstances from

which notice may be inferred: *Baustian v. Young*, 152 Mo. 317; s. c. 53 S. W. 921. Facts showing reasonably safe condition of the streets: *Jackson v. City of Lansing*, 121 Mich. 279; s. c. 80 N. W. 8. Evidence held to show reasonable care on the part of the city to protect citizens: *Martin v. City of Chelsea*, 175 Mass. 516; s. c. 56 N. E. 703. Sufficiency of evidence to recover payment of an assessment under Cal. act of March 31, 1891: *Moffitt v. Jordan*, 127 Cal. 622; s. c. 60 Pac. 173.

³⁸ *Arbuckle-Ryan Co. v. City of Grand Ledge*, 122 Mich. 491; s. c. 81 N. W. 358.

³⁹ *Grant v. Bartholomew*, 58 Neb. 839; s. c. 80 N. W. 45.

⁴⁰ *Wright v. City of San Antonio* (Tex. Civ. App.), 50 S. W. 406.

⁴¹ *Fonda v. City of Louisville*, 20 Ky. L. 1652; s. c. 49 S. W. 785.

⁴² *Village of Marysville v. Schoonover*, 78 Ill. App. 189.

⁴³ *Hyer v. City of Janesville*, 101 Wis. 371; s. c. 77 N. W. 729.

§ 1697. **Questions of fact are for the jury.**—As a general rule, the existence or nonexistence of essential facts is a question to be determined by the jury and not for the determination of the court. Where the evidence is conflicting on the subject of negligence it is error to refuse submission to the jury.⁴⁴ It is a question for the jury whether a sidewalk was in a reasonably safe condition,⁴⁵ and so as to the proximate cause of an injury,⁴⁶ or the negligence of the defendant,⁴⁷ or whether the municipality had constructive notice of the dangerous condition of a sidewalk,⁴⁸ or whether plaintiff at the time of an injury exercised due diligence in attempting to avoid an accident,⁴⁹ or whether the plaintiff was guilty of negligence in crossing a street other than at a crossing, the court having no right to instruct that it is negligence per se.⁵⁰ Whether plaintiff is guilty of contributory negligence is a question for the jury;⁵¹ and so it is a question for the jury to determine what effect plaintiff's forgetfulness should have on the question of negligence.⁵² Where plaintiff's evidence establishes a prima facie case of negligence it is for the jury to determine whether it is overcome by evidence tending to show that an excavation was caused by an unusual rain and that a water meter and pipe connections were not defective.⁵³ Whether a city is negligent in the construction of a sewer is a question for the jury,⁵⁴ and also whether the city is negligent in maintaining a dangerous place in the street dangerous to pedestrians only.⁵⁵ It is error to

⁴⁴ *Capital Printing Co. v. City of Raleigh*, 126 N. C. 516; s. c. 36 S. E. 33.

⁴⁵ *Rhyner v. City of Menasha*, 107 Wis. 201; s. c. 83 N. W. 303. Cf. *City of Topeka v. Noble*, 9 Kan. App. 171; s. c. 58 Pac. 1015; *O'Neil v. Hanscom*, 175 Mass. 313; s. c. 56 N. E. 587; *Kane v. City of Yonkers*, 43 App. Div. (N. Y.) 599; s. c. 60 N. Y. S. 216; *City of Dallas v. Jones*, 93 Tex. 38; s. c. 49 S. W. 577; 53 S. W. 377.

⁴⁶ *Koch v. City of Williamsport*, 195 Pa. St. 488; s. c. 46 Atl. 67.

⁴⁷ *Corbin v. Philadelphia*, 195 Pa. St. 461; s. c. 45 Atl. 1070.

⁴⁸ *McKissick v. City of St. Louis*, 154 Mo. 588; s. c. 55 S. W. 859.

⁴⁹ *Shiflett v. City of Cedartown*, 111 Ga. 834; s. c. 36 S. E. 221; *Redford v. City of Woburn*, 176 Mass. 520; s. c. 57 N. E. 1008.

⁵⁰ *Plummer v. City of Milan*, 79 Mo. App. 439; *Cowie v. City of Seattle*, 22 Wash. 659; s. c. 62 Pac. 121. Cf. *City of Lawrence v. Littell*, 9 Kan. App. 130; s. c. 58 Pac. 495; *Kane v. City of Yonkers*, 43 App. Div. (N. Y.) 599; s. c. 60 N. Y. S. 216.

⁵¹ *City of Aurora v. Scott*, 185 Ill. 539; s. c. 57 N. E. 440; *Corbin v. Philadelphia*, 195 Pa. St. 461; s. c. 45 Atl. 1070.

⁵² *Cowie v. City of Seattle*, 22 Wash. 659; s. c. 62 Pac. 121.

⁵³ *Kane v. Philadelphia*, 196 Pa. St. 502; s. c. 46 Atl. 893.

⁵⁴ *Dammann v. City of St. Louis*, 152 Mo. 186; s. c. 53 S. W. 932. Cf. *Donahoe v. Kansas City*, 136 Mo. 657; s. c. 38 S. W. 571.

⁵⁵ *Fuchs v. St. Louis*, 133 Mo. 168; s. c. 31 S. W. 115; 34 S. W. 508; *Werth v. City of Springfield*, 78 Mo.

charge as a matter of law that a sidewalk is defective and unsafe for pedestrians.⁵⁶ The question whether a city has taken proper precautions to guard against accident in the repair of a bridge is a question for the jury;⁵⁷ and so is the question whether a sidewalk is reasonably safe and fit for travel.⁵⁸ Whether plaintiff could have avoided the injury by going around an incline in the sidewalk and was guilty of negligence in not doing so is properly submitted to the jury.⁵⁹ The fact that a jury might have difficulty in determining whether an injury was caused by the irregular surface of the street or its slippery condition does not justify the court in determining the question in defendant's favor.⁶⁰ Generally the question of negligence is for the exclusive consideration of the jury.⁶¹

107; *Carrington v. City of St. Louis*, 89 Mo. 208; s. c. 1 S. W. 240; *Thurston v. City of St. Joseph*, 51 Mo. 510.

⁵⁶ *City of Dallas v. Webb*, 22 Tex. Civ. App. 48; s. c. 54 S. W. 398.

⁵⁷ *La Fave v. City of Superior*, 104 Wis. 454; s. c. 80 N. W. 742. Cf. *McNamara v. Village of Clintonville*, 62 Wis. 207; s. c. 22 N. W. 472; *Richards v. City of Oshkosh*, 81 Wis. 226; s. c. 51 N. W. 256; *Ottie v. Chicago & C. R. Co.*, 89 Wis. 27; s. c. 61 N. W. 289; *Morrison v. City of Madison*, 96 Wis. 452; s. c. 71 N. W. 882.

⁵⁸ *Kane v. City of Yonkers*, 60 N. Y. S. 216; s. c. 43 App. Div. (N. Y.) 599.

⁵⁹ *Urtel v. City of Flint*, 122 Mich. 65; s. c. 80 N. W. 991; *Sylvester v. Incorporated Town of Casey*, 110 Iowa 256; s. c. 81 N. W. 455. Cf. *Parkhill v. Town of Brighton*, 61 Iowa 103; s. c. 15 N. W. 853; *McGinty v. City of Keokuk*, 66 Iowa 725; s. c. 24 N. W. 506; *Walker v. Decatur Co.*, 67 Iowa 307; s. c. 25 N. W. 256; *Fulliam v. City of Muscatine*, 70 Iowa 436; s. c. 30 N. W. 861; *Hartman v. City of Muscatine*, 70 Iowa 511; s. c. 30 N. W. 859; *Dale v. Webster Co.*, 76 Iowa 370; s. c. 41 N. W. 1; *Kendall v. City of Albia*, 73 Iowa 241, 248; s. c. 34 N. W. 833; *Barnes v. Town of Marcus*, 96 Iowa 675; s. c. 65 N. W. 984; *Homan v. Franklin Co.*, 90 Iowa

185; s. c. 57 N. W. 703; *Rice v. City of Des Moines*, 40 Iowa 638; *Barce v. City of Shenandoah*, 106 Iowa 426; s. c. 76 N. W. 747. But see *Cosner v. City of Centerville*, 90 Iowa 33; s. c. 57 N. W. 636.

⁶⁰ *Hodges v. City of Waterloo*, 109 Iowa 444; s. c. 80 N. W. 523.

⁶¹ *O'Malley v. Borough of Parsons*, 191 Pa. St. 612; s. c. 43 Atl. 384; *Fisher v. City of Mt. Vernon*, 58 N. Y. S. 499; s. c. 41 App. Div. (N. Y.) 293; *City of Flora v. Pruett*, 81 Ill. App. 161; *Shumway v. City of Burlington*, 108 Iowa 424; s. c. 79 N. W. 123; *Arthur v. City of Charleston*, 46 W. Va. 88; s. c. 32 S. E. 1024; *Twist v. City of Rochester*, 55 N. Y. S. 850; s. c. 37 App. Div. (N. Y.) 307. The question of whether the city has constructive notice is for the jury: *Hodges v. City of Waterloo*, 109 Iowa 444; s. c. 80 N. W. 523. It is entirely proper for a city when it learns of an accident to take additional precautions to insure the safety of persons passing over a defective sidewalk and it will not be imputed as prior negligence: *City of Chicago v. Richardson*, 75 Ill. App. 198. The exercise of the power to drain streets is judicial in its nature and hence an owner has no right of action for injury growing out of the insufficiency of a drain. A mere mistake in judgment is not

§ 1698. **Contributory negligence—Evidence of.**—Traveling on a sidewalk known to have dangerous defects does not necessarily constitute such negligence as will prevent a recovery.⁶² It is not conclusive evidence of contributory negligence where it does not appear that the plaintiff knew of the unsafe condition.⁶³ Mere knowledge of the defect is not contributory negligence without regard to plaintiff's having it in mind at the time or to the care taken to avoid the accident.⁶⁴ But it has been held that a person is guilty of contributory negligence who is injured by going on an icy place in the sidewalk the dangerous condition of which is known where the evidence shows there was nothing to distract the attention and the danger could have been avoided by going around.⁶⁵ It can not be said as a matter of law that plaintiff was guilty of contributory negligence where the testimony is conflicting as to the amount of light by street lights, and there is testimony that the night was dark and foggy at the time of the injury.⁶⁶ Where plaintiff knew of a defect in the street the care required is proportionate to the known danger.⁶⁷ Where a known defect exists in a street a person using the street is required to use ordinary care to avoid injury, but the care is measured by the nature of the peril.⁶⁸ A person has a right to use a street which has a defect known to such person, and must use ordinary care to prevent injury, but a greater degree of care will be exacted where the person is aware of the defect and dangerous condition.⁶⁹ Where plaintiff was injured by stepping into a grate over a drain opening at a place other than a crossing, and the jury finds the city was negligent, the verdict will not be disturbed on the ground of contributory negligence where the evidence does not show that it was light enough to see the dangerous condition if plaintiff had looked, and the evidence does not show that plaintiff looked.⁷⁰ Where a person is injured by the tilting of a loose board in a sidewalk, recovery may be had

negligence: *Pressman v. Borough of Dickson City*, 13 Pa. Super. Ct. 236.

⁶² *City of Littlefield v. Anglim*, 83 Ill. App. 55.

⁶³ *City of Huntington v. Folk*, 154 Ind. 91; s. c. 54 N. E. 759.

⁶⁴ *Urtel v. City of Flint*, 122 Mich. 65; s. c. 80 N. W. 991. Cf. *Lowell v. Watertown Tp.*, 58 Mich. 568; s. c. 25 N. W. 517; *Sias v. Village of Reed City*, 103 Mich. 312; s. c. 61 N. W. 502; *Schwingschlegl v. City of Monroe*, 113 Mich. 683; s. c. 72 N.

W. 7; *Crites v. City of New Richmond*, 98 Wis. 55; s. c. 73 N. W. 322.

⁶⁵ *Howey v. Fisher*, 122 Mich. 43; s. c. 80 N. W. 1004.

⁶⁶ *Reed v. City of Spokane*, 21 Wash. 218; s. c. 57 Pac. 803.

⁶⁷ *City of Huntingburg v. First*, 22 Ind. App. 66; s. c. 53 N. E. 246.

⁶⁸ *City of Spring Valley v. Gavin*, 182 Ill. 232; s. c. 54 N. E. 1035.

⁶⁹ *Hoover v. Town of Mapleton*, 110 Iowa 571; s. c. 81 N. W. 776.

⁷⁰ *City of Dallas v. Webb*, 22 Tex. Civ. App. 48; s. c. 54 S. W. 398.

although such person knew there were loose boards in the walk, but did not know their exact location.⁷¹ It is not contributory negligence in one passing along a street with hands and arms full of articles, which would interfere with watching the street, and where the evidence showed that the true condition of the street was not apparent to a pedestrian until the defect was reached.⁷² The question of contributory negligence is properly left to the jury.⁷³ Where a person, for his own pleasure and as a matter of choice, leaves the sidewalk and street crossings and crosses a street intersection diagonally and is injured by stepping into a catch-basin, he assumes the risk.⁷⁴ Prior knowledge with momentary forgetfulness of a defect do not necessarily constitute contributory negligence such as will bar recovery.⁷⁵ Where a driveway is made reasonably safe for vehicles of ordinary width, a person familiar therewith who attempts to drive a truck of extreme width over it assumes the risk of so doing.⁷⁶ It is contributory negligence in going onto an apron leading from a sidewalk to a crosswalk which was slippery from ice, which is known.⁷⁷ A special finding that plaintiff did not know of an excavation, and hence was not guilty of contributory negligence, is not contrary to the evidence where plaintiff swore that he was near-sighted and did not see an excavation in a street, and a companion who passed the excavation earlier in the evening with plaintiff saw it.⁷⁸

§ 1699. Records of council—Proof of.—The papers, entries, records and ordinances of a municipality may be proved by a copy certified under the hand of the keeper of such records and the corporate seal thereof, if any; also they may be proved by copies examined and sworn to as such by a credible witness.⁷⁹ It is not competent to prove by a witness the action of the council in allowing a person to give his note for a liquor license. The record is the best

⁷¹ *District of Columbia v. Crumbaugh*, 13 App. D. C. 553.

⁷² *Nicholson v. Philadelphia*, 194 Pa. St. 460; s. c. 45 Atl. 375.

⁷³ *Hoover v. Town of Mapleton*, 110 Iowa 571; s. c. 81 N. W. 776; *City of Lawrence v. Littell*, 9 Kan. App. 130; s. c. 58 Pac. 495; *O'Malley v. Borough of Parsons*, 191 Pa. St. 612; s. c. 43 Atl. 384. Evidence held necessary to show want of contributory negligence in *Wood v. City of Danbury*, 72 Conn. 69; s. c. 43 Atl. 554; *Johnson v. City of Superior*, 103 Wis. 66; s. c. 78 N. W. 1100.

⁷⁴ *City of Dayton v. Taylor's Adm'r*, 62 Ohio St. 11; s. c. 56 N. E. 480.

⁷⁵ *Knoxville v. Cox*, 103 Tenn. 368; s. c. 53 S. W. 734.

⁷⁶ *Jordan v. City of New York*, 60 N. Y. S. 696; s. c. 44 App. Div. (N. Y.) 149.

⁷⁷ *City of De Pere v. Hibbard*, 104 Wis. 666; s. c. 80 N. W. 933.

⁷⁸ *Hildman v. City of Phillips*, 106 Wis. 611; s. c. 82 N. W. 566.

⁷⁹ *City of Chicago v. English*, 80 Ill. App. 163; *Hencke v. Standiford*, 66 Ark. 535; s. c. 52 S. W. 1.

evidence of the action of the council.⁸⁰ Judicial cognizance of an ordinance will not be taken by courts unless the statute expressly so declares.⁸¹ Judicial notice will be taken of a city charter, which is a public act, and it need not be pleaded.⁸²

§ 1700. Presumptions.—Where suit is brought to recover damages for a nuisance in a highway, it is proper to show that the city marshal employed men to establish the nuisance, for which the city paid, and it raises a presumption that the employment was authorized by the city and is sufficient to sustain a verdict.⁸³ The court will presume in the absence of testimony, that the cost of an improvement has been properly apportioned, under a statute providing that the ordinance and apportionment shall be prima facie evidence of every other fact necessary to be established by the plaintiff.⁸⁴ Where the statutes provide that certain facts shall constitute prima facie evidence of plaintiff's right of recovery it will be presumed that the grade of the street has been established by legislative authority, where no change has been made in the grade for fifty or sixty years, during which the street has often been reconstructed on the same grade.⁸⁵ A person who is traveling on a street which is in constant use and has no knowledge of its defects has a right to presume the street is reasonably safe for ordinary travel throughout its width.⁸⁶

§ 1701. Miscellaneous.—Where plaintiff had frequently passed over a sidewalk where the injury occurred and had noticed that it was defective and six months before the injury two other witnesses had observed its dangerous condition it is sufficient to establish constructive notice.⁸⁷ Evidence that the mayor had knowledge of the digging of a ditch in violation of an ordinance is admissible as tending to show an implied consent by the city that the ditch should be dug.⁸⁸ Where notice of injury by pollution of a stream is given to sewer commissioners the city can not complain where notice was otherwise duly proved.⁸⁹ A corporation, municipal as well as private, is bound by the declarations of its officers where such declarations accompany

⁸⁰ *Moore v. Mayor &c.*, 107 Ga. 704; *Stone Co.*, 21 Ky. L. 669; s. c. 52 S. W. 947.

⁸¹ *Duncan v. City of Lynchburg* (Va.), 34 S. E. 964.

⁸² *Wright v. City of San Antonio* (Tex.), 50 S. W. 406.

⁸³ *City of Goshen v. Alford*, 154 Ind. 58; s. c. 55 N. E. 27.

⁸⁴ *Elder v. Cassilly*, 21 Ky. L. 274; s. c. 54 S. W. 836.

⁸⁵ *Barrett v. Falls City Artificial*

City of Spring Valley v. Gavin, 81 Ill. App. 456.

⁸⁷ *Hoover v. Town of Mapleton*, 110 Iowa 571; s. c. 81 N. W. 776.

⁸⁸ *City of Corsicana v. Tobin*, 23 Tex. Civ. App. 492; s. c. 57 S. W. 319.

⁸⁹ *Platt v. City of Waterbury*, 72 Conn. 531; s. c. 45 Atl. 154.

and are explanatory of an act done by the officer in the scope of his authority.⁹⁰ The same strictness as to rules of evidence is not required before a police trial board as in court.⁹¹ The finding of the city council that a petition for annexation had been signed by more than three-fourths of the legal voters is not *prima facie* evidence of such fact, in a *quo warranto* proceeding.⁹² The power of a city under a general incorporation act to license, regulate and prohibit the sale of intoxicating liquors gives no power to issue licenses until it has been called into life by the city by appropriate legislation.⁹³ Evidence of the character of a building and the nature of business carried on on a piece of land abutting an open piece of land is not evidence of its being a highway.⁹⁴ The admission of facts precludes evidence in conflict with such admission.⁹⁵ A stipulation of defendant's attorney that in the annual appropriation bills there was an appropriation for rent of a water office sufficient to cover rent each year is sufficient proof of the appropriation in an action to recover on a lease.⁹⁶ Where it is left to mere conjecture whether a fall was occasioned by accumulations of snow or smooth ice recovery can not be had.⁹⁷ In an action to foreclose a lien of special assessment, the legality of the incorporation of the city can not be attacked.⁹⁸ An information filed against a school district admits its legal corporate existence.⁹⁹

⁹⁰ *Los Angeles City Water Co. v. City of Los Angeles*, 88 Fed. 720; *Gledden v. Town of Unity*, 33 N. H. 571; *La Salle Co. v. Simmons*, 10 Ill. 513; *Covington &c. R. Co. v. Ingles*, 15 B. Mon. (Ky.) 637; *Gray v. Rollingsford*, 58 N. H. 253; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380; *Grimes v. Keene*, 52 N. H. 330; *Smith v. Proprietors &c.*, 8 Pick. (Mass.) 178; *Bellows v. President &c.*, 2 Mason 31.

⁹¹ *People v. Roosevelt*, 44 N. Y. S. 1003; s. c. 16 App. Div. (N. Y.) 364.

⁹² *People v. City of Peoria*, 166 Ill. 517; s. c. 46 N. E. 1075.

⁹³ *People v. Mount*, 87 Ill. App. 194.

⁹⁴ *Baltimore &c. R. Co. v. City of Seymour*, 154 Ind. 17; s. c. 55 N. E. 953.

⁹⁵ *Pelletier v. City of Ashton*, 12 S. D. 366; s. c. 81 N. W. 735.

⁹⁶ *City of Chicago v. English*, 180 Ill. 476; s. c. 54 N. E. 609.

⁹⁷ *Dapper v. City of Milwaukee*, 107 Wis. 88; s. c. 82 N. W. 725. Cf. *Martin v. City of Chelsea*, 175 Mass. 516; s. c. 56 N. E. 703; *Jordan v. City of New York*, 44 App. Div. (N. Y.) 149; s. c. 60 N. Y. S. 696.

⁹⁸ *Willard v. Albertson*, 23 Ind. App. 164; s. c. 53 N. E. 1077; 54 N. E. 403.

⁹⁹ *District No. 7 &c. v. People*, 75 Ill. App. 539. Evidence establishing a *prima facie* case under city charter of Louisville, where an action is brought to enforce a lien for improvements: *Bitzer v. O'Bryan*, 21 Ky. L. 1307; s. c. 54 S. W. 951. Under Ky. St., § 2838, a copy of the ordinance authorizing an improvement, a copy of the contract and a duly attested copy of the apportionment are *prima facie* evidence that a street grade has been established according to law: *Caldwell v. Cornell*, 21 Ky. L. 812; s. c. 53 S. W. 35.

CHAPTER XLV.

FRANCHISES.

SECTION	SECTION
1702. Power to grant franchises —Limited.	1707. Franchises subject to police power.
1703. Franchise may be a contract.	1708. Revocation, forfeiture and surrender.
1704. Franchises with reference to streets.	1709. Acceptance of franchise — Conditions.
1705. Grant of exclusive franchises.	1710. Franchises to street railways.
1706. Validity of franchise.	1711. Miscellaneous.

§ 1702. Power to grant franchises—Limited.—The legislative body of a municipality is usually vested with power by the legislature to grant franchises within the corporate limits. This power is always subject to limitations, sometimes contained in the charter itself, sometimes in the statute which is to be read in connection with the charter, and at other times in the constitution. When a franchise is granted by a municipality, under legislative power granted to it, it is in fact the exercise of power by the legislature itself through the instrumentality of the municipal council. The action of the council is purely legislative. We have heretofore seen that the exercise of power by the legislature is subject to limitations in that the legislative act can not be such as to bind future legislatures, where a contract relationship is not created. An act which is purely legislative is subject to repeal by a subsequent legislature, and no legislature has a legal or constitutional right by legislation simply to bind irrevocably future legislatures. When the state grants a right to a corporation in regard to public property, highways, streets, etc., it is a right not belonging to citizens generally, but is a grant of a right existing in the sovereignty of the state alone, and is therefore a franchise. Franchises are special privileges conferred by government upon individuals which do not belong to citizens of the country generally by common right.¹ No private person can establish a public highway, public ferry, or railroad without authority from the legislature, direct or derived, and no persons can make themselves a body politic without legislative authority.²

¹ Bank of Augusta v. Earl, 38 U. S. 519, 595.

² California v. Railroad Co., 127 U. S. 1, 40; s. c. 8 S. Ct. 1073.

§ 1703. **Franchise may be a contract.**—An ordinance to grant to a corporation the use of the streets for a specified time in consideration that the company lay its tracks and operate a railway thereon, upon certain conditions prescribed, when accepted by the company and the road built and operated as specified, becomes a contract which the state is not at liberty to impair during its continuance.³ Where a municipality has granted a franchise to a corporation to supply gas or water to the municipality and its citizens through pipes and mains laid in the streets, upon the condition of the performance of services by the grantee, after performance of the grantee it is a contract protected by the constitution of the United States which the state can not impair.⁴ And the same rule applies to franchises granted by a municipality that applies where the franchise is granted by the legislature. In such case the municipality exercises delegated sovereignty.⁵

§ 1704. **Franchises with reference to streets.**—Where permission is given to remove a building through the streets, and ten days are consumed in moving it part of the way, when two days were all that were reasonably required, after which the building was ordered to be removed from the highway within three days and if not it should be removed by the board of public works, and the building not being removed within the time limited, a contractor was employed who removed the building, the board and contractor, having acted within the scope of the order, were not liable in damages.⁶ Where the city granted permission to a property owner to place building material in the street adjacent to his property during the continuous construction of a building, it must appear that no more of the street was occupied than allowed by the ordinance, and that the material was so placed when necessary during the continuous use of the street.⁷ The com-

³ City R. Co. v. Citizens' St. R. Co., 166 U. S. 557; s. c. 17 S. Ct. 653.

⁴ Walla Walla City v. Walla Walla Water Co., 172 U. S. 1; s. c. 19 S. Ct. 77; New Orleans Gas &c. Co. v. Louisiana Light &c. Co., 115 U. S. 650, 660; s. c. 6 S. Ct. 252; New Orleans Water Works Co. v. Rivers, 115 U. S. 674; s. c. 6 S. Ct. 273; St. Tammany W. W. v. New Orleans Water-Works, 120 U. S. 64; s. c. 7 S. Ct. 405; Crescent City Gas &c. Co. v. New Orleans Gas &c. Co., 27 La. An. 138, 147; Defiance Water Co. v. City of Defiance, 90 Fed. 753.

⁵ State v. Cincinnati Gas &c. Co., 18 Ohio St. 262, 293; Wright v. Nagle, 101 U. S. 791; Hamilton Gas &c. Co. v. Hamilton City, 146 U. S. 258, 266; s. c. 13 S. Ct. 90; Bacon v. Texas, 163 U. S. 207; s. c. 16 S. Ct. 1023; New Orleans &c. Co. v. New Orleans, 164 U. S. 471; s. c. 17 S. Ct. 161.

⁶ Keating v. Macdonald, 73 Conn. 125; s. c. 46 Atl. 871.

⁷ Martin v. Chicago &c. R. Co., 87 Ill. App. 208.

mon council in the exercise of a power to permit railroads to cross streets are not authorized to surrender to the railroad the exclusive use of a considerable portion of a street for the erection and maintenance of abutments and piers.⁸ A municipality has power to grant a franchise to an electric light company, chartered under general laws, to use its streets for poles and wires.⁹ Adjacent property owners on a street across which a bridge has been erected for the purpose of connecting two buildings on opposite sides of the street are entitled to prosecute a certiorari proceeding to set aside the grant of such franchise, such owners being injured thereby.¹⁰ Where a common council is granted power to regulate and control the erection of wires and poles in the streets, and other public places, it is not an infringement of the power of the legislature to grant a franchise to use the streets for the erection of wires and poles, as in the former case the power is to regulate the manner of exercising the franchise.¹¹

§ 1705. Grant of exclusive franchises.—There must be express legislative authority to enable a city council to grant an exclusive franchise. The general rule of law is that a public corporation is not permitted to deprive itself by contract of the right to exercise legislative power.¹² And an ordinance giving an exclusive privilege is unconstitutional and void.¹³ Therefore a municipality is not estopped to question the right of its council to grant an exclusive franchise to the use of its streets.¹⁴ Where the constitution provides that in any city having no light plant any person may have the privilege of using the streets for the purpose of supplying light under proper general regulations as to damages and charges, a statute which provides that the franchise for lighting shall be advertised and sold to the highest bidder is unconstitutional, in that the grantee in such case would take an exclusive franchise.¹⁵ A municipality can not by a grant to a corporation of a franchise absolutely bind itself not to furnish a system

⁸ Delaware &c. R. Co. v. City of Buffalo, 158 N. Y. 266; s. c. 53 N. E. 44.

⁹ Wyandotte Elec. L. Co. v. City of Wyandotte, 124 Mich. 43; s. c. 82 N. W. 821.

¹⁰ State v. Board &c., 65 N. J. L. 307; s. c. 47 Atl. 466.

¹¹ Barhite v. Home Tel. Co. &c., 63 N. Y. S. 659; s. c. 50 App. Div. (N. Y.) 25.

¹² Long v. City of Duluth, 49 Minn. 280; s. c. 51 N. W. 913.

¹³ Curry v. District of Columbia, 14 App. D. C. 423.

¹⁴ Smith v. Town of Westerly, 19 R. I. 437; s. c. 35 Atl. 526.

¹⁵ Pereria v. Wallace, 129 Cal. 397; s. c. 62 Pac. 61. Where the privilege granted is not exclusive the city of New Orleans may grant to a steam railroad company the use of streets: City of New Orleans v. Steinhardt, 52 La. An. 1043; s. c. 27 So. 586.

of its own for its own use. A council can not grant away one of the specific powers conferred on it by its charter.¹⁶ The grant of a franchise to a water company to lay its pipes in the streets and the erection of a water plant by the company thereunder do not affect the right of the village to construct water-works thereafter of its own, and it is not required to condemn the property of the company whose works are erected under its franchise.¹⁷ A city which has granted a franchise to a corporation to construct water-works and supply the city may, notwithstanding, construct water-works of its own.¹⁸ The exclusive right given to a street railroad company to operate its line in a city is a property right.¹⁹ Franchises which are intended to be exclusive are to be strictly construed. Therefore where a grant of an exclusive privilege is given for a term of years for supplying a city with water from a particular source or stream it is not to be extended by implication to other sources or streams.²⁰ And it has been held that a franchise may be exclusive as to other companies, but not exclusive as to the municipality itself. Thus a franchise to a water company may be exclusive as to other water companies, but not exclusive as to the municipality itself, and will not prevent it from establishing water-works of its own.²¹

§ 1706. Validity of franchise.—A municipality, under its general power, may grant the right of way to a railroad company to lay its tracks along the streets of the municipality, if in so doing it does not destroy or unreasonably impair the street as a highway for the use of the general public.²² The municipality has no power to grant permission to an abutting property owner to construct and maintain a bridge across a street whereby the value of the street for public purposes is impaired and the value of the property of adjacent owners seriously affected.²³ A grant of a franchise is valid though at the

¹⁶ *North Springs Water Co. v. City of Tacoma*, 21 Wash. 517; s. c. 58 Pac. 773.

¹⁷ *President &c. v. Village of Canandaigua*, 96 Fed. 449.

¹⁸ *Thomas v. City of Grand Junction*, 13 Colo. App. 80; s. c. 56 Pac. 665.

¹⁹ *Wilmington City R. Co. v. Wilmington &c. R. Co.* (Del. Ch.), 46 Atl. 12. As to what is an exclusive franchise of all the streets in a city, see *Wilmington City R. Co. v. Wilmington &c. R. Co.*, *supra*.

²⁰ *Stein v. Bienville Water Supply Co.*, 141 U. S. 67; s. c. 11 S. Ct. 892. See *New Orleans W. W. Co. v. Rivers*, 115 U. S. 674; s. c. 6 S. Ct. 273; *St. Tammany W. W. v. New Orleans W. W.*, 120 U. S. 64; s. c. 7 S. Ct. 405.

²¹ *Lehigh Water Co.'s Appeal*, 102 Pa. St. 515.

²² *Town of New Castle v. Lake Erie &c. R. Co.*, 155 Ind. 18; s. c. 57 N. E. 516. Cf. *Laager v. City of Antonio* (Tex. Civ. App.), 57 S. W. 61.

²³ *State v. Board &c.*, 65 N. J. L. 307; s. c. 46 Atl. 166; 47 Atl. 466.

time the grantee is not incorporated, but does become so later on.²⁴ Where a statute provides that no ordinance granting a franchise shall be passed on the day of its introduction, nor within five days thereafter, it is mandatory.²⁵ Franchises granted in bad faith are void.²⁶ An attempt to confer valuable additional franchises upon a street railway company, in excess of the power of the council, may be called in question by any citizen and taxpayer.²⁷

§ 1707. Franchises subject to police power.—A municipality is not permitted to grant away its police power, nor can the legislature do so. Every individual's property is at all times subject to proper police regulations and there is no such sanctity in the making of a contract or the granting of a franchise as will shield or exempt it from proper police regulation.²⁸ Where permission has been given to erect wires in a street and it has been done pursuant to a resolution it is in the nature of a perpetual franchise, subject to police power, and not a mere revocable license.²⁹ A franchise granted on conditions and accepted does not repeal by implication prior general ordinances which are police regulations in their nature.³⁰ And so after the granting of a franchise to a street railroad company the city may in good faith locate a sewer in such manner as to suspend the operations of the railway.³¹ But an injunction will not issue, in such case, at the suit of one not owning property on the street. The action is by the municipality.³²

§ 1708. Revocation, forfeiture and surrender.—The municipality having power to grant a franchise has power to revoke such franchise upon sufficient cause, but it is not permitted arbitrarily to exercise the power of revocation. By the recognition for nine years of the validity of an incorporation under a general act and the granting of a franchise from the city to erect poles and wires in the streets, the city is

²⁴ *Clarksburg Electric Light Co. v. City of Clarksburg*, 47 W. Va. 739; s. c. 35 S. E. 994.

²⁵ *East Tennessee Tel. Co. v. Anderson Co. Tel. Co.*, 22 Ky. L. 418; s. c. 57 S. W. 457.

²⁶ *Adamson v. Nassau Electric R. Co.*, 33 N. Y. S. 732; 12 Misc (N. Y.) 600.

²⁷ *State v. Ellis*, 52 La. An. 1065; s. c. 27 So. 580.

²⁸ *Stone v. Mississippi*, 101 U. S. 814; *Butchers' Union v. Crescent City &c. Co.*, 111 U. S. 746; s. c. 4 S.

Ct. 652; *Metropolitan Board &c. v. Barrie*, 34 N. Y. 657; *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383.

²⁹ *Suburban Electric &c. Co. v. Inhabitants &c.* (N. J. Eq.), 41 Atl. 865.

³⁰ *City of McKeesport v. Citizens' &c. R. Co.*, 2 Pa. Super. Ct. 249.

³¹ *City of San Antonio v. San Antonio St. R. Co.*, 15 Tex. Civ. App. 1; s. c. 39 S. W. 136.

³² *Hanbury v. Woodward Lumber Co.*, 98 Ga. 54; s. c. 26 S. E. 477.

estopped to recall its franchise.³³ A city council can not revoke a vested right granted an individual.³⁴ Where a city acting under power from the legislature grants a franchise to a corporation, it exercises the power of the state and acts in its behalf, but it has not the power to institute a suit to forfeit such franchise for misuse or abuse. That power is reserved in the state.³⁵ A city has power to accept a surrender of a franchise granted a street railway company.³⁶ In granting an extension of time to commence work under a franchise previously granted, conditions may be imposed on such grant.³⁷ Although an original franchise was granted by ordinance, yet if not so required by statute, it may be modified by resolution.³⁸ Where a franchise to a street railway is granted to operate and maintain its road in the streets of a city upon the consent of the city and in such manner and upon such conditions as the city may impose, and the city by ordinance grants the privilege of constructing and operating the road upon a certain street, the grant in such case is a license and not a franchise.³⁹ But the privilege of occupying a street by a street railway company is not always a license, revocable at pleasure. It may become an irrevocable contract. If the grant is for an adequate consideration and is accepted by the grantee, then it ceases to be a mere license and becomes a valid and binding contract, and probably the same effect exists where prior to a revocation the license is acted on in a substantial manner.⁴⁰ The law is not uniform that the right to the use of streets by a street railroad is a license and not a franchise.⁴¹ And it has been held that an ordinance granting a franchise in a street has the force and effect of a statute of the state, and that for a violation of its provisions an action may be maintained to vacate or annul the charter.⁴² When a city grants a franchise to construct and oper-

³³ *Wyandotte Electric Light Co. v. People*, 91 Ill. 80; *Chicago & C. R. Co. v. Wyandotte*, 124 Mich. 43; s. c. 82 N. W. 821.

³⁴ *Stevens v. City of Muskegon*, 111 Mich. 72; s. c. 69 N. W. 227.

³⁵ *Milwaukee Electric & C. Co. v. City of Milwaukee*, 95 Wis. 39; s. c. 69 N. W. 794.

³⁶ *Wood v. City of Seattle*, 23 Wash. 1; s. c. 62 Pac. 135.

³⁷ *Eureka Light & C. Co. v. City of Eureka*, 5 Kan. App. 669; s. c. 48 Pac. 935.

³⁸ *State v. Cowgill & C. Mill Co.*, 156 Mo. 620; s. c. 57 S. W. 1008.

³⁹ *Chicago City R. Co. v. People*, 73 Ill. 541; *Chicago Board of Trade v.*

People, 91 Ill. 80; *Chicago & C. R. Co. v. Dunbar*, 95 Ill. 571; *City of Quincy v. Bull*, 106 Ill. 337; *Chicago & C. Co. v. Town of Lake*, 130 Ill. 42; s. c. 22 N. E. 616; *City of Belleville v. Citizens' & C. R. Co.*, 152 Ill. 171; s. c. 38 N. E. 584.

⁴⁰ *Chicago & C. Co. v. Town of Lake*, 130 Ill. 42; s. c. 22 N. E. 616; *Harvey v. Aurora & C. R. Co.*, 186 Ill. 283; s. c. 57 N. E. 857.

⁴¹ *Detroit Citizens' St. R. Co. v. City of Detroit*, 64 Fed. 628; s. c. 12 C. C. A. 365.

⁴² *State v. Madison St. R. Co.*, 72 Wis. 612; s. c. 40 N. W. 487. Where an ordinance imposes conditions in

ate a street railroad on certain streets it becomes a contract when accepted which the city can not infringe or impair, and the city can not authorize the use of said tracks by another company unless the power is reserved in the grant. Such right can only be acquired by another company by condemnation.⁴³

§ 1709. Acceptance of franchise—Conditions.—While the acceptance of a franchise is necessary, yet it is universally held that a previous request of an ordinance granting a franchise obviates the necessity of a subsequent acceptance.⁴⁴ And so also an acceptance may be presumed, as where it is for the benefit of the corporation.⁴⁵ Where as a condition in the grant of a franchise to a gas company to lay pipes in a street, it is provided that the streets shall be left in as good condition as before, the city has a right to insist that the work shall be done under such reasonable restrictions and conditions as to secure the proper performance of the work.

§ 1710. Franchises to street railways.—The taking of private property for street railway purposes must be under the statute and is authorized only when there is a necessity, and does not depend on the judgment of the city council.⁴⁶ A permit to a street railway company to relay its rails includes the taking up of the pavement.⁴⁷ A private individual has no right to enjoin the operation of a street railway on the ground of its non-conformity with the ordinance granting the franchise unless he can show some peculiar injury to himself. Such questions can only be raised by the state or the city granting the franchise.⁴⁸ Where it is expressly stipulated between a city and street

consideration of privileges granted and requires the corporation to accept the ordinance it is not a mere license or mere private contract, so as to preclude mandamus by a citizen to enforce compliance with the ordinance: *People v. Suburban R. Co.*, 178 Ill. 594; s. c. 53 N. E. 349.

⁴³ *Mercantile &c. Co. v. Collins &c. R. Co.*, 101 Fed. 347. An ordinance held not to be a grant of franchise on certain streets in *Harvey v. Aurora &c. R. Co.*, 186 Ill. 283; s. c. 57 N. E. 857.

⁴⁴ *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 568; s. c. 17 S. Ct. 653; *City of Atlanta v. Gate City Gas &c. Co.*, 71 Ga. 106; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654; *President &c.*

v. Richardson, 1 Maine 79; *State v. Dawson*, 22 Ind. 272; *Newton v. Carberry*, 5 Cranch C. C. 632; *Perkins v. Sanders*, 56 Miss. 733, 739.

⁴⁵ *President &c. v. Dandridge*, 12 Wheat. 64, 70; *Proprietors &c. v. Proprietors &c.*, 7 Pick. (Mass.) 344; *Commonwealth v. Cullen*, 13 Pa. St. 133, 140; *Bangor &c. R. Co. v. Smith*, 47 Maine 34; *City of Kalamazoo v. Kalamazoo Heat &c. Co.*, 124 Mich. 74; s. c. 82 N. W. 811.

⁴⁶ *Harvey v. Aurora &c. R. Co.*, 186 Ill. 283; s. c. 57 N. E. 857.

⁴⁷ *North Chicago St. R. Co. v. Dudgeon*, 184 Ill. 477; s. c. 56 N. E. 796.

⁴⁸ *Kitchell v. Manchester &c. R. Co.*, 79 Mo. App. 340.

railway company that no charge for paving shall be made against the railway company, the council can not thereafter under a general law compel contribution for the paving already done.⁴⁹ The right of a street railway company to use other power than that specified can only be raised by the government with whom the contract is made, and can not be raised by a private person who sues to recover for personal injuries.⁵⁰ Where a street railway company has laid its tracks under an ordinance which provides that its track, etc., shall be under the supervision of a committee specified, it can not change its location without the consent of such committee.⁵¹ If a railroad charter requires the consent of the common council to make a location of the company's tracks within the city, such consent is required for the location of depots, engine-houses and necessary track approaches.⁵² Permission given to an electric street railway to operate its cars through streets is not a grant of the trees, and does not divest the city of its power to control the railway company as to the use of the trees.⁵³ Where a license is given and large expenditures have been made on the strength of such license, it can not be taken away during the existence of the contract for which the license is given.⁵⁴

§ 1711. **Miscellaneous.**—Where a village has the right to condemn and acquire the rights and properties of existing corporations, it is optional with the village only and an existing company has no right to compel the purchase or condemnation of its rights.⁵⁵ The city by electing to authorize private parties to erect water-works, does not estop itself from entering the field as a competitor.⁵⁶ Where a charter provides that a city council in granting a franchise may incorporate efficient provisions for compulsory arbitration of all dis-

⁴⁹ *Atlanta &c. R. Co. v. City of Atlanta*, 111 Ga. 255; s. c. 36 S. E. 667.

⁵⁰ *Chicago &c. R. Co. v. Chicago City R. Co.*, 186 Ill. 219; s. c. 57 N. E. 822.

⁵¹ *Borough of Shamokin v. Shamokin &c. R. Co.*, 196 Pa. St. 166; s. c. 46 Atl. 382.

⁵² *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646; s. c. 20 S. Ct. 509.

⁵³ *Consolidated Traction Co. v. East Orange Tp.*, 63 N. J. L. 669; s. c. 44 Atl. 1099.

⁵⁴ *Los Angeles Water Co. v. City of Los Angeles*, 88 Fed. 720; *Rhodes v. Otis*, 33 Ala. 578; *Woodbury v. Parshley*, 7 N. H. 237; *Lacy v. Ar-*

nett, 33 Pa. St. 169; *Russell v. Hubbard*, 59 Ill. 335; *Beall v. Mill Co.*, 45 Ga. 28; *Veghte v. Power Co.*, 19 N. J. Eq. 142, 153; *Williamstown R. Co. v. Battle*, 66 N. C. 540, 546; *Flickinger v. Shaw*, 87 Cal. 126; s. c. 25 Pac. 268; *Grimshaw v. Belcher*, 88 Cal. 217; s. c. 26 Pac. 84; *Smith v. Green*, 109 Cal. 228; s. c. 41 Pac. 1022.

⁵⁵ *Skaneateles W. W. Co. v. Village of Skaneateles*, 161 N. Y. 154; s. c. 55 N. E. 562.

⁵⁶ *North Springs Water Co. v. City of Tacoma*, 21 Wash. 517; s. c. 58 Pac. 773.

putes between the grantee and its employes as to wages, such provisions may become incorporated in and become a part of a franchise granted to a street railway company.⁵⁷

⁵⁷ Wood v. City of Seattle, 23 Wash. 1; s. c. 62 Pac. 135. The city is liable for the franchise tax under laws of Ky. where it owns and operates water-works: City of Newport v. Commonwealth, 21 Ky. L. 42; s. c. 50 S. W. 845; 51 S. W. 433. Construction of Borough Act of 1897 (P. L. 1897, p. 285) of N. J. and the right of borough council to control water-works previously constructed: Walling v. Mayor &c., 64 N. J. L. 203; s. c. 44 Atl. 864. § 203 Const. of Ky. applies to private corporations only: Carrollton Furniture Mfg. Co. v. City of Carrollton, 20 Ky. L. 818; s. c. 47 S. W. 439. Construction of charter of Greater New York and other laws relating to power of granting franchises, by whom, etc.: Ghee v. Northern Union Gas. Co., 158 N. Y. 510; s. c. 53 N. E. 692.

CHAPTER XLVI.

CIVIL SERVICE AND VETERANS ACTS.

(a) CIVIL SERVICE ACTS.	SECTION
SECTION	1718. Reinstatement.
1712. The scope and purpose of civil service laws.	1719. Miscellaneous provisions.
1713. Civil service laws—When introduced—New York statute.	1720. Constitutionality of civil service laws.
	(b) VETERANS ACTS.
1714. To whom applicable.	1721. Scope and purpose of acts.
1715. Civil service rules and regulations.	1722. Removal and discharge.
1716. Appointments—Meaning of, etc.	1723. Applies to subordinates only.
1717. Removal, reasons for.	1724. Hearing.
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(a) CIVIL SERVICE ACTS.

§ 1712. **The scope and purpose of civil service laws.**—A law must largely be construed with reference to the surroundings existing at the time of its enactment and the existing evils designed to be remedied. The condition of the civil service, both federal and state, prior to the adoption of civil service laws was deplorable. Officers, though elected by the people, became imbued with the idea that they were responsible to the party electing them. Those who were voters in the dominant party were also imbued with the idea that to the victor belong the spoils, and made demands considered imperative upon the incumbent for positions in the civil service irrespective of qualification or fitness for the position sought, and based their demands solely upon political service rendered or to be thereafter rendered. It has been justly said that “the continuous and systematic filling of all the offices of a great and industrious nation by such means became conclusive proof in the minds of many intelligent and influential men that the nation itself had not in such matters emerged from the semi-barbarous state, and that it had failed to obtain the full benefits arising from an advanced and refined civilization. The government, it was said, in such case, is looked upon as an enemy’s country fit to be raided and conquered; and to obtain possession of it a desirable thing, because all the offices within the gift of those who administer it are lawful spoil of war, and to be

parceled out by the chiefs of the victorious party to their faithful followers in recognition of past political services, or in expectation of future support of the same nature.”¹ The purpose of civil service laws is to do away with the evils which result from the “spoils system,” which are inefficiency, extravagance, the interruption of public business by place hunters, corruption of the electoral franchise, and political assessments. The fundamental principles of such laws are that appointments to office or employment must be made according to merit and fitness, to be ascertained by competitive examinations, free to all, and that promotions from lower to higher grades in the public service must be made on the basis of merit.²

§ 1713. Civil service laws—When introduced—New York statute.—Civil service was introduced in New York in 1883 under an act which provided for the appointment of three commissioners, who were to aid the governor in preparing rules for carrying the act into effect. The rules were required to provide for open competitive examinations for testing the fitness of applicants for public service; the filling of offices, places and employments by selections from those graded highest. By the act of 1894 the mayor of each city was required to prescribe regulations for the admission of persons into the civil service of the city in order to promote the efficiency thereof by ascertaining the fitness of applicants, or candidates, in respect to character, knowledge and ability for the branch of the service they sought to enter. By the Constitution of New York, Art. 5, § 8, it is provided that appointments and promotions in the civil service (including cities and villages) shall be made according to merit and fitness, ascertained as far as practicable by examinations competitive in their nature. Under the constitutional provision referred to it was held that no reference was made to the heads of departments, but it had reference only to subordinates and those who occupy confidential relations. Those occupying confidential relations were defined to be those whose duties were not merely clerical, but were such as specially devolved upon the head of an office which by reason of numerous duties he was compelled to delegate to others, thus requiring the exercise of skill, judgment, trust and confidence, together with responsibility of the office or the municipality. Under the statutes referred to it was held that it would not be just to hold an official responsible for the acts of an employe who necessarily had the custody of moneys

¹ Mr. Justice Peckham in *Rogers v. Common Council &c.*, 123 N. Y. 173; s. c. 25 N. E. 274; 9 L. R. A. 579. ² *People v. Kipley*, 171 Ill. 44; s. c. 49 N. E. 229.

when the officials had no choice in his selection. For this reason persons occupying positions of this nature were exempt. There was also an exemption of school teachers who were required to pass examinations under other statutes which were equivalent to civil service examinations. There is now in New York one general civil service law applicable to the whole state and to all the cities thereof. Statutes relating to appointments and employments in the civil service based on merit and fitness, to be ascertained by competitive examinations, are in force in New York, Massachusetts, Illinois, Wisconsin, Louisiana, Indiana (limited), Ohio (limited), Connecticut, California, Washington and Pennsylvania, and some other states. The federal legislation, an act of congress passed in 1883, but not relating to municipalities, is not considered. The Massachusetts act was passed in 1884, and is based on the federal law and the New York statutes, and applies to all the cities of the state. The Illinois act was passed in 1895 and is in force where adopted by a city on a majority vote, and is in force in Chicago and Evanston. The distinguishing features of this law are that it requires appointments to be made from the eligibles standing highest in the list, and allows no discretion as to selection from the highest of three eligibles, and forbids removals except for cause upon written charges after hearing by the commission, and requires a certificate from the commission as a prerequisite to the payment of a salary. It also provides for competitive examinations for promotion similar to the examination for appointment. The classified service of the city of Chicago includes all officers and employes of the city except those elected by the people, the city council, and those requiring confirmation by the council, judges and clerks of the election, members of the board of education, superintendent of schools and teachers, heads of principal departments, members of the law department and mayor's private secretary. In Ohio the law provides for the regulation and improvement of the civil service in certain departments within cities of the first and second class. The Wisconsin act of 1895 is general and prohibits the payment of salaries to persons employed in violation of the act, and authorizes prosecutions for a violation of the act by the attorney-general, state's attorney or by the board, and gives the board power to administer oaths, subpoena witnesses and compel the production of books and papers. The Louisiana legislature in 1890 passed an act, the main features of which are a restriction of appointees to registered voters who actually voted at a general election next preceding the examination; the limitation of the term of office to that of the appointing officer, and the exemption of laborers from examination. The Indiana act of 1895 relates to

charitable institutions, consisting of schools for the blind and deaf and hospitals for the insane. The New Haven charter was amended in 1897 and civil service extended to the municipal government of that city. The charter of the city of San Francisco provides for a complete civil service commission, prohibiting removals except for cause upon written charges after a hearing by the commission, and for promotions based on competitive examinations, similar to those in the original appointment, and permitting selections from the three highest on the list. Under the city charter of Seattle (1896) a system of civil service was adopted based mainly on the laws of Illinois and Massachusetts. All officers and employes, with but few exceptions, are required to undergo a competitive examination, and when appointed retain their positions until removed or retired. The civil service act of Pennsylvania was passed in 1885, which was made applicable to the city of Philadelphia.^{2a}

§ 1714. To whom applicable.—Most statutes relating to civil service indicate the scope or general character of offices intended to be affected thereby, or the nature of employment regulated by them. And where the statute is general certain offices and employments are exempted from its operation. Under the law of New York of 1888 as amended in 1892 an honorably discharged Union soldier, sailor or marine, or one who has served the time required by law in a volunteer fire department of a city, town or village of the state, could not be removed from his position except for cause shown after a hearing had, but it was provided that the provision did not apply to the position of private secretary or chief clerk or deputy of any official or department, or to any other person holding a confidential relation to the appointing officer. It was held that confidential relation within the meaning of the law had two elements, that of secrecy and that of trust and confidence; that when the statute casts upon an officer a duty involving skill or integrity and a liability either personal or on the part of the municipality which he represents, and he intrusts the discharge of this duty to another, their relations become confidential. Where the constitution provides that city officers shall be elected by the electors and appointed by such authorities as the legislature shall designate for that purpose the power of the municipal authorities to make appointments can not be changed by statute into a mere ministerial authority of appointing such persons as shall, as a result of competitive examination, be reported to them as best qualified.³ Within the meaning of the constitution and

^{2a} See report of United States Civil Service Commission for 1897-8.

³ *People v. Palmer*, 152 N. Y. 217; s. c. 46 N. E. 328; *People v. Mosher*,

statute of New York persons occupying confidential relations are not subject to competitive examinations.⁴ In order to determine whether an examination of a candidate for an office is practicable the court must first ascertain the nature and character of the duties, and when that has been done the question of exemption becomes one of law. Where the duties are not merely clerical but are such as especially devolve upon the head of the office, which by reason of the numerous duties of his office he is compelled to delegate to others and the performance of which requires the exercise of judgment, trust and confidence, involving the responsibility of the officer or the municipality, the position is confidential.⁵ An officer appointed before the adoption of civil service rules is not governed thereby.⁶ The fact that a subordinate officer performs regularly some clerical work does not make him a regular clerk within civil service rules,⁷ but the position of flume tender of city water works is one of permanent character and governed by the rules.⁸ A person employed as superintendent of the police telegraph system of a city is not an officer known to the law and is dischargeable at will.⁹ An inspector of highway improvements employed by the commissioner of public works is not governed by the civil service rules and may be discharged.¹⁰

§ 1715. Civil service rules and regulations.—Civil service commissioners or other specified officers are empowered to adopt reasonable rules and regulations for the enforcement of the law and carrying into effect its provisions. It is impossible of course for a statute to provide for all the details that may arise, and for this reason power is vested usually in commissions to adopt from time to time rules relating to the appointment and removal of officials and employes and these rules when adopted have the effect of law. The machinery for the execution of the law is thus embodied in the regulations. As to the beneficial effects growing out of the enforcement of civil service

163 N. Y. 32; s. c. 57 N. E. 88; 79 Am. St. 552; *Chittenden v. Wurster*, 152 N. Y. 345; s. c. 46 N. E. 857; 37 L. R. A. 809.

⁴ *Chittenden v. Wurster*, *supra*.

⁵ *People v. Keller*, 54 N. Y. S. 1011; s. c. 35 App. Div. (N. Y.) 493.

⁶ *Peters v. Bell*, 51 La. An. 1621; s. c. 26 So. 442.

⁷ *People v. Dalton*, 54 N. Y. S. 216; s. c. 34 App. Div. (N. Y.) 302.

⁸ *State v. Smith*, 19 Wash. 644; s. c. 54 Pac. 33.

⁹ *Miller v. Warner*, 59 N. Y. S. 956; s. c. 42 App. Div. (N. Y.) 208.

¹⁰ *Hoggatt v. City of Mt. Vernon*, 55 N. Y. S. 315; 36 App. Div. (N. Y.) 374. Under Greater New York charter the office of commissioner of jurors is a city office and a clerk in the office is subject to civil service regulations: *People v. Welde*, 59 N. Y. S. 474; s. c. 27 Misc. (N. Y.) 697.

laws where such laws are judicious and their scope is properly measured and the administration is faithfully executed there is no longer a question to be indulged. The results of both federal and state legislation upon this subject perhaps have not fully met the expectation of the designers and, as in the case of most reforms, it may yet be subject to many improvements. The main object sought in legislation of this nature is to secure permanency in the tenure of appointees but even in this there may be, it has been thought, an element of danger. Thus an appointment of one who has been selected upon merit as to qualification, does not of itself guarantee in all cases faithful service. When a person has become a fixture, so to speak, in an official position, it should not be regarded as permanent, except upon honest and faithful service rendered. If an appointment be made upon merit as to qualification the merit may be wholly neutralized by a disinclination to render faithful service as a public servant. Hence the ground of removal should not be arbitrary, and at the same time should not be hedged about and circumscribed by construction in such a way as to create an asylum of indolence and inefficiency in execution. Gross inefficiency in public service is none the less the subject of censure whether it results from inattention and lax methods or incompetency as to qualifications. For the reasons above suggested the grounds for removal should be flexible and the rules in regard to removals should be framed and enforced with the sole aim of maintaining a standard of excellency and efficiency. Where a civil service commission is empowered to prescribe suitable regulations for carrying into effect the law the regulations have the effect of law and a removal without compliance with such regulations is invalid and the person removed may be reinstated by mandamus.¹¹

§ 1716. **Appointment—Meaning of, etc.**—The meaning of the word “appointment” as used by federal and state authorities is that the choice of a person to fill an office constitutes the essence of the appointment; that the selection must be the discretionary act of the officer or board clothed with the power of appointment; that while he or it may listen to the recommendation or advice of others yet the selection must finally be his or its act, which has never

¹¹ *People v. Cram*, 64 N. Y. S. 158; s. c. 50 App. Div. 158; s. c. 50 App. Div. (N. Y.) 380. See *People v. Mosher*, 163 N. Y. 32; s. c. 57 N. E. 88. The discharge of a dockmaster without a compliance with rule 42 of the civil service commission of Greater New York was held illegal in *People v. Cram*, 64 N. Y. S. 158; s. c. 50 App. Div. (N. Y.) 380. A modification of the civil service regulations of the city of New York without the approval of the civil service commission was held void in *People v. Scannell*, 59 N. Y. S. 950; s. c. 28 Misc. (N. Y.) 401.

been regarded as ministerial.¹² Where civil rules are in force relating to the police department, the council is confined in selecting a police force to the members who are eligible.¹³ The law requiring a rating as to merit and fitness is not complied with by multiplying the rating of merit by two and declaring that the product shall be the rating of merit and fitness for applicants.¹⁴ Where a statute in relation to civil service provides that the certificate shall recite that the appointment of an employe was in pursuance of the rules made in pursuance of law, an employe appointed prior to the passage of the law under then existing rules is entitled to a certificate that he was employed in pursuance of law and of rules made in pursuance of law.¹⁵ An officer appointed prior to the passage of an act and continued in service by virtue of such appointment is not entitled to and not required to have a certificate in order to be entitled to his salary.¹⁶

§ 1717. Removal, reasons for.—One of the main reasons for the adoption of civil service laws is to prevent, at least restrict, the wholesale removal of officers and employes for political reasons, and thus prevent interference with the efficiency of the service. Most statutes, therefore, contain provisions prohibiting the removal of employes except on charges preferred in writing, stating the reasons for the removal or discharge, and provisions for a hearing.¹⁷ Where the statute provides that if one holding a position subject to competitive examination under civil service regulations shall be removed or reduced the reasons for so doing shall be stated in writing and filed with the head of the department to which he is attached, or other appointing officer, and the person removed shall have an opportunity to be heard, a reduction in rank and grade and of salary without such compliance is invalid.¹⁸ An officer of a fire department holding a competitive position under civil service rules can not be removed without the filing of reasons in writing and a hearing thereon under

¹² *People v. Mosher*, 163 N. Y. 32; s. c. 57 N. E. 88; 79 Am. St. 552.

¹³ *Jones v. Doherty* (Tex. Civ. App.), 56 S. W. 596.

¹⁴ *People v. Common Council &c.*, 57 N. Y. S. 617; s. c. 26 Misc. (N. Y.) 522.

¹⁵ *People v. Dykman*, 60 N. Y. S. 290; 29 Misc. (N. Y.) 234.

¹⁶ *People v. Knox*, 61 N. Y. S. 472; s. c. 45 App. Div. (N. Y.) 537. Power of board to certify,—see *People v. Knauber*, 60 N. Y. S. 298; s. c. 43 App. Div. (N. Y.) 342.

¹⁷ *People v. Titner*, 63 N. Y. S. 209; s. c. 49 App. Div. (N. Y.) 101.

¹⁸ *People v. Scannell*, 59 N. Y. S. 480; s. c. 27 Misc. (N. Y.) 734. A driver of the fire department of New York city holding a position under competitive examination is entitled to have the reasons for his removal stated in writing and filed and an opportunity to defend, under laws of 1883 as amended by laws of 1893, and 1898.

New York laws of 1898, ch. 186, § 3.¹⁹ The law giving a competitive employe the right to be heard before removal does not apply to an attendant of a recreation pier, whose employment is only during a season of the year, although chosen by competitive examination.²⁰ A removal "for the good of the service" is not sufficient under the classified civil service subject to competitive examination.²¹ Where the law provides that a person holding a position in the civil service shall have an opportunity to make an explanation before removal no formal proceedings are contemplated.²² Where the operation of a railroad is abandoned and therefore the employment ceases, the reasons of the removal need not be stated in writing and filed with the head of the department.²³ The reasons for removal in the classified civil service must be filed and in writing; otherwise the removal is void.²⁴ Political affiliations of an officer are no grounds for removal of a civil service officer, under charter of Greater New York.²⁵ Under the civil service laws of New York a rule provides that no person in the classified service shall be removed from office unless and until a statement of the causes of removal shall be filed and a copy of the statement furnished the person to be removed and an opportunity furnished for explanation in writing.²⁶

§ 1718. Reinstatement.—Under the New York civil service act of 1898, under a petition for mandamus to compel a reinstatement, the petitioner must allege that the position from which he was removed was at the time a competitive one.²⁷ An employe who comes within the definition "laborers and day-workmen" under the classification

¹⁹ *People v. Scannell*, 59 N. Y. S. 950; s. c. 28 Misc. (N. Y.) 401.

²⁰ *Vincent v. Cram*, 57 N. Y. S. 771; s. c. 27 Misc. (N. Y.) 158.

²¹ *People v. Dalton*, 60 N. Y. S. 909; s. c. 44 App. Div. (N. Y.) 556.

²² *People v. Coler*, 159 N. Y. 569; s. c. 54 N. E. 1090.

²³ *People v. Shea*, 64 N. Y. S. 426; s. c. 51 App. Div. (N. Y.) 227.

²⁴ *People v. Leitner*, 62 N. Y. S. 969; s. c. 29 Misc. (N. Y.) 702. Employes of the board of education of the city of Chicago may be removed or discharged as provided in teachers' and employes' pension act of June 21, 1895, notwithstanding the civil service act of March 20, 1895: *Brenan v. People*, 176 Ill. 620; s. c. 52 N. E. 353; *People v. Hertle*, 60

N. Y. S. 23; s. c. 61 N. Y. S. 965; 46 App. Div. (N. Y.) 505. Under charter of New York (§ 124) authorizing a probationary period before appointment to a clerical position the commissioners have no right to make rules as to removals or remove an applicant during the period of probation.

²⁵ *People v. Kearney*, 62 N. Y. S. 1097; s. c. 49 App. Div. (N. Y.) 125; *People v. Roosevelt*, 48 N. Y. S. 578; s. c. 23 App. Div. (N. Y.) 533; *In re Murray*, 46 N. Y. S. 172; s. c. 18 App. Div. (N. Y.) 337.

²⁶ *People v. Cram*, 61 N. Y. S. 858; s. c. 64 N. Y. S. 158; 50 App. Div. (N. Y.) 380.

²⁷ *People v. Dalton*, 159 N. Y. 235; s. c. 53 N. E. 1113.

of the civil service of New York laws of 1898, ch. 186, who are not subject to competitive examinations, can not be reinstated by mandamus.²⁸ A person illegally discharged under civil service laws and rules may be reinstated by mandamus.²⁹ Where the mayor refuses to do his duty in making classification of civil service positions, or if he does so improperly, he may be compelled by mandamus or, in some cases, by certiorari at the suit of a resident citizen to do so.³⁰

§ 1719. Miscellaneous provisions.—Where the constitution and statute provide for competitive examinations “so far as practicable” they contemplate the existence of positions where competitive examinations are not practicable.³¹ A policeman may be promoted for gallantry while in the discharge of duty, under charter of Greater New York.³² Within the meaning of the constitution of New York and of the statute (1883) competitive examination is not practicable for positions of confidential relation to the appointing officer.³³ Injunction by a taxpayer to restrain the payment of salaries to appointees is not the appropriate remedy where the mayor refuses to do his duty in making classifications, or does it improperly. The remedy is mandamus, or perhaps in some cases, certiorari.³⁴ The trial of charges against officers for their removal under civil service law is not within the constitutional provision relating to jury trials.³⁵ The classification of civil service officers under New York laws of 1884, ch. 410, is in harmony with the constitution of 1894.³⁶

²⁸ *People v. Dalton*, 63 N. Y. S. 258; s. c. 49 App. Div. (N. Y.) 71.

²⁹ *People v. Hertle*, 60 N. Y. S. 23; s. c. 61 N. Y. S. 965; 46 App. Div. (N. Y.) 505.

³⁰ *Chittenden v. Wurster*, 152 N. Y. 345; s. c. 46 N. E. 857.

³¹ *Chittenden v. Wurster*, *supra*.

³² *People v. Knox*, 62 N. Y. S. 940; s. c. 48 App. Div. (N. Y.) 477.

³³ *Chittenden v. Wurster*, 152 N. Y. 345; s. c. 46 N. E. 857.

³⁴ *Chittenden v. Wurster*, *supra*.

³⁵ *People v. Kipley*, 171 Ill. 44; s. c. 49 N. E. 229; 41 L. R. A. 775. N. Y. laws of 1898, ch. 186, do not apply to city of New York: *People v. Keller*, 158 N. Y. 187; s. c. 52 N. E. 1107. The provisions of the charter of Greater New York relating to civil service create a local system

and take the city out of the operation of the general law and its amendments: *People v. Keller*, 157 N. Y. 90; s. c. 51 N. E. 431.

³⁶ *Chittenden v. Wurster*, 153 N. Y. 664; s. c. 47 N. E. 273. Civil service act of March 20, 1895, Ill., does not conflict with Const., art. 5, § 24: *People v. Loeffler*, 175 Ill. 585; s. c. 51 N. E. 785, and is held constitutional in *Kipley v. Luthardt*, 178 Ill. 525; s. c. 53 N. E. 74; *People v. Kipley*, 171 Ill. 44; s. c. 49 N. E. 229; *Brenan v. People*, 176 Ill. 620; s. c. 52 N. E. 353; *People v. Loeffler*, 175 Ill. 585; s. c. 51 N. E. 785. Meaning of “heads of departments” under Ill. act: *People v. Kipley*, 171 Ill. 44; s. c. 49 N. E. 229. Civil service act of Ill. applies to employes of the board of education,

§ 1720. **Constitutionality of civil service laws.**—The constitutionality of civil service laws has been attacked on various grounds, but generally unsuccessfully. Usually all doubtful questions will be resolved in favor of the validity of the act. It has been unsuccessfully contended that the formation of the board of persons not more than two of whom shall be adherents of the same party is a violation of the constitution in that it amounts to a disfranchisement or deprivation of rights and privileges secured to citizens, and also that it deprives a person of life, liberty or property without due process of law. In other words, the franchise or privilege of eligibility to office is proscribed. The civil service law of Illinois was claimed to be unconstitutional in that it required a test for the appointment of applicants to positions in the public service in contravention of the provision of the constitution that “no other oath, declaration or test shall be required as a qualification.” But the contention was not sustained.³⁷ It was also contended that the civil service law of Illinois was in violation of the fourteenth amendment to the constitution of the United States, but the contention was not sustained.³⁸ The power vested in civil service commissioners is not a delegation of judicial powers in contravention of the constitution.³⁹ Where a constitution vests in the authorities of a city a discretion as to who shall be appointed, but limits the exercise of such power to such persons as have successfully passed an examination without requiring the selection of the one who has the highest percentage, a statute and rules passed in pursuance thereof, limiting the appointment to the one receiving the highest grade, are unconstitutional as in conflict therewith.⁴⁰ Where the constitution has no provision

but not to the members, the superintendent and teachers: *Brenan v. People*, 176 Ill. 620; s. c. 52 N. E. 353. Under the Ill. act of March 20, 1895, all police officers except the chief are regulated by the civil service: *People v. Kipley*, 171 Ill. 44; s. c. 49 N. E. 229; *People v. Loeffler*, 175 Ill. 585; s. c. 51 N. E. 785; *Kipley v. Luthardt*, 178 Ill. 525; s. c. 53 N. E. 74; *Brenan v. People*, 176 Ill. 620; s. c. 52 N. E. 353. Civil service law of New York is not unconstitutional in taking from the city the power of appointment given by the constitution: *In re Balcom*, 58 N. Y. S. 1097; s. c. 28 Misc. (N. Y.) 1.

³⁷ *People v. Loeffler*, 175 Ill. 585; s. c. 51 N. E. 785; *People v. Hoffman*, 116 Ill. 587; s. c. 5 N. E. 596; 8 N. E. 788; *Rogers v. Common Council &c.*, 123 N. Y. 173; s. c. 25 N. E. 274.

³⁸ *People v. Loeffler*, *supra*.

³⁹ *People v. Kipley*, 171 Ill. 44; s. c. 49 N. E. 229.

⁴⁰ *People v. Mosher*, 61 N. Y. S. 452; s. c. 45 App. Div. (N. Y.) 68. The right of subordinate employes of a municipality to hold office, and the right of municipal officers in appointing their subordinates or employes, are not within the meaning of privileges and immunities of citizens of the United States as provided in the 14th amendment of the

for the appointment of examiners or for the manner in which examinations shall be made, or how the qualifications of the applicants shall be determined, the legislature must provide therefor. And so in the absence of legislation providing machinery for conducting examinations in counties, towns and villages the constitution remains ineffectual.⁴¹ Where the legislature has by statute undertaken to deprive the local authorities of all right of selection and appointment it has exceeded its constitutional power and the act is clearly in conflict with the provisions of the organic law and invalid.⁴²

(b) VETERANS ACTS.

§ 1721. **Scope and purpose of acts.**—In New York, Massachusetts and some other states acts have been passed, sometimes as general statutes and in other instances as charter provisions, or as part of the civil service regulations, the design of which is to give a preference in the appointment or retention in office of Union soldiers and sailors. As to the propriety of such legislation, or the motives of the legislature in the adoption of such laws, courts are not permitted to inquire. Whether under our form of government based upon equality as to rights, privileges and constitutional guaranties this class of legislation can be sustained upon constitutional grounds is not, perhaps, definitely settled, although the veterans act of Massachusetts has been held valid except in minor particulars. It is no doubt entirely competent that official tenure and employment may be subject to limitation by the legislative will where the state or nation alone is interested, but it may well be doubted whether such restrictions and limitations can be sustained on constitutional grounds where they apply to purely municipal affairs. Patriotism and the proper recognition of sacrifices made in the national defense are matters of national concern, but whether exactions may be imposed upon municipalities which operate unequally upon their members and result in limitations upon the right of self-government in matters purely local, as well as infringing on individual rights, privileges and immunities, are questions as yet unsettled. Reward for patriotic service is highly commendable, but when such rewards tend toward the creation of a privileged class or classes it is trenching dangerously near the rights of freedom and equality held as a sacred heritage

constitution: *People v. Loeffler*, 175 Ill. 585; s. c. 51 N. E. 785. 452; s. c. 45 App. Div. (N. Y.) 68; *People v. Angle*, 109 N. Y. 564; s. c.

⁴¹ *Chittenden v. Wurster*, 152 N. Y. 345; s. c. 46 N. E. 857. 17 N. E. 413; *People v. Murray*, 70 N. Y. 521; *Taylor v. Kercheval*, 82

⁴² *People v. Mosher*, 61 N. Y. S. Fed. 497.

in this country by every citizen. The question of the constitutionality of the Massachusetts statute of 1895, ch. 501, §§ 2 and 6, under which it was provided that certain offices and employments should be filled by veterans in preference to all other persons, whether the veterans were or were not found or thought to be actually qualified to perform the duties of the offices and employments by some impartial and competent officer or board charged with some public duty in making appointments, was passed upon by the supreme judicial court and it was held that the statute in so far as it purported to give to veterans particular and exclusive privileges distinct from those of the community in obtaining public office was unconstitutional and void. The court said: "We think that it is inconsistent with the nature of our government and particularly with articles 6 and 7 of the declaration of rights that the appointing power should be compelled by legislation to appoint to public office persons of a certain class in preference to all others, without the exercise on its part of any discretion, and without the favorable judgment of some legally constituted officer or board designated by law to enquire and determine whether persons to be appointed are actually qualified to perform the duties which pertain to the offices."⁴³ Under chapter 517 of the Massachusetts Acts of 1896, §§ 2, 3 and 6, in an opinion of the justices of the supreme judicial court, it was held by a majority of the court: (1) That a preference of veterans over all other persons except women when they have passed the civil service examination is not unconstitutional. (2) That the discretion to appoint veterans to certain offices and employment without an examination if in the opinion of the appointing power the public service requires this to be done is not unconstitutional. (3) That the provision that the civil service commissioners shall establish rules to secure the employment of veterans in the labor service of the commonwealth and its cities and towns in preference to all other persons, except women, if construed to mean that only those found competent shall be preferred, is within the constitutional power of the legislature.⁴⁴ The constitution of New York of 1894 provides: "Appointments and promotions in the civil service of the state and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late civil war, who

⁴³ *Brown v. Russell*, 166 Mass. 14; *Brown v. Russell*, *supra*. Cf. *State s. c.* 43 N. E. 1005; 32 L. R. A. 253. *v. Miller*, 66 Minn. 90; *s. c.* 68 N. W.

⁴⁴ Opinion by a divided court in 732.

are citizens and residents of this state, shall be entitled to preference in appointments and promotion without regard to their standing on any list from which such appointment and promotion may be made." Afterwards the act of the legislature of 1895 went into effect, which provided in substance that as to honorably discharged soldiers and sailors of the late civil war competitive examinations should not be deemed practicable or necessary in cases where the compensation did not exceed four dollars per day. This act was held by the court of appeals to be unconstitutional in that it created a favored class in the exemption of veterans from competitive examinations, which every other citizen must submit to, and therefore contrary to the spirit of the constitution.⁴⁵

§ 1722. Removal and discharge.—The intention of the framers of the veterans act was to make appointees thereunder secure in the positions held by them, and render their positions permanent as nearly as possible, yet the office held by a veteran may be abolished if it is done in good faith and as a matter of economy, and the veteran can not insist on reinstatement when there are no other vacancies in the department.⁴⁶ And so where a veteran was appointed for special work and removed when his service was no longer required, and no vacancy existed to which he could be transferred, he is not entitled to reinstatement. The law does not contemplate the creation of a vacancy when none exists.⁴⁷ Where a veteran has been discharged by abolishing the office merely to accomplish his discharge a veteran may be reinstated by mandamus.⁴⁸ When the term of an office is not fixed by law the appointing power may limit its duration even as to a veteran.⁴⁹ A statute relating to the removal of veterans holding office in the "public works" of a city or town is not to be extended by implication to public departments.⁵⁰ Under the charter of Greater

⁴⁵ *In re Keymer*, 148 N. Y. 219; s. c. 42 N. E. 667.

⁴⁶ *People v. Simis*, 45 N. Y. S. 940; s. c. 18 App. Div. (N. Y.) 199; *People v. King*, 42 N. Y. S. 961; s. c. 13 App. Div. (N. Y.) 400; *People v. Scannell*, 56 N. Y. S. 117; s. c. 25 Misc. (N. Y.) 619; s. c. sub nom. *In re Breckenridge*, 160 N. Y. 103; s. c. sub nom. *People v. Scannell*, 54 N. E. 670; *People v. Waring*, 62 N. Y. S. 966.

⁴⁷ *People v. Claussen*, 61 N. Y. S. 579; s. c. 29 Misc. (N. Y.) 579. Cf. *People v. Gilroy*, 15 N. Y. S. 242; s.

c. 60 Hun (N. Y.) 507; *People v. Adams*, 133 N. Y. 203; s. c. 30 N. E. 851; *People v. Wurster*, 35 N. Y. S. 89; s. c. 89 Hun (N. Y.) 5; *In re Vincent*, 57 N. Y. S. 771; s. c. 27 Misc. (N. Y.) 158; *In re Breckenridge*, 160 N. Y. 103; s. c. sub nom. *People v. Scannell*, 54 N. E. 670.

⁴⁸ *State v. Mayor &c.*, 63 N. J. L. 148; s. c. 43 Atl. 433.

⁴⁹ *Gilhooley v. Board &c.* (N. J.), 43 Atl. 569.

⁵⁰ *Ellis v. Common Council &c.*, 123 Mich. 567; s. c. 82 N. W. 244.

New York it has been held that a boiler inspector may be removed whenever the board may determine in good faith that he is not needed, although he is a veteran fireman, and the law declares that no veteran fireman holding a position by appointment shall be removed without cause.⁵¹

§ 1723. Applies to subordinates only.—The New York act of 1896 which promotes the employment and retention of Union veterans in public service of the state and its municipalities is limited in its operations to subordinate positions and does not apply to the position of assessor.⁵² In determining who are not subordinates within the meaning of veteran statutes, weight must be given to the fact as to whether or not the class of persons to whom the statute is claimed to apply constitute an independent body, charged with the performance of important public duties, in the doing of which they act upon their own responsibility, their acts being subject to no review, except by statutory methods. Even where there is a review the crucial test is whether they are subject to the direction and control of a superior officer, or whether they are independent officers subject only to the direction of the statute.⁵³ In such case it is not material that such persons may be appointed to their positions. A law providing that in every public department honorably discharged Union soldiers shall be preferred does not apply to a member of the board of health, because the board is a department and its members are not appointees.⁵⁴

§ 1724. Hearing.—Usually statutes of this character provide for a hearing on charges preferred in writing and prohibit removals except in the manner prescribed. A statute providing that no veteran holding office in the civil service of a city or town shall be removed

⁵¹ *Kelly v. York*, 59 N. Y. S. 30; s. c. 42 App. Div. (N. Y.) 283.

⁵² *People v. Board &c.*, 159 N. Y. 495; s. c. 52 N. E. 559.

⁵³ *People v. Van Wyck*, 159 N. Y. 509; s. c. 54 N. E. 31; 54 N. Y. S. 675; 34 App. Div. (N. Y.) 573.

⁵⁴ *People v. Board &c.*, 159 N. Y. 568; s. c. 54 N. E. 1093. Cf. *Menges v. City of Albany*, 56 N. Y. 374; *People v. Angle*, 109 N. Y. 564; s. c. 17 N. E. 413; *People v. Fitzsimmons*, 68 N. Y. 514, 518; *People v. Draper*, 15 N. Y. 532; *Rathbone v. Wirth*, 150 N. Y. 459; s. c. 45 N. E. 15;

People v. Howland, 155 N. Y. 270; s. c. 49 N. E. 775; *Gilbert &c. R. Co. v. Anderson*, 3 Abb. N. C. (N. Y.) 434; *People v. Roberts*, 148 N. Y. 360; s. c. 42 N. E. 1082; *People v. Rathbone*, 145 N. Y. 434; s. c. 40 N. E. 395; *Smith v. Board &c.*, 148 N. Y. 187; s. c. 42 N. E. 592; *People v. Lyman*, 157 N. Y. 368; s. c. 52 N. E. 132. Commissioners appointed by mayors of New York and Brooklyn to construct and maintain the Brooklyn bridge are not subordinate officers: *People v. Nixon*, 158 N. Y. 221; s. c. 52 N. E. 1117.

except after a full hearing, etc., applies only to officers within the scope of the civil service act, and a veteran may be removed from any other office without a hearing and mandamus will not lie.⁵⁵ A person holding office as a discharged soldier, claiming a right to a transfer to some other department, has the burden of showing that another position in another department exists which he is competent to fill.⁵⁶

§ 1725. Miscellaneous.—Where an applicant states under oath that he has had no service in the army or navy he can not afterwards claim the statutory privileges of honorably discharged soldiers.⁵⁷ Where the statute provides that Union soldiers and sailors shall not be discharged from public service except for incompetency and conduct inconsistent with their positions, a painter employed upon a per diem basis can not be discharged without hearing, no allegations of incompetency having been preferred.⁵⁸

⁵⁵ *Ayers v. Hatch*, 175 Mass. 489; s. c. 56 N. E. 612.

⁵⁶ *In re Breckenridge*, 160 N. Y. 103; s. c. sub nom. *People v. Scannell*, 54 N. E. 670.

⁵⁷ *People v. Waring*, 62 N. Y. S. 966.

⁵⁸ *People v. Cram*, 63 N. Y. S. 1027. Construction of laws of New York and charters of Greater New York and Brooklyn with reference to the application of the veterans: *People v. Dalton*, 158 N. Y. 204; s. c. 52 N. E. 1119. Cf. *People v. Gray*, 53 N. Y. S. 274; s. c. 32 App. Div. (N. Y.) 458; *People v. Follett*, 53 N. Y. S. 956; s. c. 24 Misc. (N. Y.) 510; *People v. McCartney*, 53 N. Y. S. 1047; s. c. 34 App. Div. (N. Y.) 19; *People v. Cram*, 54 N. Y. S. 355; s. c. 34 App. Div. (N. Y.) 313. The age limit of the rules of Buffalo is superseded by the laws of 1883, ch. 354, and 1884, ch. 410: *People v. Board &c.*, 45 N. Y. S. 46; s. c. 20 Misc. (N. Y.) 217. The law of 1887 was not repealed or modified by laws of 1896, and is operative under charter of Greater New York: *People v.*

Coler, 157 N. Y. 676; s. c. 51 N. E. 1093. Under New York constitution and laws of 1899, ch. 370, a veteran standing highest must be appointed: *In re Balcom*, 58 N. Y. S. 1097; s. c. 28 Misc. (N. Y.) 1. Under the constitution of New York which requires appointments to be made according to merits and fitness ascertained by examination and providing that veteran soldiers are to be given the preference a law which authorizes the appointment of any one of three veteran soldiers obtaining the highest rating is void: *People v. Common Council &c.*, 57 N. Y. S. 617; s. c. 26 Misc. (N. Y.) 522. For a case where there was a failure to show a dereliction of duty and failure to obey instructions, see *People v. Brady*, 65 N. Y. S. 844; s. c. 53 App. Div. (N. Y.) 279. Massachusetts law of 1896 giving preference in appointment to Union veterans if qualified is constitutional: *Opinion by Divided Court*, 166 Mass. 589; s. c. 44 N. E. 625; 34 L. R. A. 58; *State v. Miller*, 66 Minn 90; s. c. 68 N. W. 732.

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